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How Notre Dame Should Amend Its Pleadings in the Obamacare Contraceptive Case

These are the thoughts of an economist who thinks some about law. I have not read the opinions, briefs, or pleadings carefully, so don't rely on this too heavily, but I think I've covered the procedural necessities pretty well, if my facts (e.g., that insurance companies are fined if they provide non-compliant coverage) are correct.

. Notre Dame made a contract with the insurance company for health insurance for its employees, a contract which did not require the insurance company to provide contraceptives. The insurance company, however, did provide free contraceptives. Notre Dame wants no part in providing contraceptives to its employees, and allowing the company to provide its other insurance is key to the company's providing free contraceptives.

Notre Dame asked for a preliminary injunction against the government to stop it from fining Notre Dame for not having contraceptive coverage for its employees.

Judges Posner and Hamilton denied the preliminary injunction, because there is no risk of the government fining Notre Dame in 2014 anyway, because its employees will have contraceptive coverage--- as a result of the actions of the insurance company. With zero probability of harm, you can't get an injunction.

What should Notre Dame have asked for instead?

1. A preliminary injunction to the insurance company to allow Notre Dame to void the insurance contract at its option at any time until the merits of the case are decided, because the contract was signed under unlawful government duress. This would allow Notre Dame to renegotiate a health insurance contract with the new provision that it not include contraceptives. The insurance company would be free to ask for extra premiums, if free contraceptives actually save it money by reducing the number of pregnancies. Notre Dame would be free to switch to another insurance company if the bargaining fell through.

Note that item (1) would be unnecessary if Notre Dame were able to get the insurance company to agree to let Notre Dame void the contract without legal compulsion. The insurance company might well agree to that. Otherwise, Notre Dame needs to make the insurance company, not just the government, a defendant in the case.

2. A preliminary injunction to the government not to fine or otherwise punish any insurance company that fails to provide contraceptives in a contract with Notre Dame at any time until the merits of the case are decided. Notre Dame can ask for this itself, without the insurance companies being plaintiffs, because Notre Dame benefits from such an injunction--- and it doesn't even know which insurance company it might use, if its negotiations with its current insurer break down.

3. A preliminary injunction to the government not to fine Notre Dame if Notre Dame is not providing contraceptives to its employees at any time until the merits of the case are decided. This would be necessary after Notre Dame voided its original contract and negotiated a new one that excluded contraceptives.

Of course, Notre Dame didn't ask for those three things, only for the third of them. What can Notre Dame do now? That involves the Federal Rules of Civil Procedure, so I, in my ignorance, am on shaky ground. I see no reason, however, why Notre Dame could not file an amended pleading in District Court, particularly since requests 1 and 2 would be completely new. (Probably in legal language I should say "demands" instead of "requests", but it goes against the grain to say that.) Or, if Notre Dame can get request 1 to be fulfilled voluntarily by the insurance company, that would be even better procedurally, because (a) the insurance company wouldn't have to be joined as a defendant, and (b) the facts would have changed since the December 3 2013 motion, further justifying amended pleadings.

Appendix (my boldfacing)

From the December 3, 2013 Complaint:

“**WHEREFORE,** Notre Dame respectfully prays that this Court:
I. **Enter a declaratory judgment that the U.S. Government Mandate violates Notre Dame's rights** under RFRA;
2. Enter a declaratory judgment that the U.S. Government Mandate violates Notre Dame's rights under the First Amendment;
3. **Enter an injunction prohibiting the Defendants from enforcing the U.S. Government Mandate** against Notre Dame;
4. **Enter an order vacating the U.S. Government Mandate**;
5. Enter a declaratory judgment that Defendants' requirement that student health plans facilitate access to abortion-inducing products, sterilization, contraception, and related education and counseling violates Notre Dame's rights under RFRA and the First Amendment; enter an injunction prohibiting the Defendants from enforcing that requirement against Notre Dame; and enter an order vacating the requirement;
6. Award Notre Dame's attorneys' and expert fees under 42 U.S.C. § 1988; and
7. Award all other relief as the Court may deem just and proper.”

From the 7th Circuit opinion:

“But we are left with the question: **what does Notre Dame want us to do**? Tell it that it can tear up the form without incurring a penalty for doing so, even though the govern- ment’s regulations require the religious institution to retain it after signing it, 26 C.F.R. § 54.9815-2713A(a)(4), though not to submit it to the government? But what effect would that have—except to rescind the university’s exemption from the requirement of paying for the contraceptive services that Meritain is now offering as a consequence of Notre Dame’s choosing to exempt itself from the contraception regulations? No certification, no exemption. **We imagine that what the university wants is an order forbidding Aetna and Meritain to provide any contraceptive coverage to Notre Dame staff or students pending final judgment in the district court. But we can’t issue such an order; neither Aetna nor Meritain is a defendant** (the university’s failure to join them as defendants puzzles us), so unless and until they are joined as defendants they can’t be ordered by the district court or by this court to do anything. Furthermore, while a religious institution has a broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution.”

and

“Still, Notre Dame’s compliance has not mooted the case. One can imagine an alternative form of relief to turning the clock back; and **being able to imagine an alternative form of relief is all that’s required to keep a case alive after the primary relief sought is no longer available.** Hoosier Environmental Council v. U.S. Army Corps of Engineers, 722 F.3d 1053, 1057–58 (7th Cir. 2013). For example, the university could ask the district court (because the case is before us on an interlocutory appeal, our ruling will not end the litigation) to **order the government to notify all of Notre Dame’s students and employees of the university’s exemption** from having to provide contraception and of its opposition to having to notify Aetna and Meritain of their duties under the Affordable Care Act with regard to contraceptive services.”

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