

# ACA Mandate Spurs Litigation Onslaught

Religious groups sue as insurance deadline nears.

BY JENNA GREENE

As the U.S. Supreme Court considers whether to hear a challenge to the Affordable Care Act's contraception mandate, religious groups and employers are blanketing courts with suits that claim the provision is unconstitutional.

The groups argue the mandate violates their religious beliefs by requiring them to provide their employees with health insurance plans that pay for birth control. Religious charities, universities,

Christian-owned businesses and others have filed 75 suits across the country against the U.S. Department of Health and Human Services challenging the requirement, according to the Becket Fund for Religious Liberty. The organization represents plaintiffs in 10 cases.

Lawyers say that even more cases are likely. Many companies "are looking at [insurance] plan-years that start Jan. 1, so they're going to have to make a decision," said Lori Windham, senior

SEE CONTRACEPTION, PAGE 5



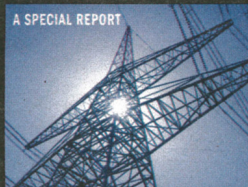
OPPOSED: Demonstrators rally in New York last year against insurance coverage for contraception.

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**MORE INSIDE:** At the annual Association of Corporate Counsel conference, company lawyers share ideas on compliance with the Affordable Care Act. **PAGE 6**

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A SPECIAL REPORT



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## On Second Thought...

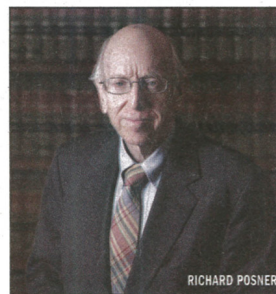
Is it awful when a judge concedes possible error?

BY TONY MAURO

Richard Posner is the latest judge to learn that while confession may be good for the soul, when a judge does the confessing, people sit up, notice and take potshots.

In just one line in the newest of 40 books by the court of appeals judge, Posner wrote "I plead guilty" to having written a decision upholding Indiana's voter ID law. Posner said he has since come to realize that

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RICHARD POSNER

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## Big Slump for LSAT

The decline means hard choices for law schools.

BY KAREN SLOAN

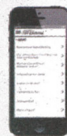
Planning and budgeting for the future is a tough job for law school administrators these days—and yet another major decline in the pool of law school admissions test-takers won't make their task any easier.

The number of people who took the Law School Admission Test in October—  
SEE LSAT, PAGE 4

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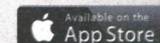
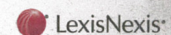
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# Court Split Widens Over Coverage Requirement for Contraception

CONTRACEPTION, FROM PAGE 1

counsel at the 13-lawyer Becket Fund, which represents plaintiffs of all faiths pro bono.

"Either they're going to comply Jan. 1 or they're going to pay some very large fines, so one reason you see so many cases is that they have to get relief quickly," she said. "They can't afford to wait around and see what the courts decide."

In the latest case, nonprofit Roman Catholic broadcaster Eternal Word Television Inc. filed suit on Oct. 28 in U.S. District Court for the Southern District of Alabama. The Becket Fund is litigating the case, and the state of Alabama has joined as co-plaintiff. "We do not believe that contraception, voluntary sterilization and abortion-inducing drugs constitute health care," Eternal's chairman, Michael Warsaw, said in a written statement. "We simply cannot facilitate these immoral practices."

Jones Day, also working pro bono, filed 16 cases on behalf of Catholic dioceses, schools and charities across the country. Firm partners working on the cases include Noel Francisco, who leads the government-regulation practice; Paul Pohl, head of the business and tort litigation practice; and Charles Carberry, co-chairman of the corporate criminal investigations practice. The firm declined to comment.

Christian public interest law groups the Thomas More Law Center and the Alliance Defending Freedom have brought about two dozen suits, arguing that the law violates the Religious Freedom Restoration Act and the First Amendment. In addition, the American Center for Law and Justice, led by Supreme Court advocate Jay Sekulow, has filed least seven suits.

Under the Affordable Care Act, employer-sponsored health care plans must cover the entire cost of contraceptives approved by the U.S. Food and Drug Administration, although churches and other houses of worship are exempt. The fine for failure to comply is \$100 per day per employee.

Three petitions for review are now before the Supreme Court, each brought by private companies that object to some or all forms of contraception on religious grounds.

## EXERCISE OF RELIGION

One of them is by Pennsylvania cabinet maker Conestoga Wood Specialties Corp., owned by a Mennonite family. The company lost, 2-1, before the U.S. Court of Appeals for the Third Circuit in July. The majority found that a for-profit corporation cannot engage in the exercise of religion under the First Amendment. There's the obvious reason—corporations don't pray or go to church. "We do not see how a for-profit 'artificial being' ... that was created to make money could exercise such an



**LITIGATING:** Companies "are going to pay some very large fines" if they don't comply, says Lori Windham, a lawyer for the challengers. Gregory Lipper has filed briefs supporting the government.

inherently 'human' right," Judge Robert Cowen wrote for the majority.

