IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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Stephen Del Sesto, as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan, et al., Plaintiffs,	: 18-CV-00328(WES)
	: United States Courthouse Providence, Rhode Island
vs.	:
Prospect CharterCARE,LLC, et al., Defendants.	: Tuesday, February 12, 2019 10:00 a.m.

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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES CHIEF DISTRICT COURT JUDGE

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1 (In open court.)
2 THE COURT: All right. Good morning, everyone.
3 We're here in the matter of Stephen Del Sesto as
4 receiver and administrator of the St. Joseph Health
5 Services of Rhode Island Retirement Plan vs. Prospect
6 CharterCARE, LLC, et al., to hear a motion for
7 preliminary settlement approval as well as other
8 matters.
9 Let's have counsel identify themselves for the
10 record.
11 MR. WISTOW: Max Wistow for the plaintiffs.
12 MR. LEDSHAM: Benjamin Ledsham for the
13 plaintiffs.
14 MR. SHEEHAN: Stephen Sheehan for the
15 plaintiffs.
16 MR. DEL SESTO: Stephen Del Sesto, the state
17 receiver.
18 MR. HALPERIN: Preston Halperin for the Prospect
19 entities.
20 MR. MCGOWAN: John McGowan for the Prospect
21 entities, sir.
22 MR. MERTEN: Howard Merten for the Diocesan
23 defendants.
24 MR. KESSIMIAN: Paul Kessimian for the Diocesan
25 defendants.

1 MR. BOYAJIAN: Steven Boyajian for the Angell
2 Pension Group, your Honor.
3 MR. SULLIVAN: And Dan Sullivan also for the
4 Angell Pension Group.
5 MR. FRAGOMENI: Good morning, your Honor.
6 Chris Fragomeni on behalf of the Prospect entities.
7 MR. RUSSO: Mark Russo for the Prospect
8 entities, your Honor.
9 MR. WOLLIN: David Wollin for the Rhode Island
10 Foundation, your Honor.
11 MR. LAND: Richard Land on behalf of CharterCARE
12 Community Board and Roger Williams Hospital.
13 THE COURT: Thank you. So who else is going to
14 be arguing today?
15 MR. WISTOW: May I address the Court on that
16 issue, your Honor?
17 THE COURT: Yes. I'm listening. I'm just
18 moving yesterday's piles while you come up, okay.
19 MR. WISTOW: Your Honor is kind of awash in
20 briefs I'm afraid in this case.
21 THE COURT: Yes.
22 MR. WISTOW: I'm going to try to be brief in the
23 hopes of obtaining forgiveness in part for all the
24 materials we've dumped on you. I've talked to all
25 defense counsel in the case and we've agreed, subject

1 to your Honor's approval, on how to address the issues
2 before the Court this morning.
3 The objections to the motion to approve the
4 partial settlement on a preliminary basis started off
5 with regard to problems with ERISA and failure to join
6 the Pension Benefit Guaranty program. And all counsel
7 agree again, subject to your Honor's desires, to argue
8 that issue independently first and then go on to -- and
9 I would like Mr. Sheehan to argue that. Prospect has
10 indicated they want Mr. McGowan to argue that separate
11 issue. And then --
12 THE COURT: That issue is exactly what? How do
13 you characterize that?
14 MR. WISTOW: That would be the issue of failure
15 to join Pension Benefit Guaranty Corporation as a party
16 and the general preemption of ERISA and how it affects
17 the settlement without regard to any other issues.
18 Once that issue is addressed, there remains
19 other objections by the non-settling defendants, and
20 those other objections relate to whether this is a good
21 faith settlement or not under the recently enacted
22 joint tortfeasor statute that abolishes proportionality
23 of fault as the basis for allocation between the
24 parties. There's an objection based on collusion that
25 would prevent a good faith finding. There's objections

1 based on the fact that part of the settlement between
2 the pension plan and the proposed settling defendants
3 violates the contract with some of the non-settling
4 defendants and violates the Rhode Island Hospital
5 Conversion Act.
6 I don't mean to be exhaustive, but your Honor
7 could see those issues are quite different from whether
8 or not the plan is preempted by ERISA and whether or
9 not the case can go forward without PBGC. And it seems
10 logical, I believe to all of us, we've agreed, if the
11 Court would allow us to argue in that order.
12 THE COURT: I think that's fine. There might be
13 some overlap, but I don't think it's -- I think this is
14 very manageable the way you suggested it.
15 MR. WISTOW: Thank you, your Honor. With that,
16 I would suggest that -- we are the movants -- I would
17 suggest that Mr. Sheehan start with his arguments why
18 the objections of Prospect CharterCARE and the Diocese
19 with regard to the nonjoinder of PBGC, the Pension
20 Benefit Guaranty Board, and the failure to bring them
21 in as a party, means nothing both as to the original
22 objection they filed and the surreply which your Honor
23 allowed them to file on July 5th.
24 And he will also address the issues of whether,
25 for example, the PBC statute allows the receiver to

1 have made the expenditures he made, whether or not the
2 ERISA statute abolishes the collateral source rule and
3 related concepts all peculiar to ERISA and the Pension
4 Benefit Guaranty Corporation.
5 If your Honor would like, I can before that
6 begins give you some of the travel of what happened,
7 maybe that would be helpful, that got us where we are
8 today. It's up to the Court. I'll try to be very
9 brief in that regard. I suggest it might help.
10 THE COURT: I think I'm pretty familiar with the
11 travel, but if you think there's material that I don't
12 know or need to know, go ahead.
13 MR. WISTOW: Well, I'll try to be very brief,
14 and I hope my definition of brief comports with your
15 Honor's.
16 Your Honor knows that we're talking about a
17 defined benefit pension plan established by St.
18 Joseph's Hospital Society of Rhode Island, one of the
19 purporting settling defendants, there's something like
20 2729 beneficiaries -- participants, I should say, in
21 the plan plus members of their family who are dependent
22 in part.
23 The SJHSRI which owned the old St. Joseph's
24 Hospital lost -- transferred the assets of the old St.
25 Joseph's Hospital in June 2014 to some new entities.

1 They no longer continue to operate a hospital business.
2 They purported to keep with them the pension liability.
3 On August 17th, 2017, which is more than three
4 years after the closing on June 20th, 2014, the
5 original transfer, the receivership petition is filed
6 in the Superior Court by SJHSRI as the petitioner. The
7 respondent was the plan itself as the trust.
8 Most importantly, that petition alleged that the
9 plan was insolvent and asked for an immediate
10 reduction, 40 percent, in benefits and set that down
11 for hearing October 11th, about six weeks after the
12 notice -- after the petition. Our office was hired by
13 the petitioner on October 17th, 2017. Needless to say,
14 the reduction did not go forward on the 11th; it was
15 just held in abeyance.
16 And this is going to become relevant later on
17 different issues. Because of the difference of opinion
18 of individual plan participants as to what their
19 attitude was about a reduction, they went off into
20 different groups. My job when I was hired was to try
21 to maximize the total money in the plan, and it was
22 clear that I would never get involved in how that would
23 be split up if there were arguments among the various
24 participants. Arlene Violet and Robert Senville --
25 Ms. Violet couldn't be here this morning, but

1 Mr. Senville is here and he has represented, noted his
2 appearance previously in Superior Court at least to
3 advocate for the older and more disabled pensioners.
4 Jeff Kasle for the intermediate participants and Chris
5 Callaci for the union. They represent hundreds and
6 hundreds of different people in the plan. And I'll
7 explain in a moment what happened in the superior court
8 with them.
9 Again, I want to emphasize that if there's ever
10 a shortfall with this plan, I will not in any way be
11 involved in how will the shortfall be allocated among
12 these people. That's strictly between the receiver and
13 whoever their representatives are.
14 I was allowed to subpoena documents and during
15 the eight months approximately that I was retained up
16 until the time we brought suit, which was on June 18th,
17 2018, I wanted for my own legal reasons to bring that
18 suit within four years of the anniversary date of the
19 closing, June 20th, 2014. By September 4th, 2018,
20 about two-and-a-half months later, we signed a
21 settlement agreement with some of the defendants,
22 namely, CharterCARE Community Board, the old Roger
23 Williams Hospital and the old St. Joe's Hospital; some
24 people call it Fatima.
25 In that settlement, the plan was to be given a

1 minimum of $11,150,000 or greater than 95 percent of
2 the liquid assets. There was going to be an
3 escrow -- a transfer of the escrow rights to another
4 $750,000 of money held by the Rhode Island Department
5 of Labor. There was a transfer of rights that CCB
6 owned in an entity called CharterCARE Foundation which
7 had received about $8.2 million as a result of a Cy
8 Pres petition that took place some years ago but after
9 the closing in 2015.
10 In addition and very important, the agreement
11 provided that we would get all the rights that these
12 settling defendants owned in the new entity PCC, LLC,
13 which had been created as a parent to own the two new
14 hospital corporations that would be operating, let's
15 call it, new Fatima and new St. Joe's. And it's our
16 position that CCB and its subsidiaries own at least 15
17 percent of the parent company of the operating
18 hospitals.
19 One of the complicating factors in this thing,
20 your Honor, is there's a put that CCB has to put the 15
21 percent to the sellers, but that put doesn't arrive
22 until June 20th, '19. That's only four months from
23 now. And the put is only good for 90 days. And if
24 there can't be an agreement, then the matter has to go
25 to arbitration.

