



CYPEN & CYPEN
NEWSLETTER
for
June 22, 2017

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Never Forget September 11, 2001
and
Always Remember May 2, 2011

1. SCOTUS HOLDS THAT A PLAN MAINTAINED BY A PRINCIPAL-PURPOSE ORGANIZATION QUALIFIES AS A “CHURCH PLAN,” UNDER ERISA, REGARDLESS OF WHO ESTABLISHED IT: The Employee Retirement Income Security Act of 1974 (ERISA) generally obligates private employers offering pension

plans to adhere to an array of rules designed to ensure plan solvency and protect plan participants. “Church plans,” however, are exempt from those regulations. From the beginning, ERISA has defined a “church plan” as “a plan established and maintained for its employees by a church.” Congress then amended the statute to expand that definition, adding the provision at bar: A plan established and maintained for its employees by a church includes a plan maintained by an organization the principal purpose of which is the administration or funding of such plan for the employees of a church, if such organization is controlled by or associated with a church. Petitioners, who identify themselves as three church-affiliated nonprofits that run hospitals and other healthcare facilities (collectively, hospitals), offer their employees defined-benefit pension plans. Those plans were established by the hospitals themselves, and are managed by internal employee-benefits committees. Respondents, current and former hospital employees, filed class actions alleging that the hospitals’ pension plans do not fall within ERISA’s church-plan exemption because they were not established by a church. The District Courts, agreeing with the employees, held that a plan must be established by a church to qualify as a church plan. The Courts of Appeals affirmed. On certiorari to the United States Court of Appeals for the Seventh Circuit, SCOTUS held that a plan maintained by a principal-purpose organization qualifies as a “church plan,” regardless of who established it. The term “church plan” initially “meant” only “a plan established and maintained by a church.” But the subparagraph provides that the original definitional phrase will now “include”

another—“a plan maintained by [a principal-purpose] organization.” That use of the word “include” is not literal, but tells readers that a different type of plan should receive the same treatment (that is, an exemption) as the type described in the old definition. In other words, because Congress deemed the category of plans “established and maintained by a church” to “include” plans “maintained by” principal purpose organizations, those plans—and *all* those plans—are exempt from ERISA’s requirements. *Advocate Health Care Network v. Stapleton*, No. 16-74 (U.S. June 5, 2017).

2. FOLLOW-UP ON THE MOST HATED MAN IN

PENSIONLAND: In the *Governing* April feature, “The Most Hated Man in Pensionland,” Liz Farmer profiled philanthropist John Arnold, who has been donating billions to help fund pension policy research and pro-reform political candidates and ballot initiatives. These activities have made Arnold public enemy No. 1 among lots of government workers and union leaders. Arnold has said that he first became intrigued by the topic when he read about unfunded liabilities following the 2008 financial crisis. Among those who oppose his efforts is the National Conference of Public Employees Retirement Systems (NCPERS). Hank Kim, Executive Director, has responded to *Governing* via letter to the editor:

Public pension funds are properly concerned about the outsized influence wielded by Arnold, a billionaire who made his fortune from the Enron debacle. There is no one who has worked harder to undermine a pension system that has ensured retirement security for millions for the past century, and no one

who has done more to stoke fear about the future of pensions. For a math genius, Arnold is surprisingly weak in his grasp of statistical outliers. The 2008-2009 global financial crisis that sparked his interest in public pensions has abated. The sharp dips in pension asset values have recovered. The vast majority of public pensions are well funded and are gaining strength as the economy grows. Arnold's research is fixated on events that have passed. As he works to keep the spotlight on the minority of public pension plans that are in trouble, Arnold goes easy on the legislatures that failed, even in boom economic times, to fund the commitments they made. Is there any wonder why the research he pays for is widely discounted as shortsighted and politically motivated?

To ask the question is to answer it.