The corporation's owners can do so, of course, but the owners aren't the same as the corporation. When the owners decided to incorporate, they created "a distinct legal entity that has legally distinct rights," Cowen wrote.

Likewise, Michigan manufacturer Autocam Corp. lost before the Sixth Circuit in September. "We agree with the government that Autocam is not a 'person' capable of 'religious exercise,'" the unanimous panel found.

The most fully litigated case—and perhaps the one with the best shot at Supreme Court review—is the Becket Fund's on behalf of the owners of craft chain Hobby Lobby Stores Inc., which has 13,000 full-time employees, and Christian bookstore chain Mardel Inc.

The stores' owners don't object to all birth control, just methods that prevent a fertilized egg from being implanted—Plan B, the "week after" pill Ella, and intrauterine devices.

On June 27, the full Tenth Circuit ruled in favor of Hobby Lobby, finding that it could indeed be a "person" exercising religion. The statute at issue, the Religious Freedom Restoration Act, doesn't define "person," so the court turned to the Dictionary Act, which says the word "person" includes, among other things, corporations.

The court said there's no basis for

the government to treat differently for-profit corporations, which get no break from the contraception mandate, and nonprofit religious ones, which may be exempt. "Religious conduct includes religious expression, which can be communicated by individuals and for-profit corporations alike," Judge Timothy Tymkovich wrote for the majority.

The government appealed the decision to the Supreme Court in September. Hobby Lobby also asked the high court to take up the case—and added former solicitor general Paul Clement of Bancroft as co-counsel.

"We think this is a really important issue and the Supreme Court is going to have to decide it," Windham said. "Even though Hobby Lobby won a great victory at the Tenth Circuit and we're very happy about it, we don't want to see it upset on appeal."

The circuit split deepened on November 1, when the D.C. Circuit backed the owners of Freshway Foods and Freshway Logistics who objected to the contraception mandate, finding the law wasn't properly tailored.

Gregory Lipper, senior litigation counsel at Americans United for Separation of Church and State, who has filed amicus curiae briefs in 13 cases supporting the government, said it's "a near certainty" the high court will take up the issue. "You've got a company asking for the right to deny tens of thousands of women access to contraception based on the religious beliefs of the people who happen to own the company," he said. "It's quite likely the Supreme Court will hear at least one of the cases this term."

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## Chevron Witness Presents Fat Target

BY MICHAEL D. GOLDHABER

The star witness in Chevron Corp.'s megator countertrial has been Alberto Guerra, a former Ecuadorian judge now living in an unprecedented private witness protection program funded by Chevron.

Chevron alleges that Guerra arranged for a group of Ecuadorian environmental plaintiffs and their lawyers to bribe an Ecuadorian judge in return for a bogus \$19 billion judgment in February 2011. Chevron's opponents—now battling Chevron's fraud claims in federal court in New York—insist it's Guerra's story that's bogus.

Guerra has testified that his former judicial colleague Judge Nicolas Zambrano was eager to preside over the pollution case against Chevron, aiming to milk it for all it was worth. Guerra repeated that Zambrano first directed

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Tracking the world's big disputes

him to test Chevron's willingness to pay bribes. After being rebuffed by Chevron, Guerra said, he tried the Ecuadorian plaintiffs and had much better luck.

Guerra said that around September 2010 he met with Steven Donziger, Luis Yanza and Pablo Fajardo of the Ecuadorian plaintiffs' team and offered to let them write their own judgment in return for a \$500,000 bribe to Zambrano. Guerra was to receive 20 percent.

Guerra testified that he edited the judgment written by the plaintiffs over the weekend of Jan. 28-29, 2011, to "fine-tune it" and "make it look as if it were written by a judge in the court." Guerra said that he hid the edits on Fajardo's laptop computer.

The task of attacking Guerra's motives fell to Julio Gomez of Gomez LLC, who is defending the Ecuadorian litigants. Guerra presented a fat target in light of Chevron's admitted financial support for the former judge. Not only is Chevron paying Guerra \$48,000 for his evidence, but the oil company has agreed to move his extended family to the United States for their security and support their applications for asylum, and is paying him \$12,000 a month with generous benefits for at least two years to make him available for testimony.

In reply to Gomez's questions, Guerra estimated that he had given 10 to 20 bribes in his career as a lawyer, and taken 10 to 20 bribes in his career as a judge—including throwing one case for as little as \$200.

"It doesn't take very much, does it?" Gomez said.

U.S. District Judge Lewis Kaplan asked the disgraced ex-judge from Ecuador two questions. As he spoke, the U.S. judge's eyes focused on the papers and screens in front of him (and perhaps on the appellate record). "Have you told the truth in this courtroom?" "Yes sir." "Do you understand that you could be subject to prosecution for perjury and a jail term?" "I know that sir."

The trial, which began on Oct. 15, was scheduled to resume on Nov. 4.



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