1 The settlement agreement gives the receiver
2 rights of how to control the put and how to participate
3 in the arbitration subject at all times when it was
4 entered into to approval by the superior court and then
5 approval by this Court.
6 To finish up that pie, all of the items in the
7 settlement agreement that were going to be given to us
8 were stated to be presently held in trust for us and
9 secured by the financing agreement at UCC-1. So what
10 we ended up there, your Honor, is with a settlement
11 agreement that in effect was an option on behalf of the
12 receiver and the plan participants subject to approval
13 of two courts, similar to perhaps you might analogize
14 it to a purchase and sale of real estate where it's
15 subject to planning board and zoning approval and the
16 like but there's a present contract.
17 What they got in return, the settling
18 defendants, were releases under the new joint
19 tortfeasor release, and we'll get into that in some
20 substance because they're complaining about that. In a
21 nutshell, basically what the new joint tortfeasor does
22 is what's been done in the state at least four times in
23 the past -- there's a *Depco* case, the *Station* fire
24 case, the *38 Studios* case -- it's abolished the pro
25 rata share concept for joint tortfeasors and simply

1 given a credit for the amount paid if indeed it's a
2 good faith settlement. That would put Rhode Island --
3 a little more than 50 percent of the American
4 jurisdictions have statutes like that. For example,
5 the Mass statute is like the statute that we're talking
6 about here.
7 We still would reserve claims against the
8 settling defendants to press in liquidation. They've
9 agreed our request to go into a judicially supervised
10 litigation, and they've agreed in addition to give us
11 all their rights in CharterCARE Foundation which had
12 gotten 8.2 million. And we're not releasing them from
13 that nor releasing them from any assets in connection
14 with the 2014 sale. I can categorize it simply as
15 meaning mainly or fraudulent transfer claims.
16 And we released only our current offices in the
17 settling defendants. On October 10th, 2018, there was
18 a hearing in front of Judge Stern. I believe you were
19 there, your Honor. And he issued a decision on October
20 29th which is at 2018 WL 5792151. And he approved the
21 contract over objection.
22 And I'd like to quote from his decision. He
23 stated that there was, quote, Widespread support of the
24 proposed settling agreement from the plan's
25 participants. And he was quoting Arlene Violet. He

1 quoted her saying, Excellent first step in attempting
2 to secure additional funds to bolster the plan,
3 unquote. Jeff Kasle, he quoted, He represents
4 wholeheartedly and unequivocally his support for the
5 PSA. And Chris Callaci, who is counsel for the union,
6 UNAP, at the hospital, he quoted him as giving his
7 quote, unwavering support, and noted that apart from
8 the objections he heard from the defendants in the
9 case, there were no other objections from any other
10 participants or creditors.
11 So an order entered in the superior court on
12 November 16th allowing us to go forward here. We filed
13 a motion here on November 21st, 2018. And here's what
14 we're asking for today before we get into the argument.
15 We're asking only a preliminary order and only relating
16 to those three defendants; CCB, old Roger Williams, old
17 St. Joe's. We're asking -- and there's a proposed
18 order in the file, it's document 63-2 -- it's asking
19 for a finding that as to this partial settlement, the
20 finding is within the range of possible final approval,
21 within the range. That it's in good faith within the
22 meaning of the new statute. That notices under CAFA
23 [phonetic] must go out to potential class members and
24 various AGs and that Wistow, Sheehan & Loveley, my
25 firm, be appointed as preliminary class counsel, not as

1 final class counsel, and only for the settlement. And
2 that the hearing be scheduled for full approval or
3 objections to be heard against the settlement and
4 objections to what then will be our applications for
5 fees and objections.
6 I'm going to stop there and --
7 THE COURT: So I have a number of questions. I
8 can save them for Mr. Sheehan if you want. But some of
9 them are sort of general questions. I don't know if
10 you want to try to answer them or not.
11 The first one is just a very basic question
12 which is, do you agree that this is an ERISA pension
13 plan?
14 MR. WISTOW: No, I don't agree, your Honor.
15 THE COURT: Did you plead it? You pled this
16 case as an ERISA plan?
17 MR. WISTOW: Right. I pleaded in the
18 alternative.
19 THE COURT: But aren't you bound by that
20 pleading?
21 MR. WISTOW: No. In my memo, I cite cases that
22 commend lawyers in situations like this for pleading in
23 the alternative. And let me say, absolutely I pleaded
24 it was an ERISA, without question, but I also pleaded
25 in the second portion of the thing that it was not an

1 ERISA plan.
2 And indeed, the reason we brought the state
3 court claim is it's denuded of the ERISA applications
4 in the event your Honor chose to find that it was not
5 an ERISA plan and refused to continue to have ancillary
6 jurisdiction or supplemental jurisdiction as to the
7 non-ERISA things.
8 THE COURT: Well, when do you have to make a
9 choice on this?
10 MR. WISTOW: For a settlement like this, and Mr.
11 Sheehan will address that, there are cases settled
12 sometimes because it's unclear what the result can be.
13 It's to avoid getting into the issue of is it ERISA or
14 is it not? This Court has jurisdiction because of the
15 pleading of ERISA. It doesn't mean that before it can
16 approve it, it has to agree that it's ERISA. You could
17 look down -- let's try it this way, your Honor.
18 If I pleaded that this was an ERISA case and it
19 turned out not to be, as has happened in some of the
20 cases we cite, a settlement is still binding because
21 the Court has jurisdiction and doesn't have to go
22 through the steps of deciding if it is, in fact, an
23 ERISA case.
24 And by the way, the defendants have not answered
25 the case. They have not even said that it's an ERISA

1 case in their answer. I hope that answers your
2 question.
3 THE COURT: Well, it does, but it seems like
4 there's just a lot of fancy footwork going on here, and
5 it kind of bothers me a little bit; that is, you don't
6 want to say it's really an ERISA plan, but you actually
7 want me to make declaratory rulings about the
8 application of state law that you say are appropriate
9 or important to the settlement. And I feel like -- I
10 feel a little bit like, you know, you want it all ways
11 here.
12 MR. WISTOW: My cake and eat it.
13 THE COURT: You want it to be in federal court.
14 You want it to be in state court. You want a state
15 court receivership. You want the federal court to make
16 a declaration as to the applicability of state law.
17 And we haven't even -- the case, as you just pointed
18 out, hasn't even been answered yet.
19 So, you know, I mean, I totally agree
20 that -- and, you know, maybe this isn't working with
21 the way you wanted to provide the argument -- I totally
22 agree the parties have a right to settle their claims
23 whenever they want to and that's fine. I don't want to
24 be one to stand in the way of a settlement. But I'm a
25 little concerned about being asked to put stamps of

1 approval of this settlement that get way ahead of the
2 case when we don't even know if you're in the right
3 court.
4 MR. WISTOW: We are in the right court if we
5 plead ERISA. That's clear, that's what the cases say;
6 you have jurisdiction. If you ultimately decide it's
7 not ERISA, the cases say that doesn't vitiate
8 settlements that have been entered into. The Court has
9 jurisdiction.
10 My hesitancy in taking a firm position as to
11 whether it's ERISA or not is ERISA is a question of
12 both fact and law, the applicability in this situation,
13 and really cannot be predicted in some circumstances
14 until the completion of a trial. And to take the
15 position until we know definitively whether or not it's
16 ERISA means no case can be settled.
17 The reason -- I was not trying to have my cake
18 and eat it. What I did was what the cases say is
19 prudent to do. I'm not here to tell your Honor that
20 this case is an ERISA case without any doubt whatever.
21 I don't have the temerity to do that. I think it's a
22 case that can be, in good faith, pleaded to be ERISA
23 and ultimately may be proven. On the other hand, it
24 might not be, and that's why we have the state court
25 claims.

1 Your Honor can keep the state court claims if
2 you wish under supplementary jurisdiction even if you
3 decide it's not ERISA.
4 THE COURT: Well, let me ask you this: If
5 there's at least a strong possibility that it's an
6 ERISA claim and an ERISA plan, why wasn't the
7 receivership sought in federal court instead versus
8 state court? We have an argument here that the state
9 court is without jurisdiction and shouldn't have
10 appointed the receiver in that the receiver has no real
11 legitimate authority.
12 Now, there's a whole side of that which I'll ask
13 the other side about, which is, to some degree, I say
14 so what; I could just appoint Mr. Del Sesto as the
15 receiver in federal court and adopt everything that's
16 gone on so far. And I think under my equitable
17 jurisdiction if the receivership was in federal court,
18 I have the authority to do that and I could move this
19 right up to where it is now. So I'm not sure that as a
20 practical matter that it's all that significant.
21 But they raised this argument, and it does seem
22 to me to be a legitimate question. If it's an ERISA
23 plan, why wouldn't it be a federal court receivership?
24 MR. WISTOW: The answer to that question, your
25 Honor, is in the pleadings we submitted, and it's an

1 area that my brother understands better than I do, the
2 role of ERISA. Let me say this -- and I do want him to
3 speak about it because I don't think I can do justice
4 to it.
5 What I will say is even in the motion to dismiss
6 that was filed on December 24th by these defendants
7 that are saying this, they never said boo about the
8 inability to appoint the receiver. This came up for
9 the first time in the objection. They even have
10 pending in front of the state court motions which I've
11 attached to my papers which they wish to be heard,
12 their motions, for March 1st. That's Exhibit 2, I
13 believe, to my objection to Prospect.
14 In addition to that, your Honor, the receiver
15 has been in the state court at least six times that
16 these people have been parties to asking for
17 disbursements. They never, ever raised this. I'm not
18 talking about waiver of jurisdiction. What I'm talking
19 about is -- they've raised an interesting issue.
20 There's not one case -- I've read the cases Mr. Sheehan
21 briefed and his responses. I see myself getting into
22 arguing this, and I'm really not competent to.
23 THE COURT: So maybe you want to turn it over to
24 Mr. Sheehan.
25 MR. WISTOW: I think that is what I should do.

1 I do want to say one other thing about this.
2 One of the things that is especially troubling
3 about this is your Honor knows by now that two lawyers
4 and I from my office went to Washington to meet with
5 the PBGC in, I believe it was, December with the former
6 chief counsel of the PBG who is advising us where this
7 was discussed. There's a declaration by that lawyer --
8 he's no longer with PBGC -- that every single pleading
9 in this case, every one, and there's a supplemental
10 declaration that I handed in this morning, including
11 the declaration recently raised that the Court
12 appointing Mr. Del Sesto, the superior court Judge
13 Stern, had no possible jurisdiction.
14 All of that has been sent to PBGC and the way
15 it's been categorized, and I quote from docket 101,
16 page 28, the surreply you allowed, Concerted efforts by
17 the administrator, meaning the receiver, meet with and
18 dissuade the PBGC from discharging its statutory
19 responsibilities do not make the PBGC less of a
20 necessary party and undercut the administrator's
21 attempt to categorize the PBGC's role as speculative.
22 Your Honor, this is a complete red herring and
23 I'm hopeful -- I'm confident, I should say, that Mr.
24 Sheehan can convince you. And with that, I'll subside.
25 THE COURT: Okay. Thank you.