3. FIREHOUSE CLOUT: In recent years, many states have changed their workers' compensation rules for firefighters, writes Alan Greenblatt in *Governing*. When one of them develops cancer, heart disease or lung disease, the illness is now assumed to be job-related. These changes reflect the hazards of fighting fires. They also reflect the clout of firefighters and their unions. The heroic image of firefighters is well earned, but it is a political asset as well. No politician wants to be seen as opposed to them, or to the public safety values that they embody. When you think of firefighters in the political sphere, they are kind of a protected class. Everyone wants firefighters on their side. Firefighters do not simply rely on their image. They work the entire political system. The International Association of Fire Fighters raised money for the 2016 federal election cycle. But their

greatest impact is at the state and local levels. In Arizona alone, there are more than 30 political action committees representing the interests of firefighters. However, firefighters bring more than money to the table. They are in practically every legislative district in the land. And because their work is done in shifts, there is always someone off-duty who is available to go around and knock on doors. All candidates want the endorsement of the firefighters union if they can get it. In Arizona, Bryan Jeffries, president of the Professional Fire Fighters of Arizona, is credited with helping to negotiate a reduction in pension benefits last year. Jeffries agreed to a change in the formula for cost-of-living adjustments for retirees, as well as increased contributions from new hires, as well as increased contributions from new hires. These alterations are expected to save the state \$1.5 billion over 30 years. Maybe Jeffries was willing to come to the table because he had served on the Phoenix City Council and was able to see the issue from both sides. Or maybe he, as the sponsor of the bill said “Quite honestly, I knew if I didn’t have the support of the firefighters, it would have been very difficult, if not impossible, to pass the bill. Everybody likes firefighters. They’re very organized. They’re very politically organized.”

4. FEDERAL COURTS OF APPEAL LACK JURISDICTION UNDER 28 U.S.C. §1291 TO REVIEW AN ORDER DENYING CLASS CERTIFICATION (OR AN ORDER STRIKING CLASS ALLEGATIONS), AFTER THE NAME PLAINTIFFS HAVE VOLUNTARILY DISMISSED THEIR CLAIM WITH

PREJUDICE: Orders granting or denying class certification are inherently interlocutory, hence not immediately reviewable under 28 U.S.C. §1291, which empowers federal courts appeal to review only “final decisions of district courts.” In a 1978 decision, the United States Supreme Court held that the death-knell doctrine—which rested on courts’ recognition of denial of class certification which sometimes end the lawsuit for all practical purposes—do not warrant mandatory appellate jurisdiction of certification orders. Although the death-knell theory likely enhanced the quality of justice afforded a few litigants, it did so at a heavy cost to §1291’s finality requirement. First, the potential for multiple interlocutory appeals inhered in the doctrine. Second, the death-knell theory forced appellate courts indiscriminately into the trial process, circumventing the two-tiered screening procedure Congress established for interlocutory appeals in 28 U.S.C. §1292(b). Finally, the doctrine operated only in favor of plaintiffs, even though the class-certification question may be critically important to defendants as well. Two decades later, after Congress amended the Rules Enabling Act, to empower this Court to promulgate rules providing for interlocutory appeal of orders “not otherwise provided for in §1292,” the court approved Federal Rule of Civil Procedure 23(f). Rule 23(f) authorizes permissive interlocutory appeal from adverse class-certification orders in the sole discretion of the court of appeals. This discretionary arrangement was the product of careful calibration on the part of the rulemakers. Respondents, owners of Microsoft’s videogame console, the Xbox 360, filed this putative class action alleging a design defect in the device. The District Court struck

respondents' class allegations from the complaint, and the Court of Appeals denied respondents permission to appeal that order under Rule 23(f). Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims with prejudice, but reserved the right to revive their claims should the Court of Appeals reverse the District Court's certification denial. Respondents then appealed, challenging only the interlocutory order striking their class allegations. The Ninth Circuit held it had jurisdiction to entertain the appeal under §1291. It then held that the District Court's rationale for striking respondents' class allegations was an impermissible one, but refused to opine on whether class certification was inappropriate for a different reason, leaving that question for the District Court on remand. On certiorari, the United States Supreme Court of the 9th Circuit, the Supreme Court reversed and remanded holding that federal courts of appeals lack jurisdiction under §1291 to review an order reviewing class certification (or an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice. Section 1291's final-judgment rule preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff had adequate incentive to continue despite the denial of class certification.

