Written by **Raven Clabough** on July 30, 2013

# Court Rules Mennonite Company Must Comply with Contraception Mandate


The United States Court of Appeals for the Third Circuit has ruled that the Conestoga Wood Specialties Corporation, a Mennonite-owned company, must comply with the Health and Human Services mandate that compels companies to pay for drugs that may cause abortions. The ruling was handed down in a 2-1 decision assertin that the Mennonite faith of the company's owners may not prohibit the company from complying with the mandate.

"Since Conestoga is distinct from the Hahns [the owners of the Conestoga Wood Specialties Corporation], the Mandate does not actually require the Hahns to do anything," wrote Judge Robert Cowen. "All responsibility for complying with the Mandate falls on Conestoga … It is Conestoga that must provide the funds to comply with the Mandate — not the Hahns."

"Our decision here is in no way intended to marginalize the Hahns' commitment to the Mennonite faith," Judge Cowen continued. "We accept that the Hahns sincerely believe that the termination of a fertilized embryo constitutes an intrinsic evil and a sin against God to which they are held accountable, and that it would be a sin to pay for or contribute to the use of contraceptives which may have such a result. We simply conclude that the law has long recognized the distinction between the owners of a corporation and the corporation itself."

The majority opinion also determined that Conestoga Corporation cannot be protected as a "person" under the federal Religious Freedom Restoration Act. "Since Conestoga cannot exercise religion, it cannot assert a RFRA claim," the court concluded.

But Ed Whelan of the *National Review* observes several issues with the majority opinion:

> The Third Circuit majority fails to keep in mind the Hahns' dual roles as shareholders of Conestoga and as members of Conestoga's board. Referring only to the Hahns as Conestoga's "owners," the Third Circuit majority argues that the claim that they have religious-liberty rights "rests on erroneous assumptions regarding the very nature of the corporate form." It likewise contends that the HHS mandate "does not actually require the Hahns to do anything." But the HHS mandate in fact requires that the Hahns, as Conestoga's board members, comply with its terms in operating Conestoga. In other words, it constrains how the Hahns exercise their authority as board members in conducting Conestoga's operations. And by virtue of their other role as owners, the Hahns face a substantial economic penalty if they fail to operate Conestoga consistent with the HHS mandate.

Regarding the majority's opinion's dismissal of the RFRA claim because "Conestoga cannot exercise religion," Will Baude notes on volokh.com that the opinion ultimately undermines its own logic. According to the majority opinion, general business corporations do not exercise religion or engage in religious practices such as prayer or observing sacraments, but Baude opines on the faultiness of this reasoning:

> The majority also endorses other arguments "questioning whether a corporation can 'believe' at all," and adding that "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires." But those arguments would all prove too much, because they are technically true of any organizational association, including … a church!

Ironically, the majority opinion goes on to justify the right of religious organizations to receive "special solicitude" and Free Exercise rights. But as noted by Baude, this concession undermines the majority's opinion:

> But what the majority says here about churches cuts against everything it has just said about corporations not having "beliefs" or "religiously-motivated actions separate and apart" from their members — churches don't do those things either, in a technical sense. So while one can certainly say that religious organizations are special, the (necessary) recognition that religious corporations have Free Exercise rights destroys the reasoning that the court had previously given for saying corporations don't have rights. (The opinion later returns to the theme, suggesting that accepting the benefits of separate legal personhood and limited liability means giving up one's free exercise rights, but again … churches.)

The dissenting judge, Kent A. Jordan, notes these flaws and more in his dissenting opinion, which was 60 pages long, twice the length of the majority opinion. In the dissenting opinion, Judge Jordan targeted the government's arguments regarding "abortifacients":

> At oral argument, counsel for the government insisted that "abortifacient" is a "theological term," and that, "for federal law purposes, a device that prevents a fertilized egg from implanting in the uterus," like Plan B and Ella, "is not an abortifacient." There was something telling in that lecture, and not what counsel intended. One might set aside the highly questionable assertion that "abortifacient" is a "theological" and not a scientific medical term, which must come as a surprise to the editors of dictionaries that include entries like the following: "abortifacient [MED] Any agent that induces abortion."

According to Jordan, the government counsel's fixation on just when the fertilized egg is terminated ignores the underlying issue: The Hahns believe that a human life comes into being at conception, and as such, destruction of that egg, whether before or after implantation in the uterus, is perceived as murder by the Hahns.

But Jordan contends that that is ultimately what the government intended to do — drown the debate in jargon rather than give any credence to anything that might "smack of religion in this case:"

> The government evidently would like to drain the debate of language that might indicate the depth of feeling the Hahns have about what they are being coerced to do. "Keep the conversation as dry and colorless as possible," is the message. Don't let anything that sounds like "abortion" come up, lest the weight of that word disturb a happily bland consideration of corporate veils and insurance contracts. Like it or not, however, big issues — life and death, personal conscience, religious devotion, the role of government, and liberty — are in play here.

The Third Circuit Court's ruling is in direct conflict with a recent ruling by the Tenth Circuit Court in the Hobby Lobby case. The plaintiffs in the Tenth Circuit case were Hobby Lobby Stores and Mardel and their owners, who have a religious objection to the HHS mandate. The court ruled that the mandate places a substantial burden on the religious exercise rights of Hobby Lobby and Mardel because of the millions of dollars in annual fines they would be subjected to for failure to comply. According to the

court, the government did not prove that any burden the mandate presents to the owners was overridden by a compelling governmental interest.

Because of the conflict between the Third Circuit and the Tenth Circuit Courts, the Supreme Court will very likely have to address the issue.