1 MR. SHEEHAN: May I proceed, your Honor?
2 THE COURT: Yes.
3 MR. SHEEHAN: Thank you, your Honor. I have
4 prepared points to address, and I really think it might
5 make sense to pick up where Mr. Wistow left off in
6 response to the Court's questions before I do that,
7 with the Court's permission.
8 THE COURT: Yes. You know, let's be cognizant
9 of time here. We started around 10:00. I was a little
10 late on the bench. It's 10:45 now. So, you know, we
11 don't have unlimited time. So why don't you do what
12 you can do in about 45 minutes.
13 MR. SHEEHAN: All right. Thank you, your Honor.
14 The question was why was this filed in state
15 court. The receiver didn't file this case, your Honor.
16 The defendant, St. Joseph Health Services of Rhode
17 Island, filed the case in state court and they
18 contended in their petition that this was a church plan
19 exempt from ERISA. Now, they also contended that at
20 some point in the future it would become an ERISA plan,
21 and they wanted a 40 percent cut in benefits before
22 that happened.
23 Then the receiver was appointed. And the
24 receiver realized that for the benefit of the plan
25 participants, the better argument is that this was an

1 ERISA plan earlier but that, your Honor, is contrary to
2 the way that this plan has been managed since 1965.
3 For well over 40 years, your Honor, the plan has been
4 operated as a church plan. Now, ERISA came in in 1973
5 so you'd have to do the math from that. So this was
6 the predicament that the receiver found himself in.
7 Now, there was a question your Honor raised
8 which is why ask the Court to make rulings on the state
9 law joint tortfeasor statute if we're contending it's
10 an ERISA plan? Your Honor, we're not asking you to
11 determine that that statute applies. We're asking you
12 merely to determine that if that statute applies, it's
13 been satisfied.
14 THE COURT: Well, what's the difference?
15 MR. SHEEHAN: Oh, the difference, your Honor, is
16 night and day because at some point later on in the
17 case when rights of contribution have to be determined,
18 the issue will arise, does the statute apply or not?
19 THE COURT: I mean, that's even worse. You're
20 asking me to make -- you're not just asking me to
21 interpret the statute, you're asking me to interpret it
22 in advance of there being an actual case or controversy
23 challenge in the statute. So you're asking me to give
24 you some kind of a preemptory ruling.
25 MR. SHEEHAN: 100 percent not the case, your

1 Honor. A condition of the settlement the defendants
2 insisted upon and the plaintiffs wanted also was that
3 the settlement be approved as a good faith settlement
4 factually. So there's no advisory opinion being sought
5 from the Court. That's a linchpin of the settlement.
6 THE COURT: Well, I can rule that it's a good
7 faith settlement and approve the settlement without
8 making any ruling on the applicability of the state
9 statute.
10 MR. SHEEHAN: 100 percent.
11 THE COURT: Okay. Well, I thought -- maybe I
12 misunderstood what you said. I thought you said that
13 you wanted me to rule that if the statute was
14 applicable later on, that it was binding.
15 MR. SHEEHAN: Your Honor, that is poor phrasing
16 on my part.
17 THE COURT: Or I didn't understand it. So let
18 me just get this straight.
19 So you're saying to me that all that you are
20 asking me to do is to approve the settlement as a good
21 faith settlement and that with respect to the
22 applicability of the joint tortfeasor statute and
23 whether it applies and how it applies, that that's a
24 matter to be left to another day with another court or
25 this Court, however it plays out?

1 MR. SHEEHAN: 100 percent.
2 THE COURT: But that a finding of that sort in
3 terms of how it applies to any future contribution
4 action is not a contingency to the settlement.
5 MR. SHEEHAN: No, your Honor. The settlement
6 anticipates and would be effective even if it were
7 determined that the state statute doesn't apply. All
8 the settlement deals with is the factual finding, and
9 the issue of whether it applies or not will be
10 litigated in some other context.
11 THE COURT: Okay. Thank you.
12 MR. SHEEHAN: Your Honor, the Prospect entities
13 take the lead on the ERISA issues and make two
14 arguments which are more non sequiturs than arguments.
15 The first is the settlement should not be considered by
16 the Court until the Court determines that the plan is
17 governed by ERISA. And that has two parts. First part
18 is plaintiffs and defendants agree that the plan is
19 governed by ERISA. And second is PBGC should be a
20 party to any settlement affecting an ERISA-governed
21 plan.
22 Their second argument is federal courts have
23 exclusive jurisdiction over disputes involving ERISA
24 Title 1 violations and over fiduciary initiated
25 lawsuits involving an ERISA plan. That's not actually

1 an argument, your Honor, that applies to this case, but
2 I'm going to deal with it when we come to it.
3 The first point, that plaintiffs and the
4 Prospect entities agree that the plan is an ERISA plan.
5 The plaintiffs contend it's an ERISA plan, but it's
6 against the factual background, your Honor, of the plan
7 having been operated as an exempt church plan. So
8 there is no clarity factually at this time that the
9 plan is, indeed, an ERISA plan. We will have to prove
10 that, your Honor, contrary to the way the plan has been
11 operated, as I said, since 1973, over 35 years.
12 We also plead in the alternative state law
13 claims that will entitle us to full relief. And there
14 is a line of cases, your Honor, cited in our memorandum
15 that says Rule 8 was designed exactly for this
16 situation where there is any question about whether a
17 plan is an ERISA plan.
18 Now, most importantly, it doesn't matter whether
19 we agree. You cannot stipulate that a plan is governed
20 by ERISA. That's a question of law, ultimately. You
21 can't stipulate to the law. And we cited cases to that
22 effect.
23 Most importantly, your Honor, is that
24 uncertainty as to whether the plan is covered by ERISA
25 does not preclude approval of the settlement. There

1 have been many church plan cases settled, your Honor,
2 in the same procedural context we find ourselves in
3 today where the defendants were contending it was
4 exempt from ERISA, the plaintiffs were contending it
5 was covered, and the case settled before there was any
6 determination.
7 We cited four of them in our reply memo at page
8 48. There was another one, your Honor, two months ago
9 in Texas -- actually Eastern District of Pennsylvania.
10 And I'm just going to give copies to my brothers
11 because it wasn't cited in the memorandum.
12 Your Honor, may I give a copy to the clerk?
13 THE COURT: Yes.
14 MR. SHEEHAN: And your Honor, I'm going to focus
15 on the third finding of fact, which is on page 1, which
16 states that at the time this action was being offered
17 for settlement -- a class-action settlement -- there
18 was a challenge to the plan as a nonexempt church plan,
19 meaning, it had not been determined. And the Court
20 approved the settlement.
21 Because, your Honor, courts approve settlements
22 all the time when there is uncertainty as to the law.
23 And as my brother pointed out, that uncertainty does
24 not affect the Court's subject-matter jurisdiction.
25 There's a great First Circuit case that talks about a

1 plaintiff alleging a federal claim and then thereafter
2 the claim going up in smoke. But the Court still has
3 federal question jurisdiction because that's predicated
4 on the allegations in the complaint.
5 Now, right in *Miller* had the same point
6 that -- at Section 12-374, the settlement hearing
7 should not be turned into a hearing on the merits.
8 Your Honor is well aware of that. I'm going to skip to
9 it.
10 My adversary brothers do not address any of
11 these cases even though they are in our reply
12 memorandum, and they begged the Court's indulgence to
13 submit a surreply memorandum. They don't cite any
14 treatises or law reviews suggesting that there's any
15 problem in settling a case when there's uncertainty as
16 to whether the plan is governed by ERISA.
17 They make an argument, your Honor, that the
18 issue of standing precludes the Court's approval of the
19 settlement. Well, they claim that the plaintiffs,
20 specifically the plan participants in particular, have
21 no injury-in-fact. They don't -- their standing
22 argument, though, your Honor, is expressly predicated
23 on if the plan is governed by ERISA, plaintiffs will
24 lack standing. They don't cite any cases that a court
25 cannot approve a settlement because plaintiffs may lack

1 standing at a later time if it's determined that one of
2 their claims is invalid.
3 We've cited many cases in which courts in your
4 Honor's position have approved settlements because of
5 the possibility that in the future it will be
6 determined that the plaintiffs lack standing. And the
7 reason, your Honor, that these determinations are in
8 the future is that although standing is a prerequisite
9 at all times in the case before the Court, the
10 requirements of demonstrating standing are very, very
11 liberal at the motion to dismiss or premotion to
12 dismiss phase. At the summary judgment phase, much
13 tighter. At trial, tighter still. So you may have
14 standing premotion to dismiss and not have it in
15 summary judgment.
16 There's the fundamental problem with their
17 argument of basing standing on a possible future
18 determination that the plan is governed by ERISA. And
19 that fundamental problem is that standing is determined
20 based upon the standard of proof applicable to the
21 stage of the litigation when the issue is raised. And
22 that's our case preanswer, even premotion to dismiss.
23 The question of standing is decided by assuming
24 that all of the allegations in the complaint are true.
25 That's the *Deepwater Horizon* case, your Honor, the BP

1 case in the Gulf of Mexico.
2 THE COURT: Let me cut through this because I
3 really want to cut to what I think is the chase.
4 MR. SHEEHAN: Certainly.
5 THE COURT: And I think that what the
6 non-settling defendants are saying, what it really
7 comes down to, is, look, you have -- you're saying to
8 me, you have to figure out whether ERISA applies here
9 and you have to figure it out now because if this is an
10 ERISA plan, if this case is governed by ERISA now, then
11 everything that has happened up to this point has been
12 without appropriate authority.
13 This shouldn't have been a state court
14 receivership. The receiver wasn't appointed
15 appropriately. The receiver didn't have the authority
16 to enter into the settlement. Everything is undone.
17 And so what you're saying is, I think as a
18 general principle correct, that parties can settle
19 their disputes anywhere along the spectrum and if the
20 legal issues that may be raised by the case may not
21 ripen and never be decided, it doesn't preclude
22 settlement. I think they would contend that this is a
23 different situation because it goes to -- the question
24 of whether ERISA governs goes to the heart of the
25 authority of the receiver to do any of this.

1 Now, I raised with Mr. Wistow a practical
2 solution to that which I'll ask them about which is,
3 okay, even if all of that is true, why couldn't this
4 just be made a federal receivership; I adopt everything
5 that's happened, and then the receiver has the
6 appropriate authority and moves forward with the
7 settlement? That would seem to eliminate that problem.
8 And I'm going to ask them about it. You're
9 welcome to comment on that. But that seems to
10 be -- that just seems to me to be the core of the
11 argument.
12 MR. SHEEHAN: All right, your Honor. My answer
13 to that is twofold. The first is that they're wrong on
14 the law that even if it were clear now that this was an
15 ERISA plan, that the receiver lacks jurisdiction
16 because he was appointed by a state court judge.
17 They're wrong on the law. They don't cite a single
18 case that stands for that proposition. There's the
19 Princess Lida doctrine that holds that the first court
20 to obtain jurisdiction over the race, in this case, the
21 assets of the plan, has exclusive jurisdiction. And in
22 fact, the state court, even if there are issues of
23 federal law involving the race, the state court has
24 exclusive jurisdiction.
25 Now, in this case that issue of exclusion

1 jurisdiction is not an issue because the state court
2 has deferred to this Court, but what that establishes
3 is that the receiver has authority. The state court
4 could have retained this case. And, your Honor,
5 there's a decision two months ago, December 18th of
6 2018 -- I'm sorry, it's some time ago actually,
7 *Browning Corporation vs. Lee*. It's 624 F.Supp. 555,
8 Northern District of Texas, which is very, very
9 applicable here, your Honor. I'm going to give my
10 brothers a copy, and if I may hand a copy up to the
11 Court.
12 This case, your Honor, involves a state court
13 appointed receiver over the assets of what were
14 believed to be a church plan. And litigation was
15 brought by the receiver in state court for breaches of
16 fiduciary duty. And thereafter, the receiver applied
17 to the federal court for a declaratory judgment that
18 the plan was governed by ERISA.
19 And the court held that state courts have the
20 same competence as federal courts to decide whether a
21 plan is governed by ERISA. And because the state court
22 proceeding was ready for trial, the federal court
23 stayed -- actually declined jurisdiction, and the state
24 court determined whether the plan is governed by ERISA.
25 So this whole notion, your Honor, that state

