Bloomberg Law

Pension & Benefits Daily™

Church Plans

View From Groom: After *Advocate*—Practical Considerations for Church Plan Sponsors

BY DAVID W. POWELL

In a unanimous decision by eight justices (with Justice Gorsuch taking no part) in *Advocate Health Care Network et al. v. Stapleton et al.*, the Supreme Court has rejected the plaintiffs' interpretation of the definition of church plan for purposes of exemption from ERISA. In the majority opinion written by Justice Kagan, the Court approached the single question before it—whether a church plan had to be originally established by a church, rather than by a church-affiliated nonprofit—as a matter of statutory interpretation. Applying the rules of construction, the Court found that ERISA did not impose such a requirement.

Certainly, church plans can breathe a little easier with this decision. But the Supreme Court addressed only one element of the church plan definition—the question of establishment. We would suggest this presents an opportunity for church plan sponsors to reassess their situations in light of the *Advocate* decision, and in some cases, make some changes.

And don't forget that these considerations apply to all church plans—including defined contribution 401(a) and 401(k), 403(b), 457, nonqualified, and welfare plans—not just the defined benefit plans that have been the subject of most of the litigation. As noted below, church 403(b) plans have also been the subject of litigation in state court.

1. Are your plans controlled by or associated with a church?

One of the issues not addressed by the Court—because it was not before it—is what it means to be ''controlled by or associated with'' a church or convention or association of churches within the meaning of the church plan definition. The statute itself defines ''associated with'' as ''sharing common religious bonds and convictions''. Numerous private letter rulings and some case law apply these terms. For example, listing a nonprofit in a denominational directory where the denomination formally declares the nonprofit to be part of the church has been found to satisfy the ''associated with'' prong, but there may be other ways to show this. This may be a good time for a church plan sponsor to reevaluate how strong its position is that this fundamental part of the church plan definition is satisfied.

David W. Powell is a Principal in the Groom Law Group, a leading expert on church plans, and author of BNA Tax Management Portfolio No. 372, Church and Governmental Plans.

2. What is a church?

Another question not presented to or answered by the Court, is what is a ''church'' for purposes of the church plan definition. It is the original narrow interpretation of ''church'' by the IRS (a ruling that a Catholic religious order was not a church) that led to the 1980 amendments to the church plan definition in ERISA that are at the heart of the litigation in *Advocate*. Now that we know that it is not necessary for a church to have originally established a church plan, the importance of that definition decreases for some plans. However, to qualify as church plans, plans not established by a church must show that they are maintained by ''principal purpose organizations'' that are controlled by or associated with a ''church.'' It is, therefore, still important that there be a church for the nonprofit to be controlled by or associated with. This may particularly raise questions for plans of what is known as ''parachurch'' ministries (faith-based organizations that usually carry out their mission independent of oversight by a traditional church or denomination).

3. Is your plan maintained by a ''principal purpose'' organization?

Part of the church plan definition is that the plan be maintained by ''an organization. . .the principal purpose or function of which is the administration or fund-

ing of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches''. This has become known as a ''principal purpose'' organization.

In numerous rulings, the IRS has indicated that this element can be satisfied in the case of a plan for employees of a church-associated nonprofit by a retirement or benefits committee of the nonprofit, if the committee's principal purpose is the administration of retirement or welfare plans, and provided that the nonprofit is controlled by or associated with a church.

Notably, the Court expressly observed in a footnote in the majority opinion that, in the lower courts, the plaintiffs had argued that internal benefits committees do not count as principal purpose organizations. But the Court declined to address that issue as not being before it, and stated that nothing in the opinion expresses a view of how it should be resolved.

4. Is the church plan definition constitutional?

Plaintiffs in the lower court cases also repeatedly challenged whether the church plan exemption is unconstitutional under the Establishment clause of the First Amendment, at least as to nonprofits that are not themselves churches under the plaintiffs' definition of that term. The Supreme Court did not address this issue, and so, despite the unanimous decision on the establishment by a church issue in Advocate, church plan sponsors may need to be prepared to defend against more First Amendment challenges in the future.

5. Consider plan terms and communications

As long as there continues to be a possibility of a challenge to church plan status, a review of plan terms, and employee forms, notices and disclosures for all church plans with an eye towards thoughtful consistency with that status is advisable. Knowledge of the numerous special church plan rules is critical in designing and administering church plans.

6. Is there a risk of a legislative change in the area?

Justice Sotomayor, in her concurring opinion, agrees with the statutory interpretation by the majority, but suggests that things have changed since 1980 and ''[t]his current reality might prompt Congress to take a different path.'' However, at least for now, it is difficult to see much support for such a course in the current Congress.

7. Do I need to be concerned about state law claims?

That ERISA does not apply to church plans does not mean there are no potential claims that can be made against church plans. The absence of ERISA also means the absence of preemption of state law. Potential state law claims will be dependent on the applicable jurisdiction, but we note, for example, that one of the prominent plaintiffs' law firms has brought claims under state law for fiduciary breach alleging excessive fees in a traditional denominational church plan. The case is *Bacon v. Bd. of Pensions of Evangelical Lutheran Church in America*, No. A15-1999 (Minn. Ct. App. July 25, 2016), *review denied* (Oct. 18, 2016), *cert. denied*, 137 S. Ct. 1213, 197 L. Ed. 2d 259 (2017). Consideration of how state laws might apply to a church plan is advisable.

Summary

While the effort by plaintiffs to interpret the church plan definition as excluding plans originally established by church-affiliated nonprofits has been defeated, it does not mean that challenges to church plans under the traditional definition are necessarily going away. Now would be a good time for church plan sponsors to review their plan structures for all of their plans, not just defined benefit plans, to bolster their ability to show satisfaction of the traditional church plan definition.

Action Steps:

- Review ''control by'' or ''association with'' a church for all plans
- Review maintenance of all church plans by a ''principal purpose'' organization
- Review plan terms, forms, notices and administrative practices for consistency with church plan status
- Consider what state laws may apply

  ISSN