Also like the death-knell doctrine, respondents' theory allows indiscriminate appellate review of interlocutory orders. The one-sidedness of respondents' voluntary-dismissal device reinforces the conclusion that it does not support mandatory appellate jurisdiction of refusals to grant class certification. The tactic permits only plaintiffs, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the class issue may be just as important to defendant, for class certification may force a defendant to settle rather than run the risk of ruinous liability. *Microsoft Corp. v. Baker*, No. 15-457 (U.S., June 12, 2017).

5. FIRE SCIENCE VITAL TO FLORIDA: According to the Tallahassee *Democrat*, as Florida burns, it is all too clear what kind of problems wildfire presents. It is also clear what the response is – brave men and women equipped with rakes, shovels, bulldozers, hoses and helicopters. A response is not a remedy, though. Where do we find solutions for wildfire problems? Where we find solutions to so many problems – science. In this case, fire science. There is too much at stake here not to equip those who manage our forests with the tools they need when the conflagrations come. The most valuable tool we can give them in the long run is knowledge. With a better understanding of fire, we are more likely to prevent it getting the upper hand on us. Most people understand that prescribed burns reduce the likelihood of catastrophic wildfires. What is trickier is figuring out the prescription. Do you burn on a rigid schedule, say every three years? Or do you do it on a variable schedule? How high do we turn up the

heat? Yes, we can regulate the temperature almost like an oven, with our choice of time of day, time of year and weather conditions. It takes a lot experimentation to get that right. That is where public scientists make an important contribution. They do the research that informs how we manage our forests, and the outreach that puts that knowledge into the hands of our firefighters, land managers, tree farmers, government officials and homeowners.

6. VIDEO TAX TIPS FROM THE IRS: Here are tax-related identity theft tips: The IRS YouTube channels provide short, informative videos on various tax related topics in English, Spanish and ASL:

www.youtube.com/irsvideos

www.youtube.com/irsvideomultilingua

www.youtube.com/irsvideosASL

7. NEW OFFICE ADDRESS: Please note that Cypen & Cypen has a new office address: Cypen & Cypen, 975 Arthur Godfrey Road, Suite 500, Miami Beach, Florida 33140. All other contact information remains the same.

8. CRAZY STATE LAWS: *Good Housekeeping* reminds us that there are crazy laws in every state. In the State of Mississippi nutrition labels cannot be enforced. In 2013, lawmakers barred towns from forcing restaurants and food manufacturers to include nutrition label information on kids' meals. This is also known as The Anti-Bloomberg

Bill. At least you are kept in the dark when it is cheat day. By the way, on June 26, 2014, the New York Court of Appeals, the state's highest court, ruled that the New York City Board of Health, in adopting the regulation, exceeded the scale of its regulatory authority.

9. ZEN PROVEN TEACHINGS TO LIVE BY: A closed mouth gathers no foot.

10. PONDERISMS: Why isn't the number 11 pronounced onety-one

11. OLD CEMETERIES & EPITAPHS: A truly happy person is one who can enjoy the scenery on a detour and one who can enjoy browsing old cemeteries. For example, in a Thurmont, Maryland, cemetery it reads: Here lies an Atheist, all dressed up and no place to go.

12. TODAY IN HISTORY: This day in 1870, U.S. Congress creates the Department of Justice

13. KEEP THOSE CARDS AND LETTERS COMING: Several readers regularly supply us with suggestions or tips for newsletter items. Please feel free to send us or point us to matters you think would be of interest to our readers. Subject to editorial discretion, we may print them. Rest assured that we will not publish any names as referring sources.

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15. REMEMBER, YOU CAN NEVER OUTLIVE YOUR DEFINED RETIREMENT BENEFIT.