1 courts have no authority in the area of ERISA --
2 THE COURT: All right. That's a 1986 decision
3 of a district judge in Texas which, no disrespect, but
4 that's 30 years old. Not all that long after ERISA was
5 passed.
6 Is that the only case you can find to say that?
7 MR. SHEEHAN: No, your Honor, but it's the only
8 case in this particular niche of a church plan that may
9 or may not be governed by ERISA. But I represent to
10 your Honor, and I'm about to cite cases, that it is a
11 fundamental cornerstone of our federalism, if I may say
12 so, that state courts of general jurisdiction are
13 competent to decide issues of federal law.
14 THE COURT: That's certainly true, I would never
15 disagree with that, but in the area of ERISA, I'm
16 unfamiliar with any cases in which ERISA questions are
17 dealt with in state court.
18 MR. SHEEHAN: Well, your Honor --
19 THE COURT: It's one of those three or so areas
20 where the Supreme Court has said the field is
21 completely preempted by federal law. And I don't know,
22 maybe it's just because of the practice, but these
23 cases are virtually always handled in federal court.
24 Now, other than this case, I mean, I'm
25 interested if you have other authority that says as a

1 principle, as you used the term, our federalism, if
2 that principle has been used to say that, you know,
3 state courts -- just as with constitutional questions,
4 state courts are perfectly competent and capable and
5 should be deciding ERISA questions just like federal
6 court. I'd be interested in the cases that say that.
7 MR. SHEEHAN: We've cited your Honor to the
8 *Dailey* case which is a Third Circuit case involving the
9 NHL. And I don't have the cite in front of me, your
10 Honor, but it's in the memo. And there was a prior
11 pending action in Canada involving the pension plan.
12 And the Third Circuit was asked to take jurisdiction
13 because it was an ERISA case, and federal courts have
14 exclusive jurisdiction over ERISA.
15 And the Third Circuit said that the Princess
16 Lida doctrine absolutely forecloses that argument in
17 the context of ERISA notwithstanding the strong
18 federal -- strong congressional intent that ERISA be
19 adjudicated in federal court. Princess Lida precluded
20 the Third Circuit from deciding ERISA cases because a
21 Canadian court had prior jurisdiction over the plan.
22 And the Princess Lida doctrine, your Honor, is
23 fundamental. It was established to deal with the
24 problem of state and federal courts exercising
25 jurisdiction over the same race. And it said the first

1 court to have jurisdiction gets it. State court, gets
2 it. Canadian court, gets it. That's it. That's the
3 first point, your Honor, that they're wrong as a matter
4 of law even if it were determined now that ERISA was
5 applicable.
6 But more importantly, your Honor, the
7 determination cannot be made now whether ERISA is
8 applicable. And consequently --
9 THE COURT: Why not?
10 MR. SHEEHAN: Your Honor, should your Honor make
11 the determination, we would have to have a trial.
12 There are issues of fact. This was operated as an
13 ERISA plan until it was put into receivership. And all
14 of our claims, your Honor, arise, by the way, before
15 the plan was put into receivership. If I may just get
16 some water.
17 So there are issues of fact.
18 THE COURT: You could have a situation where
19 -- I can't remember now. The complaint in this case is
20 150, 160 pages long, but it could be that the
21 defendants end up admitting all the facts relating to
22 this being an ERISA plan. There might not be a need
23 for a trial. You pled certain facts in the complaint.
24 They may admit those facts. Those facts are now
25 established.

1 MR. SHEEHAN: But they haven't admitted
2 anything.
3 THE COURT: I know they haven't answered yet.
4 MR. SHEEHAN: Let me rephrase my argument.
5 THE COURT: If they did, that would be
6 established.
7 MR. SHEEHAN: Let me rephrase my answer. It
8 could possibly not be determined until there's a trial.
9 That's why it can't be determined now.
10 First of all, it can't be determined now
11 obviously at this stage of the pleadings. Your Honor
12 would have to deny the settlement. We'd have to have
13 the motions to dismiss be decided. There would have to
14 be discovery. There would be motions for summary
15 judgment. We're talking a considerable period of time
16 from now at a different stage of the litigation.
17 It cannot be decided now whether the plan is or
18 is not governed by ERISA. And it's that stage that the
19 settlement is being asked for court approval, and it is
20 in that context that the Court must act. The Court
21 cannot act because something may happen in the future
22 that will divest the Court or the state court receiver
23 of jurisdiction. The issue is whether there is a
24 colorable claim now for jurisdiction. And there
25 certainly is.

1 Your Honor, none of these church plan cases --
2 we cited four of them in our memo, there have been
3 dozens that settled in precisely this context -- before
4 there was any determination as to whether this plan was
5 governed by ERISA. Now, my brother will say but those
6 didn't involve state court appointed receivers, which
7 is why I handed up the *Browning* case, your Honor,
8 because that did.
9 THE COURT: Okay. Why don't you deal with the
10 PBGC issue. I really -- I get it. I think I
11 understand your argument. So get to that because we
12 have these other issues as well.
13 MR. SHEEHAN: I will, your Honor. My brothers
14 argue that if this is an ERISA plan, the PBGC has to be
15 involved. Again, they're jumping the gun. At this
16 stage of the proceeding, it cannot be determined that
17 the plan is an ERISA plan. So that question about what
18 may happen later is premature and not an obstacle to
19 settlement, first.
20 Second point, let us say we stipulate to the
21 facts and your Honor rules right now that the plan is
22 governed by ERISA. There are insuperable obstacles to
23 bringing the PBGC into this case. Rule 19(a)(1)(A)
24 allows compulsory joinder where the court is unable to
25 accord complete relief between the existing parties.

1 And that does not apply in any way, shape or form to
2 the possibility that the PBGC may come in at some
3 point.
4 If the Court denies our claims, the defendants
5 get complete relief between us. And the fact that they
6 may be exposed to other litigation under the
7 established case law under 19(a)(1)(A) is irrelevant.
8 That's (a)(1)(A).
9 (a)(1)(B) is if the party who has not yet been
10 joined claims an interest in the subject matter of the
11 action, then that party may be compelled to join and
12 then there are two subsections to that under which that
13 may happen. But the predicate is that the party has to
14 claim an interest. And the PBGC has not claimed an
15 interest. So Rule 19 prohibits compulsory joiner.
16 On top of that, your Honor, we have the *Heckler*
17 *vs. Chaney* case which holds that an agency's exercise
18 of its discretion not to commence an enforcement action
19 is not judicially reviewable. What that means in this
20 case, your Honor, is that this Court could not compel
21 PBGC to take over the plan. And they only operate
22 after a termination. A termination clearly would have
23 to precede PBGC involvement. The PBGC guarantee is
24 plan determination insurance. The statute is clear,
25 that's the predicate, so the Court could not compel

1 them to terminate the plan.
2 And what the Court in *Heckler v. Chaney*
3 analogized to was a court compelling a prosecutor to
4 seek an indictment. Not judicially reviewable, cannot
5 be done. And this issue came up in the *Paulson* case,
6 your Honor, the Ninth Circuit where a district judge
7 sua sponte directed the PBGC to be brought into the
8 case. They were acting as the statutory trustee in a
9 plan that had been terminated. The plan participants
10 had sued for a breach of fiduciary duty. The judge
11 thought, well, since the PBGC is the statutory trustee
12 for the plan, they should be asserting claims against
13 those fiduciaries and ordered that PBGC provide them to
14 the case.
15 After four years of back and forth -- if you
16 look at Pacer, it's mind boggling -- the district court
17 reversed itself and said that PBGC's decision whether
18 or not to sue these fiduciaries is a discretionary
19 decision. And the Ninth Circuit said, no, no, no, we
20 agree with the conclusion but not the reasoning. It's
21 not discretionary. It's not judicially reviewable.
22 And my brothers have argued that this Court
23 could conduct a de novo review of the PBGC's refusal to
24 terminate a plan, which is categorically 100 percent
25 false. Not only that, it's not an abuse of discretion

1 standard. It's not judicially reviewable. So PBGC is
2 about as far from the issues in this case now as it
3 could be.
4 THE COURT: Okay. Now, before you sit down, I
5 want to come back to the ERISA question one more time
6 because I want to make sure I understand where you
7 stand, I guess.
8 So it seems to me that the way this could play
9 out is I could approve the settlement preliminarily,
10 moves forward, and maybe even approve it finally that
11 the rest of the case moves forward. Eventually there's
12 a summary judgment or a trial and there's a -- there
13 could be a finding against the non-settling defendants.
14 And then those defendants move at some point for -- are
15 sued for contribution on the settling defendants, and
16 that's when the issue is finally joined as to the
17 enforceability of the settlement statute.
18 MR. SHEEHAN: That's precisely the plaintiffs'
19 position.
20 THE COURT: And presumably, by that time, some
21 finding will have been made about whether this is an
22 ERISA plan or not because if we proceed all the way to
23 trial in this court, then it's obviously an ERISA plan.
24 MR. SHEEHAN: Somebody has a judgment against
25 them.

