ECPA Expert

Evangelical Christian Publishers Association

Legal Update from Flagler Law Group

FLAGLER LAW GROUP LLC

Our Mission is to serve the legal needs of Christian publishing organizations by leveraging focused expertise into practical solutions.

Brian Flagler founded Flagler Law Group in the spring of 2006 to serve the legal needs of publishers, designers, producers, and distributors of Christian media. With a combined 20+ years in the industry, we know Christian publishing. We believe that our experience handling matters for a diverse variety of Christian publishers, ministries, and other organizations **from the publishing perspective** significantly contributes to the value that we offer our clients.

(541) 549-8401
brian@flaglerlawgroup.com

ECPA PUBLISHERS LEGAL HOTLINE:

For new ECPA members and smaller ECPA houses that do not currently have access to experienced publishing counsel, ECPA offers the ECPA Publishers Legal Hotline. In partnership with Flagler Law Group, the Hotline is available to assist these members as they establish publishing procedures, navigate rights issues, and encounter other questions within the Scope of Service. Subscribers may pose questions to publishing counsel by telephone or email and receive the Hotline discount: Flagler Law Group makes up to five (5) hours of its publishing attorneys' time available to each eligible subscriber at 30 percent off of their regular rates. Visit the **ECPA.org website** for more information.

July 2014

Hobby Lobby Wins at Supreme Court: For-Profit Corporations May Seek Religious Accommodation from Health Care Law

By Craig Gipson and Brian Flagler

Some for-profit corporations may now claim the same accommodation from the Affordable Care Act's (ACA) contraception mandate as non-profit corporations. On June 30, the U.S. Supreme Court released its anticipated decision in the case of *Burwell v. Hobby Lobby*, finding that closely-held, for-profit corporations do not have to provide contraceptive services that violate their owners' sincere religious beliefs.

What was the case about?

The U.S. Department of Health and Human Services (HHS) promulgated regulations under the ACA establishing which services employers with 50 or more employees must provide in their health insurance plans. Among these services is a list of FDA-approved contraceptive drugs and devices. At issue in *Hobby Lobby* were four contraceptive services which may cause the destruction of an already-formed human embryo. The owners of Hobby Lobby and Conestoga Wood Specialties objected, claiming that they held a sincere religious belief that life begins at conception; by forcing them to include (and pay for) services that violate their sincerely held religious belief, they claimed the government was infringing their religious liberty rights. The government previously exempted religious organizations such as houses of worship from the requirement altogether and provided an accommodation for religious non-profit organizations. However, the government refused to provide any sort of accommodation to religious owners of for-profit corporations.

What did the Court decide?

In a narrow 5-4 ruling, the Court essentially agreed with the owners of Hobby Lobby and Conestoga Wood Specialties. The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the government from substantially burdening a person's exercise of religion unless the government "demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." [1]

The Court first rejected HHS' argument that "the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships." Basically, the Court determined that the law does not force business owners to choose between incorporating their business and exercising their religious

rights. Writing to contradict HHS's position, the Court held that "[a] corporation is simply a form of organization used by human beings to achieve desired ends . . . when rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."

Next, the Court found that the imposition of taxes for failing to comply with the regulations—"close to $475 million more in taxes every year" for Hobby Lobby—constituted a substantial burden to the respective owners' exercise of religion. While assuming that the government's interest in providing access to contraception was a "compelling government interest," the Court found that the government failed to accomplish its objective by the least restrictive means. Essentially, the Court determined that the government could still accomplish its objective without infringing religious exercise rights. In fact, the Court found, the government already created the means to do so by allowing religious non-profit corporations to receive an accommodation. The accommodation allows women working for a religious non-profit organization to obtain coverage for the objected-to contraceptive services directly from a health insurer without involving her employer. Why, the Court asked, could the same accommodation not be extended to for-profit corporations?

What does the decision mean for Christian publishers?

Non-profit Christian publishers were already eligible to receive an accommodation. Now, closely-held for-profit Christian publishers (generally, those for which at least 50% of its stock is owned by 5 or fewer people) can seek that same accommodation. The method of implementing the accommodation is currently before a federal appellate court, but for now, the method will likely be similar to the process for non-profit organizations, as described in a 2013 *Legal Update*. Flagler Law Group will update ECPA members if HHP revises the process for claiming the accommodation.

From a broader perspective, the decision is a positive legal development for religious liberty. Congress enacted RFRA to counteract a 1990 Supreme Court opinion that eroded free exercise religious rights previously understood to be within the First Amendment. The government's position in this case would have further separated religion from public life—removing the right to exercise one's religion within the economic sphere. The Court's affirmation that RFRA protects religious liberty beyond the confines of the sanctuary and home is welcome news for organizations that seek to operate in accordance with the tenets of their members' faith.

[1] *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 and 13-356, 2014 BL 180313 (U.S. June 30, 2014)

ECPA

www.ecpa.org
info@ecpa.org