

**MEMO# 30939**

November 7, 2017

## **Minnesota District Court Issues Order in Thrivent Case**

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: Minnesota District Court Issues Order in Thrivent Case

On November 3, 2017, in the District of Minnesota case between Thrivent Financial for Lutherans (Thrivent) and the Department of Labor (DOL) regarding DOL's fiduciary rulemaking, the judge issued the attached order (1) granting a preliminary injunction applicable only to Thrivent, (2) granting DOL's motion to stay the case, and (3) denying Thrivent's motion for summary judgment.

### **Background**

As a reminder, Thrivent's case is the only remaining undecided district-level case against DOL regarding its fiduciary rulemaking (although it is anticipated that a decision in the 5th Circuit will be handed down soon). Thrivent's suit requests an injunction regarding a narrow issue—the Best Interest Contract (BIC) exemption's requirement that a financial institution not restrict an investor's right to sue in court, which would force Thrivent to abandon its long-standing dispute resolution method. DOL conceded this point and now acknowledges that this provision in the BIC exemption should be invalidated because it violates existing law (the Federal Arbitration Act).[\[1\]](#) In conjunction with its concession, DOL issued Field Assistance Bulletin 2017-03,[\[2\]](#) announcing an enforcement policy related to the arbitration prohibition. In the Bulletin, DOL announces that it "will not pursue a claim against any fiduciary based on failure to satisfy the BIC Exemption or the Principal Transactions Exemption, or treat any fiduciary as being in violation of either of these exemptions, if the sole failure of the fiduciary to comply with either the BIC Exemption or the Principal Transactions Exemption, is a failure to comply with the Arbitration Limitation in Section II(f)(2) and/or Section II(g)(5) of the exemptions."

Because this provision is the entire basis for Thrivent's suit, DOL withdrew its cross-motion for summary judgment and asked the court to stay the suit pending administrative action to modify the BIC exemption provision at issue. Thrivent continued to advocate for a nationwide injunction to block the BIC exemption's arbitration prohibition.[\[3\]](#)

## **Injunction**

In granting the preliminary injunction in favor of Thrivent, the court found that the issue was not moot, despite DOL's temporary enforcement policy and expression of its intent to modify the provision. The court noted that the anti-arbitration condition remains in place, the potential actions of two different agencies (DOL and IRS) are implicated, and the rulemaking process can be lengthy (given its decision, the court stated that it did not need to consider the potential effect of class-action law suits). The court also found that Thrivent sufficiently demonstrated the threat of irreparable harm and is likely to succeed on the merits of the case, given DOL's concession. The order makes clear that the preliminary injunction only applies to a party trying to enforce the anti-arbitration provision against Thrivent. Therefore, other providers do not benefit from the injunction and must continue to rely upon the DOL's non-enforcement policy, as well as the expected delay of the provision's application (i.e., the delay of the January 1, 2018 applicability date).

## **Future Action**

Although the court acknowledged the likelihood of Thrivent's success on the merits of the case, it denied Thrivent's request for summary judgment (without prejudice). It also granted DOL's request to stay the case. DOL had argued that a stay was justified because the challenged provision was not yet applicable to Thrivent, and DOL was reassessing both the BIC exemption and the broader rulemaking. Given the injunctive relief, issuance of a stay will not cause harm to Thrivent. Now that the court has granted the stay, there is unlikely to be further movement in this case while DOL completes its reexamination and considers amendments to the rulemaking.

## **Delay of January 1, 2018 Applicability Date**

In a November 2 court filing in the Thrivent case (attached), DOL notified the court that it had submitted to OMB final amendments to delay the January 1, 2018 applicability date, entitled "18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption; Class Exemption for Principal Transactions; PTE 84-24." DOL tells the court "For related administrative actions, the Department has finalized actions for Federal Register publication within about three weeks of submitting the action for interagency review." Note that the date three weeks from DOL's November 1 submission to OMB is November 22.

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[Attachment No. 1](#)

[Attachment No. 2](#)

### **endnotes**

[1] Similarly, DOL also filed a brief in the 5th Circuit acknowledging this new position.

[2] Field Assistance Bulletin 2017-03, issued August 30, 2017, is available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-03>.

[3] Thrivent argued that, at this point, DOL's statement that it may alter or eliminate this condition of the BIC exemption is "mere speculation." Thrivent observed that DOL's motion to stay was not accompanied by a declaration from a DOL official with a definitive statement on the future of this condition. Given DOL's concession, Thrivent argued that the court should grant summary judgment in Thrivent's favor, rather than simply issue a stay. Similarly, in a subsequent letter to the court, Thrivent noted that the DOL's recent announcement of a non-enforcement policy with respect to the BIC exemption's anti-arbitration provision does not change its view about the need for a preliminary injunction, noting that private litigants (who are not bound by DOL's non-enforcement policy) are responsible for enforcing that provision.