1 THE COURT: Can't stay on the fence all the way
2 to trial.
3 MR. SHEEHAN: Exactly. I don't know if I agree
4 with you describing us as being on the fence, but I get
5 your Honor's point and I agree.
6 THE COURT: Finally that's decided; it's an
7 ERISA plan.
8 MR. SHEEHAN: Right.
9 THE COURT: And there's an action for
10 contribution. And either I or another judge or Judge
11 Stern, whoever has it, has to then decide whether this
12 prohibition on contribution applies. Defendants would
13 say there's a very real possibility that at that point
14 in time you're going to decide that this contribution
15 statute is completely preempted by ERISA; it has no
16 application.
17 Now, that's the point, right, that's the point.
18 They're saying, look, everybody's better off if you
19 decide it now because you're going to end up deciding
20 this later and those settling defendants are going to
21 say, well, you know, we thought we had this protection.
22 And then I don't know what happens after that. Do they
23 go -- let's say I find that the statute is preempted by
24 ERISA, that there's no protection. Now, there's
25 nothing left, there's no assets, there are no assets

1 left in the settling defendants.
2 So now what happens? Are these defendants going
3 back after the pensioners? I mean, what happens?
4 MR. SHEEHAN: Your Honor, your scenario would
5 involve the settling defendants incurring years of
6 legal fees and the no assets problem would -- the ox
7 would be gored, would be the ox of the plan
8 participants. The defendants' rights to contribution
9 are determined at the time they have a claim for
10 contribution, and that cause of action does not arise
11 until they have been held liable. And to preserve the
12 status quo because of something that may happen in the
13 future was addressed by Judge Selya involving the same
14 statute in another context, the *Depco* context. And he
15 pointed out that there are eight steps that have to
16 take place before you get to the issue of whether the
17 statute is constitutional. And it is premature to make
18 any determinations of those steps in connection with a
19 settlement. And he listed the eight steps.
20 Your Honor, that would be giving the defendants
21 the benefit of pre-cause of action contribution
22 preservation of assets. And the law is that you take
23 what you get when your cause of action arises; you take
24 what's there.
25 Now, the suggestion by the defendants, your

1 Honor, that the statute would be preempted by ERISA is
2 addressed, and it would not be. There are three cases
3 in the District of Massachusetts -- two in Mass and one
4 in Puerto Rico --
5 THE COURT: But you're saying I shouldn't decide
6 that now.
7 MR. SHEEHAN: But your Honor's scenario, and I
8 want your Honor to be comfortable, that the law in the
9 First Circuit, at least by the district court
10 interpreting the First Circuit and the Supreme Court,
11 is that ERISA does not preempt state law contribution
12 rules.
13 The Second Circuit has gone the other way.
14 Second Circuit has been heavily criticized for that.
15 So that --
16 THE COURT: The bottom line is, your point is,
17 it's premature and I shouldn't decide it now, correct?
18 That's your position, isn't it?
19 MR. SHEEHAN: Right. And your Honor shouldn't
20 be concerned about preserving assets for a claim that
21 may arise in the future.
22 THE COURT: It's not that I'm concerned about
23 it. I'm just saying --
24 MR. SHEEHAN: No, you raised the issue.
25 THE COURT: They're concerned about it and

1 they're saying, I think, that that's the scenario. And
2 I get your point. You get what's there if and when
3 there's anything there, if you win.
4 MR. SHEEHAN: Your Honor, the settling
5 defendants, by the way, are bearing the risk that if
6 the statute is blown out -- I'm sorry, your Honor.
7 I've come down from 10,000 feet to be here today, and I
8 am incredibly dehydrated. I'm going back to Denver
9 tonight.
10 Your Honor, I just lost my train of thought.
11 THE COURT: It's okay because I think you made
12 your points, and I want to give them a chance. So why
13 don't you sit down and hydrate and you can respond
14 after --
15 MR. SHEEHAN: It finally caught up with me, your
16 Honor. Your Honor, I do want to hand up the affidavit
17 from Mr. Cohen. And what it is is a supplementary
18 affidavit that brings to the present the representation
19 that PBGC has been provided with all the pleadings in
20 this case so that the argument --
21 THE COURT: That's fine. I understand the
22 point.
23 MR. WISTOW: Your Honor, please, before -- I
24 just wanted to add --
25 THE COURT: This isn't a filibuster. You have

1 to give the other side a chance.
2 MR. McGOWAN: Mr. Sheehan has inspired me to
3 bring my own water.
4 Good morning, your Honor. My name is John
5 McGowan. I know -- I think I've been described a
6 couple different ways today, but it's McGowan. May it
7 please the Court.
8 I'm here to basically address Prospect entities'
9 called ERISA-related issues. And I know that Mr.
10 Wistow described them as kind of first order PBGC and
11 then ERISA. I think it probably more logically is
12 taken in reverse and talk about ERISA generally and
13 then maybe in that context PBGC. I think primarily
14 because if ERISA doesn't apply and this is not an ERISA
15 plan, the PBGC has no role, you know, it kind of goes
16 by the boards.
17 I think one of the basic takeaways from our
18 position is that we do believe that the ERISA question
19 is a threshold question on a lot of different fronts.
20 I know that I've been practicing ERISA law since 1984
21 and, in my experience, this is the latest in a federal
22 court proceeding that that threshold question has
23 gotten kind of raised and much less disposed of, and I
24 think for a couple reasons.
25 First, it goes to subject-matter jurisdiction.

1 I don't think there's an alternative claim that
2 diversity exists here. Maybe there was another claim
3 on some other federal statute, but I think that the
4 whole premise on which this litigation was commenced
5 was the idea that this Court had subject-matter
6 jurisdiction because of ERISA. So that I think is a
7 key determination.
8 And second, it goes to the question about
9 preemption of state law. And an awful lot flows from
10 that determination; i.e., if this is an ERISA plan and
11 ERISA applies, this Court has subject-matter
12 jurisdiction. If ERISA applies, then federal
13 preemption applies in a lot of different contexts to a
14 lot of different claims. So from my perspective and
15 again from my experience, it typically is something
16 that it's addressed right out of the gate.
17 And, you know, again, we do understand that we
18 haven't answered. We have made, I think, abundantly
19 clear in our motions practice that we do agree -- we do
20 believe that this is an ERISA plan based certainly upon
21 the allegations in the complaint and from all that
22 we've seen, particularly if, again, is true in, I
23 think, paragraph 80 of the first amended complaint,
24 there is an assertion that following the sale of the
25 two hospitals to our clients that the president of, I

1 think, St. Joseph's Hospital of Rhode Island and
2 in-house counsel were basically put in charge of the
3 plan.
4 And one of the linchpin arguments that we
5 believe plaintiffs are making here in arguing that the
6 church plan exemption does not apply is that the plan
7 neither is controlled by a church or, for that matter,
8 an entity the principle purpose of which is
9 administering the plan. And, you know, having a couple
10 of guys run it probably isn't a principal purpose
11 entity.
12 So we think there's -- we understand, you know,
13 there's a judicial finding that needs to be made and a
14 critical one we believe, but --
15 THE COURT: Again, cut to the chase here. It
16 seems like this is all premature; that your request for
17 this finding at this stage, it's premature, it's not
18 ripe. There's a settlement. The parties have a right
19 to settle the cases. Cases settle here all the time
20 where there may be questions of the merits of the
21 claim. There may even be questions of jurisdiction.
22 So for example, an example that happens all the
23 time is the case is either brought here or removed here
24 that has a federal 1983 component to it, but it has
25 also various state law causes of action. The 1983

1 component may not have any merit. It may be subject to
2 a valid qualified immunity defense that would result in
3 federal jurisdiction being stripped. But the parties
4 settle the case.
5 Sometimes they even try the case and go forward.
6 Early in the litigation we don't look behind the 1983
7 claim and try to figure out whether there's a valid
8 qualified immunity defense to decide whether they
9 should be here in federal court. If they want to
10 settle, they settle and we don't get involved in that.
11 Why is this any different? I understand it's
12 ERISA, but really in principle, why is it different
13 than any other case where the parties have worked out a
14 settlement relatively early in the litigation?
15 MR. McGOWAN: Well, first of all, your Honor, we
16 are not suggesting in any way, shape or form that
17 parties in raising ERISA claims can't settle them;
18 i.e., we're not saying that you have to decide ERISA
19 cases and figure out whether subject-matter
20 jurisdiction exists before you can even consider a
21 settlement. But I think what sets this particular case
22 apart from a lot of those cases, I believe all the
23 cases that were raised by our brethren in their reply,
24 but also in I think -- cutting to the chase, this is
25 not a complete settlement. This is a partial

1 settlement with some of the defendants with a case
2 moving forward under ERISA or not under ERISA against a
3 number of other defendants who remain in a case going
4 forward. And I do believe that in all of the other
5 cases they were complete settlements as to all parties
6 and as to all issues.
7 And I understand that; i.e., parties can go
8 outside the courtroom doors and make a deal and not
9 bother the Court further and make a contract amongst
10 themselves and go away. And even though ERISA,
11 perhaps, is implicated or even if it's involved, they
12 can certainly do that; nothing stops them.
13 But in this particular case, only some of the
14 defendants are going away. The plaintiffs remain, and
15 all the other defendants remain to sort it all out.
16 THE COURT: Happens all the time.
17 MR. McGOWAN: Well, but in this particular case
18 in a situation where if ERISA doesn't apply, this Court
19 has no subject-matter jurisdiction and where are we?
20 And if ERISA does apply and under the scenario that
21 your Honor posited to Mr. Sheehan, if ERISA does apply
22 and, again, we submit and I think our papers reflect
23 the fact that a state statute that specifically
24 addresses pending ERISA litigation, you know, would be
25 facially preempted. So, okay --

1 THE COURT: But that's a question for another
2 day in another -- either within this case or in another
3 case where your clients ultimately have a judgment
4 against them and then need to seek contribution from
5 the non-settling defendants. We're not there yet.
6 And you may be right if you bring that
7 contribution claim that you can convince a judge that
8 the contribution -- the joint tortfeasor statute that
9 was passed is completely preempted by ERISA and has no
10 effect, you may be able to prevail on that. But you're
11 asking me to effectively make that call now when
12 there's no case or controversy in front of me that
13 would call on me to make that decision.
14 MR. McGOWAN: Well, I guess, your Honor, I think
15 what we're saying is that we think that our interests
16 are prejudiced by allowing it to move forward now
17 before we get to that point. In an alternative
18 scenario, if CCCB and the other settling defendants in
19 this particular settlement were to be put in a
20 bankruptcy proceeding and everybody could have a run of
21 the assets, all of us would be -- if you're standing
22 equally as to each other, none of us have liens, none
23 of us have secured rights, we'd all be sharing pari
24 passu with each other in terms of what they've got over
25 there. But in allowing this partial settlement to move

1 forward and then pronouncing that, perhaps, we have
2 very valid claims later after, frankly, the plaintiffs
3 have been allowed to clean out the closet, leaves us
4 prejudiced by that process. And we believe that that
5 does a disservice certainly to our clients but, I mean,
6 you know, we think it's inappropriate under these
7 circumstances if, in fact, they aren't getting -- that
8 is not the deal, that the deal is found to be
9 completely different than what it is, again, the state
10 statute doesn't apply but so what.
11 We're just -- you know, we've been prejudiced,
12 our plan has been prejudiced --
13 THE COURT: Under your construction of how the
14 world should operate here, how this case should
15 proceed, you would effectively prevent any defendant
16 from settling their claims with the plaintiffs unless
17 all defendants settle or all defendants are always on
18 the same -- you know, the same stage or on the same
19 page. And that's really never the way litigation
20 works. I mean, sometimes defendants all get on the
21 same page, but very often they're not on the same page
22 and they act and operate independently.
23 So, I mean, you say your clients are prejudiced,
24 but the settling defendants are prejudiced if I don't
25 approve this settlement in the sense that they want to

1 dispose of this matter and they want to be done with
2 it. They don't want to incur any additional legal
3 fees. They don't want to drain the assets. They don't
4 want the litigation to go on for whatever reasons they
5 have, but they don't want it to go on. They want to be
6 done with it. And you would be standing in the way.
7 MR. McGOWAN: Well, I mean, in fairness, and we
8 have not yet raised this issue in this litigation but,
9 I mean, I do know that our clients have contractual
10 indemnification claims, I mean, irrespective of the
11 right to contribution or indemnification which, by the
12 way, in the literature, the Second Circuit versus Ninth
13 Circuit discussion, has always involved whether or not
14 there's a right to contribution for indemnity as
15 between breaching fiduciaries.
16 And in our particular case, our clients are
17 non-fiduciary, non-parties in interest who are
18 strangers to the plan so I'm not sure that even that
19 broader discussion where it kind of goes to our
20 question about whether we have noncontractual rights to
21 contribution or indemnity. But the point is we have
22 contractual rights to indemnity so that we could well,
23 for that matter, hold the settling defendants in the
24 case on the grounds by asserting cross-claims against
25 them for indemnification based upon our contractual

1 rights, and they could be here spending money anyway.
2 But, you know, that's a question for another day.
3 THE COURT: They may be judgment proof, right?
4 MR. McGOWAN: Yes. They could be judgment
5 proof.
6 In terms of the ERISA issue, again, we
7 understand that there's been no determination made, but
8 we do believe that, in our view, this is an ERISA plan.
9 And if it is an ERISA plan as we believe, this Court
10 does have subject-matter jurisdiction that the
11 receiver, in his capacity as the administrator of that
12 plan, has fiduciary obligations. And we do believe
13 that at least the settlement should be viewed with
14 fresh eyes by this Court acknowledging, one, what the
15 plan would gain but, more important, two, what the plan
16 would give up in terms of the scope of the releases
17 being provided.
18 THE COURT: But I'm not making any finding about
19 the releases.
20 MR. McGOWAN: Well, but at some level that kind
21 of is the point. I mean, the point is that the
22 releases go beyond the corporate entities being
23 released. It goes to all of the individuals who are
24 current or former employees, officers, representatives,
25 agents. And when you view this kind of a settlement

1 through ERISA eyes, then you're releasing not only the
2 entities, but you're also releasing a number of parties
3 who may well be fiduciaries and culpable fiduciaries in
4 the circumstance. So is it a good deal or not?
5 Our point is that when the state court was
6 looking at this, they weren't thinking of the scope of
7 the releases being, perhaps, more encompassing than
8 what maybe the court would consider, but the court over
9 in state court is not familiar with the ERISA statute
10 as it applies to fiduciaries post de facto and named
11 and whether or not the releases were overinclusive.
12 So again, it's another reason why we believe
13 that, you know, the Court should at least be looking at
14 the settlement with fresh eyes to figure out whether or
15 not it's reasonable and viewed through the prism of
16 ERISA. Your Honor, you've mentioned a couple times
17 when Mr. Sheehan --
18 THE COURT: Well, unpack that a little bit, Mr.
19 McGowan. So I want to make sure I understand what
20 you're saying.
21 MR. McGOWAN: Sure.
22 THE COURT: So you're really -- I think with
23 that argument you're really saying not so much that
24 ERISA preempts, but that my role in approving the
25 settlement and finding that it's a good faith

1 settlement and it's in the interest of parties and so
2 forth, that I should look at that with the kind of
3 ERISA eyeglasses on, I suppose, looking at the -- not
4 just the interest of the receiver and people that are
5 represented by the receiver, but the question of
6 whether the releases speak too broadly, whether there
7 are people who might have assets that are being let off
8 the hook here. Is that what you're saying?
9 MR. McGOWAN: That is in part because, I mean,
10 bearing in mind that --
11 THE COURT: But isn't that an argument for the
12 receiver to be concerned about, not for you to be
13 concerned about?
14 MR. McGOWAN: Well, we are being pursued by the
15 receiver in his capacity as the administrator of the
16 plan for appropriate equitable relief under ERISA
17 Section 502(a)(3). So to the extent that we're being
18 pursued in equity, our kind of fundamental position is
19 you have to exhaust other remedies against the
20 breaching fiduciaries and to be able to accurately
21 identify who those fiduciaries are before you can come
22 against us in equity, even if you can get there.
23 And actually that kind of is another reason why
24 we bring up the PBGC which is, I mean, we believe it's
25 premature to again pursue and seek from our clients,

1 who are strangers to the plan, appropriate equitable
2 relief without having exhausted all of the other
3 avenues. And so to the extent that the plaintiffs kind
4 of are hurdling forward and collecting what they can
5 quickly from various sources in this particular case,
6 the people who are the entities that sponsored and
7 maintained the plan and chose not to fund it and
8 neglected it after the sale of the hospitals in 2014
9 before turning it over to the receiver in 2017, that to
10 quickly settle with them and then seek to pursue us in
11 equity is that they haven't yet done their homework and
12 that -- you know, not all of it, and we understand
13 reasonable minds can differ but --
14 THE COURT: I'm just not sure I even get that
15 argument. They are the masters of their complaint.
16 They are the architects of their litigation strategy.
17 Who are you to tell them how they should
18 litigate this and ultimately decide which parties to
19 settle with, which assets to grab, which defendants to
20 go to trial on? I mean, that's all litigation
21 strategy. These settling defendants have a limited pot
22 of money available; it's a dwindling set of assets. It
23 seems perfectly legitimate to me that they make a
24 decision to grab those assets while -- and preserve as
25 much of that as they can, at the same time looking at

1 these other defendants and saying there are very deep
2 pockets there, the assets aren't wasting. We're going
3 to continue to litigate against this set of defendants,
4 and maybe at some point we'll settle with them, maybe
5 not. Maybe we'll go to trial.
6 I mean, that's just a litigation -- that's a
7 strategic litigation decision that a plaintiff is
8 perfectly entitled to make. I mean, you don't have any
9 right to tell them what to do and how to do it.
10 MR. McGOWAN: No, and we're not purporting to.
11 We're merely observing and arguing that our position is
12 that we are at, if you will, the make whole end of this
13 and, you know, we would be remised were we not to point
14 out to the Court that there may be more opportunities
15 for them to make whole before they even get to us. And
16 that's why, you know, we are objecting to the fact that
17 the settlement was hastily done over in state court.
18 THE COURT: They can't get any more out of these
19 settling defendants than they're getting, can they?
20 MR. McGOWAN: But in exchange, they're releasing
21 not only the settling defendants, but they are also
22 releasing other parties, other non-parties, who could
23 be pursued perhaps for breach of fiduciary duty for
24 having been instrumental in running the plan into the
25 ground.

1 Sp I guess what we're saying is that the
2 settlement release, we believe, sweeps too broadly and
3 there is a problem with that.
4 THE COURT: Well, but your answer or your way
5 of -- your client's way of dealing with that is through
6 contribution later on. Now, you've got a problem
7 because they got this statute passed, but you can make
8 your argument later that that statute is preempted and
9 has no effect. And you'll have an opportunity to seek
10 contribution not just from the entities, but maybe from
11 those people that you're thinking had more assets that
12 had been released as a part of this settlement. That
13 release doesn't have any impact on your clients.
14 MR. McGOWAN: Another thing that is a little
15 bothersome about this and the manner in which the
16 settlement was forged is the fact that we believe that
17 one of the other missing parties in this case is
18 potentially the Department of Labor. We certainly are
19 aware that if, in fact, this is an ERISA case, and I
20 think an early determination of that would kind of set
21 the table for the DOL to make a determination as to
22 whether or not to get involved.
23 THE COURT: I guess I just don't understand that
24 whole argument. It seems to me that the PBGC's
25 decision to take over a plan is driven by their statute

1 and the regulations that they operate by. And that's
2 an independent decision that it makes. It doesn't seem
3 like that is within my authority to tell a federal
4 agency that it should engage its authority on this
5 pension plan at this time if it is decided that the
6 plan is not ready for it, I guess.
7 MR. McGOWAN: Well, let me address that
8 case -- that matter, your Honor, and then go back to my
9 point about the Department of Labor, a different
10 federal agency.
11 THE COURT: Okay. Go ahead.
12 MR. McGOWAN: No, I was talking about the
13 Department of Labor.
14 THE COURT: All right.
15 MR. McGOWAN: But on the subject of the PBGC.
16 We do agree that the statute says what the statute says
17 and that if the plan is, in fact, insolvent, that the
18 PBGC has an obligation to act and that the phrasing in
19 the plaintiffs' brief that it shall act under certain
20 circumstances, it may act in others, it's an accurate
21 statement of the statute.
22 But our point is this: When we started down
23 this road, the plan was characterized as insolvent in
24 the complaint. It has -- the story has changed in the
25 first amended complaint. Now it's insolvent, with

1 quotes, and the idea that maybe at some point in the
2 future it will be unable to pay benefits when due but
3 not necessarily can't pay benefits when due right now.
4 There was a shifting in the alleged facts between the
5 complaint and the first amended complaint.
6 But that being what it is, we have a situation
7 where the plan is being maintained, if you will, by the
8 administrator, a court-appointed receiver, and
9 sponsored by three nonoperating entities or at least a
10 couple of them, CCCB and such. And as your Honor
11 pointed out, were the settlement to be approved, they
12 would be denuded potentially of all of their assets.
13 That fact pattern that there is a sponsor that not only
14 isn't putting money into the plan but can't put money
15 into the plan because there is no money and perhaps is
16 even in kind of the advanced stages of the liquidation
17 process, really puts the PBGC in a situation where it
18 has no choice but to act.
19 We understand that the statute says that PBGC
20 has the discretion, but there's four factors there.
21 One is, has it met the minimum contribution
22 requirements? That's been going on for apparently
23 several years; since 2010 I think is what's been
24 alleged in the first amended complaint. That it will
25 not -- at least will not be able to pay all benefits

1 when due so it has that kind of future insolvency which
2 is another of the predicate acts. And a third one
3 which is the one that PBGC often moves on which is that
4 the long-term implications of allowing the plan to
5 continue put the PBGC in a position to want to act now.
6 And when the PBGC has a situation where
7 basically a plan has all but been abandoned because the
8 plaintiff sponsor is in liquidation, then the PBGC
9 invariably steps in. I guess my point is, the
10 trajectory for this plan and the trajectory for the
11 plan sponsors is that the plan sponsors will be gone
12 and then the PBGC has no choice but to step in because
13 it doesn't leave plans orphaned and running
14 indefinitely until they run out of funds.
15 I mean, that's what they certainly did in the
16 *Sears Holding* court case. It's in bankruptcy. They
17 decided they needed to step in because someone needs to
18 act and take over the plan. They just did it again the
19 other day in a case involving -- it's called *PBGC vs.*
20 *Dimensional Lettering, Inc.*, over in the Eastern
21 District of New York. And they filed that cause of
22 action on the 6th of this month.
23 So the point is, it's a doomed plan at some
24 level. The PBGC ultimately has to act. And the
25 broader point that we were making about standing is the

1 fact that if the PBGC comes in, and we believe it's
2 inevitable, and we acknowledge that with the
3 discretionary sections of the statute your Honor could
4 enforce it to, which I do think probably is good law,
5 that eventually they will and when they do, that to the
6 extent that the participants who are covered by the
7 plan and the plan's subject to ERISA and the PBGC steps
8 in and guarantees the payment of benefits, that
9 actually the PBGC guaranty will be sufficient to
10 completely make whole those individuals; i.e., there is
11 no 40 percent cut in there for them. The PBGC
12 guaranties will make them a hundred percent whole. And
13 there may be a handful of participants. We don't have
14 access to all of the plan records to try to make that
15 determination. But the point is there may be a few
16 participants in there if the benefit levels are beyond
17 the PBGC guaranties, can't tell you that for a fact,
18 but the point is only those people would be, if you
19 will, left injured or having an injury in fact that
20 would be beyond what even the PBGC could protect them
21 from.
22 But it's a much different dynamic, it's a much
23 smaller population, a fraction of the 2700 that are
24 covered by the plan at this point in time.
25 THE COURT: Well, what law is there that says

1 that the PBGC must step in in front of other entities
2 that may have liability to a plan and cure the problem
3 before those entities are made to pay whatever they're
4 responsible for because of their wrongful conduct?
5 MR. McGOWAN: Let me unpack that, your Honor.
6 First of all, we think there is nothing that requires
7 the PBGC to protect a breaching fiduciary who is liable
8 to make good losses that breaching fiduciaries caused
9 the plan. We think that, for example, the
10 administrator's Section 502(a)(2) count, I think it's
11 the second count in the amended complaint, again, these
12 settling defendants and possibly others who are not
13 even named as parties, there is no reason why the PBGC
14 would have to step in to protect them.
15 Our point goes to the fact that three of the
16 four ERISA claims -- actually, two of the three ERISA
17 claims, one is just the declaratory judgment claim
18 which is, I think, certainty Count Four, but certainly
19 one and three are predicated if you're seeking
20 appropriate equitable relief under ERISA Section
21 502(a)(3) and that in doing so, in seeking, again,
22 equity to, if you will, make whole these participants,
23 our point is in those circumstances perhaps the PBGC
24 with regard to a plan that is on the precipice of
25 insolvency or is in an orphaned position where, again,

1 PBGC's involvement is inevitable, we would submit, that
2 the PBGC's involvement would then determine how much
3 and which plan-covered participants might be left short
4 and perhaps entitled to some sort of equitable relief
5 from somebody. But that we view making that
6 determination without making a determination of what
7 the guaranteed benefits for those individuals would be
8 would be jumping the gun. And that's why in our papers
9 in our surreply we pointed out that the passage taken
10 from the *DeWolff* case, *LaRue vs. DeWolff*, when you read
11 it in its entire context from that case where the
12 Supreme Court in that famous 401k plan case talked and
13 compared and contrasted the defined contribution claim
14 versus the defined benefit claim, talked about in a
15 defined benefit plan claim that a participant covered
16 by the plan wouldn't have an injury in fact if, in
17 fact, their benefits were fully guaranteed by PBGC
18 because they couldn't be injured.
19 I mean, right now we are at a stage in this
20 process where there's been a lot of talk, frankly,
21 picked off by the purported settling defendants about
22 40 percent cuts to benefits. And we are a long way
23 from having that happen, your Honor, because if, in
24 fact, the PBGC did step in and guaranteed benefits
25 because it is found to be an ERISA plan, there would be

1 no 40 percent cut for anybody who is fully protected by
2 the PBGC guarantee. They'd have no beef with anybody.
3 THE COURT: But they can come in at the other
4 end too.
5 MR. McGOWAN: I'm sorry, your Honor?
6 THE COURT: PBGC could come in after this
7 settlement after whatever transpires with the
8 non-settling defendants.
9 MR. McGOWAN: They could come in after.
10 THE COURT: Tell me what you wanted to tell me
11 about the Department of Labor.
12 MR. McGOWAN: Oh, I'm sorry, your Honor. Thank
13 you.
14 The Department of Labor is a very big actor in
15 the enforcement of ERISA rights and remedies. They're
16 very involved in bringing their own causes of action.
17 In many of the cases we've described to the Court, the
18 DOL has brought those actions and sought a federal
19 court-appointed receiver or an independent fiduciary.
20 In fact, I think they just did so the other day in a
21 case involving a defective multiple employer welfare
22 arrangement. And that was *Acosta vs. Riverstone*
23 *Capital* which they brought an injunction and got an
24 appointment of a receiver the first of this month out
25 in the Central District of California.

1 My broader point being, the Department of Labor
2 routinely polices the rights of participants and
3 beneficiaries in ERISA-covered plans and could, in
4 fact, carry the laboring oar if, in fact, this plan
5 were found to be subject to ERISA.
6 THE COURT: If that happened, what would
7 be -- they would be petitioning this Court for the
8 appointment of a receiver, right?
9 MR. McGOWAN: Possibly. Or for that matter
10 confirming the appointment of Mr. Del Sesto. And I
11 understand that.
12 THE COURT: So why couldn't I -- it comes back
13 to a question I asked earlier on. If there was any
14 question of the authority of Mr. Del Sesto as a state
15 court-appointed receiver, why couldn't I just appoint
16 him independently and adopt everything that's
17 transpired to date or possibly appoint him jointly with
18 Judge Stern in the state court? What would prevent me
19 from making this a joint appointment of the two courts
20 and that way, to the extent that ERISA is implicated or
21 it should be an ERISA receivership, then we're covered?
22 MR. McGOWAN: We would be covered, but it would
23 have implications for all that has gone on before. I
24 mean --
25 THE COURT: I could simply adopt everything

1 that's happened before.
2 MR. McGOWAN: Without making an independent
3 finding of whether or not what's gone on before is
4 appropriate under ERISA?
5 THE COURT: No. I'm not saying I would do it
6 without making an independent finding, but I've
7 followed this pretty closely. I've consulted closely
8 with Judge Stern throughout. I attended the hearing.
9 I've read his decisions. I'm pretty up to speed. It's
10 not like this has gone on, you know, without me paying
11 attention to what's happening.
12 MR. McGOWAN: Understood, your Honor.
13 THE COURT: So, yes, I would make my independent
14 evaluation, but assuming I did that and concluded that
15 everything that has happened before I would endorse,
16 then I don't think there's anything that would prevent
17 me from doing that.
18 Do you agree?
19 MR. McGOWAN: As a practical matter, your Honor,
20 I would never disagree with a federal court judge who
21 believes he has the authority to do something. I would
22 certainly not stand in the way.
23 THE COURT: Well, I don't think that's -- it's a
24 legitimate question. I'm not trying to bully you into
25 it. I'm really asking you the question.

1 It seems to me that my equitable jurisdiction
2 with receiverships is quite broad and it's an honest
3 question. I do think I have the authority to do that
4 if it were -- I'm not saying I'm going to do it. I
5 just think that it is a possibility.
6 Let me shift gears and ask you a different
7 question.
8 MR. McGOWAN: Sure.
9 THE COURT: Because if your clients felt so
10 strongly that this should be in federal court,
11 receiverships are removable. Why didn't you remove
12 this case?
13 MR. McGOWAN: Well, I think when the state
14 receivership proceeding was commenced, and I will let
15 my colleague, Mr. Halperin, perhaps deal with that in
16 more depth, but my understanding is when this
17 receivership proceeding was commenced in 2017, our
18 clients were not on the horizon. Our clients were
19 strangers to the plan. Our clients weren't involved in
20 it. I believe that in at least a couple of the
21 instances when our clients have attempted to step
22 forward in the state court proceedings, it was ruled
23 that they had no standing.
24 So I mean, they haven't exactly been -- had an
25 opportunity to participate actively in the receivership

1 proceedings. I think they've been actually shown the
2 door. But more important, there was nothing in the
3 state receivership proceeding to suggest that state or
4 federal court actions seeking to rope our clients in,
5 irrespective of two hospitals they bought in 2014 in a
6 receivership proceeding that was commenced three years
7 later involving the plan, there was no belief on our
8 client's part that they were part of any of that. Only
9 later when the lawsuits were filed naming them as
10 codefendants, were they apprised of that. So they had
11 no reason to believe that they had an obligation to
12 timely object thinking that the train was headed in
13 their direction.
14 THE COURT: Okay.
15 MR. McGOWAN: And again, Mr. Halperin can expand
16 upon that. A couple of final points, your Honor. I
17 know that Mr. Sheehan had offered up this *Browning*
18 *Corporation vs. Lee*. This is the one that's 30 years
19 old or actually 32 or 33 years old.
20 THE COURT: Right.
21 MR. McGOWAN: An observation. You'll notice in
22 our surreply we point out that with this being a
23 retirement plan, if you will, there's a pretty pure
24 application of ERISA's preemption provision and that
25 there is a host of cases that -- where it gets a little

1 murkier. And that's because they implicate ERISA's
2 savings clause, which is ERISA Section 514(b)(2) where
3 the business of insurance and securities and banking
4 are saved to state regulation. And that there's a line
5 of cases typically involving health insurance where
6 those issues crop up invariably.
7 This is one of those cases from 1986. It
8 involves -- while certainly a church wasn't involved or
9 a series of churches wasn't involved, this involves the
10 organization, sale and marketing of health insurance
11 across unrelated entities. And that's why if you look
12 at the last couple of pages of that case where it goes,
13 "The Court further finds it's in the best interest of
14 all concerned that this court decline jurisdiction of
15 this matter and permit the 200th Judicial District
16 Court in Travis County, Texas, to adjudicate
17 plaintiffs' claims. First, plaintiffs claim that the
18 MBT is an employee benefit plan within the meaning of
19 ERISA should have been raised as a defense in the
20 pending state court proceeding." That case was filed
21 over six-and-one-half years ago -- six-and-one-half
22 months, I'm sorry, after the consent judgment, an order
23 appointing permanent receiver was filed in the previous
24 state court proceeding. And after the United States
25 Department of Labor concluded that the MTB did not

1 constitute an employee benefit plan under ERISA.
2 The point is that the federal regulators
3 concluded that that trust, which was to create and sell
4 health insurance, was not itself an ERISA plan. So
5 when all that flowed from that was it was over in state
6 court and then the defendants tried to bring the
7 federal courts back into it, the federal court said no.
8 The federal regulators have concluded that there's no
9 ERISA plan to be found there. This really is a state
10 law matter. So I don't think it quite supports the
11 point for which Mr. Sheehan advances the case.
12 And in the other case that he handed up which
13 was *Snyder vs. Holy Redeemer Health System*, I note --
14 or at least from what I'm reading here, and I only had
15 the opportunity to read it today, this looks like a
16 complete settlement. It goes to my earlier point about
17 the thing that sets this case apart from these other
18 cases is a complete resolution of all claims against
19 all parties, we understand. Certainly you can settle
20 those where the subject-matter jurisdiction of the
21 Court hasn't been conclusively determined or ERISA's
22 reach hasn't been conclusively found.
23 But when you have a partial settlement of a case
24 and the case seems to move forward, again, predicated
25 on the existence of an ERISA regulated benefit plan,

1 that's another matter entirely.
2 THE COURT: All right. Let's go off the record
3 for a moment.
4 (Off-the-record discussion.)
5 (Recess taken.)
6 THE COURT: All right. Mr. Sheehan, you can
7 make your two points.
8 MR. SHEEHAN: Just reaching the podium now, your
9 Honor. Point number one, your Honor, is that this
10 whole issue about an injury because of the settlement
11 statute is a red herring and this is the reason why,
12 all of the defendant assets are going to the settlement
13 and they are going to get a credit for every penny
14 that's paid. And they benefit by having the settlement
15 now as opposed to those assets being frittered away in
16 litigation expenses and asserting a contribution claim
17 later. If the statute is determined to be
18 unconstitutional and they want to sue directors or
19 officers for pro rata fault, they can. It's a
20 nonissue, your Honor.
21 Second, on the Department of Labor, that's a
22 whole new argument but, in fact, the declaration of
23 Jeffrey Cohen points out the Department of Labor has
24 been given notice of this suit in every pleading in the
25 case. And the Rule 19 applies to the Department of

1 Labor just as it applies to PBGC.
2 And Rule 19 is the rule. There's no limbo state
3 where the Court stops doing things deciding settlements
4 because someone is out there who might be interested
5 who's not coming in. They can't be brought in.
6 They're not here. And the settlement has to go
7 forward.
8 THE COURT: All right. Thank you.
9 Mr. Halperin.
10 MR. HALPERIN: Your Honor, we're switching gears
11 now off of ERISA. I will be as brief as I can within
12 the 15 minutes.
13 Your Honor, because I've been involved with this
14 more so than Mr. McGowan, I want to just give you the
15 background that perhaps was not provided that's
16 relevant to where we are here today.
17 The petition that was filed, as my brother
18 indicated for receivership, was filed by the St. Joseph
19 Health Services of Rhode Island, Inc., which was one of
20 the employer entities. And when they filed that
21 petition, they alleged that the plan was not at that
22 time subject to ERISA. My client, the Prospect
23 entities, were nowhere to be found at that point. They
24 were only the subject of a discovery subpoena. They
25 certainly had no reason to even seek to remove it.

1 Although, I do not believe that they would have had any
2 sort of standing to do so even if they wanted to do so.
3 Ultimately, Judge Stern did rule that Prospect
4 entities had no standing to even complain about the
5 settlement. I don't think that was viable. However, I
6 fully support and would ask the Court to appoint Mr.
7 Del Sesto as the receiver and have the ancillary
8 receivership happening simultaneously. That has
9 certainly happened before, and I think that would be
10 very helpful and appropriate. And as this case moves
11 forward, it would give the Prospect entities and other
12 parties the opportunity to come before this Court with
13 what might be solutions to this problem or different
14 directions and ask that the receiver be instructed to
15 do certain things; for example, the receiver could
16 decide -- the Court could decide to instruct the
17 receiver to terminate the plan because it should be
18 terminated. At which point that would accelerate the
19 PBGC's entrance into this case. Something to be
20 considered at a later time, but without that ancillary
21 receivership, that may not be before this Court.
22 THE COURT: Would you support that as a joint
23 appointment?
24 MR. HALPERIN: Honestly, I believe that the
25 state court has really no reason to be involved in this

1 on a go-forward basis, and I would -- I'm sure you
2 could discuss that with Judge Stern, but I don't see
3 why it would take two courts to adjudicate anything
4 going forward. Once this phase of the case is over,
5 we're into a different phase.
6 But if there's any reason for the state court to
7 want to retain that jurisdiction, I certainly would not
8 object to that.
9 THE COURT: Well, it might be just because it
10 isn't clear yet what kind of a receivership it is, and
11 it could be a state court receivership, it could be an
12 ERISA receivership. And that issue hasn't been fully
13 resolved yet.
14 MR. HALPERIN: I would agree to that. To that
15 point, it makes sense to have both courts involved
16 until that determination has been made.
17 On that one point, I have to say that when a
18 plaintiff makes a statement in a complaint, it would
19 seem to be a judicial admission of some kind that this
20 plan is subject to ERISA so it's hard for me to imagine
21 what the plaintiff is going to litigate on the issue of
22 whether it's subject to ERISA. We're going to admit
23 it; we've already said so. So it seems to me that
24 issue has been decided unless the Court wants to make
25 an independent ruling contrary to what the parties are

1 alleging in their papers.
2 So I'm not sure why there's all this controversy
3 about it when it was alleged in their papers. Yes,
4 they went in another direction, but that does not make
5 sense to me.
6 An interesting point in the original petition
7 for the receivership, which I noticed in preparing for
8 this, is that it was stated right in the petition that
9 was filed by St. Joseph Health Services of Rhode Island
10 that the Prospect entities had no role in evaluating
11 this plan or its funding level, which is sort of a
12 gratuitous but interesting point that they made in
13 filing this petition. It was only the investigation
14 that went forward that yielded all these new claims.
15 It's been three years since that sale, and a lot
16 has happened in those three years that we know nothing
17 about. And I think the point that my brother was
18 making as to the settlement is that the settlement, if
19 approved by this Court, could be construed as the Court
20 approving, blessing and essentially stating that all
21 the provisions in the settlement including the releases
22 have now been authorized by the Court. So to the
23 extent the Court does approve this, we'd ask that the
24 Court navigate to preserve the rights based on the
25 things that the Court has said here today.

1 THE COURT: Well, there are statements in that
2 settlement agreement, for example, that, you know, the
3 settlement parties were -- I may not get this right;
4 it's been a long time since I looked at it. The
5 settling parties were less at fault than these other
6 parties and things like that. I mean, I'm not going to
7 endorse any of those statements if I approve the
8 settlement. I mean, that has to be absolutely clear,
9 as well as not endorsing or making any finding with
10 respect to the enforceability of this joint tortfeasor
11 statute.
12 MR. HALPERIN: And along those lines, the other
13 points that I wanted to make are, the Court needs to be
14 aware that the authority that's being granted by the
15 settling defendants CCCB to the receiver is to control
16 the actions of CCCB which is the 15 percent member of
17 the Prospect CharterCARE LLC entity that controls these
18 hospitals. And that necessarily implicates the state
19 Hospital Conversion Act.
20 There is very clear language in the Hospital
21 Conversion Act that when there is a change of voting
22 control that you have to go before the Department of
23 Health. And I can -- the language, we've cited it in
24 our brief, but it's kind of cumbersome language, but if
25 you take out all the inapplicable language that's in

1 the Act, this is what it says: Conversion means any
2 transfer by a person or persons of authority in a
3 hospital which results in a change of control of 20
4 percent or greater of the voting rights of the
5 hospital, pursuant to which by virtue of such transfer
6 a person, together with all persons affiliated, holds
7 their own to the abrogate 20 percent or greater of the
8 voting rights of the hospital.
9 What we have here is an entity in which the CCCB
10 settling defendant controls 50 percent of the board
11 seats of the hospital. That was the arrangement that
12 was made. And now we could have the receiver
13 essentially controlling the actions of CCCB, arguably
14 changing those board members and doing so in a manner
15 that is designed to benefit the receivership estate
16 which, frankly, could result in a breach of fiduciary
17 duty by some of those directors who could be appointed.
18 This is a concern that could be easily navigated
19 around in the settlement in that the Court should
20 require the receiver, and certainly if the receiver
21 becomes part of the federal court receivership, that
22 would be easily done. But even as a condition of the
23 settlement, the receiver should be required to comply
24 with any and all necessary laws and regulations that
25 govern the control of the hospital and the Hospital

1 Conversion Act. That, by the way, is already a
2 provision that is in the transfer section of the LLC
3 agreement which leads me to my next point.
4 THE COURT: Just before you get to that, would
5 you just -- I want to make sure I understand this
6 ownership transfer clearly so describe that to me
7 again.
8 MR. HALPERIN: Sure. There's two issues. One
9 is ownership, but the other one is voting control and
10 they are distinct.
11 THE COURT: Right.
12 MR. HALPERIN: So we don't have a reason to
13 believe that the ownership interest will necessarily be
14 transferred. It might, but more likely they will
15 simply exercise the put rather than receive an actual
16 transfer. So I'm focusing on the voting control.
17 THE COURT: Right.
18 MR. HALPERIN: And that's what I think the
19 Hospital Conversion Act issue is. They control 50
20 percent of the board of directors of the Prospect
21 CharterCARE LLC entity pursuant to the operating
22 agreement for the hospital.
23 THE COURT: But back it up. With the put,
24 describe to me again how that works.
25 MR. HALPERIN: Okay. It's before you even get

1 to the put. There are provisions in the agreement that
2 allow the receiver to direct the conduct. So paragraph
3 17 of the settlement agreement has the CCCB entity
4 holding in trust their interest for the benefit of the
5 receiver. That I have no problem with from a voting
6 control standpoint.
7 But paragraph 19 has PBGC required to comply
8 with all reasonable requests of the receiver to
9 maximize the value of the CCCB hospital interest.
10 Paragraph 24 has the settling defendants agreeing to
11 cooperate with and follow the request of the receiver.
12 It's very broad control that they have the right to
13 exercise once the Court unleashes that, and I'm very
14 concerned that they're going to exercise that in a way
15 that is detrimental to the operating hospital.
16 And the interests of the receiver are clearly
17 adverse to the interests of the hospital entity
18 operating. And I just want the Court to be aware of
19 that concern that the receiver not taking action, it's
20 going to either interfere with the operation of the
21 hospital or risk the licensing of the hospital by
22 violation of the licensing statute or the Hospital
23 Conversion Act.
24 THE COURT: Okay.
25 MR. HALPERIN: On the LLC agreement side,

1 there's a breach right now of the agreement between
2 CCCB and the Prospect CharterCARE LLC entity and the
3 other 85 percent member Prospect East. The granting of
4 that security interest is already in breach.
5 Now, there is a position that they're taking
6 that it's not a breach because there's an exception in
7 the LLC agreement that allows them to take that
8 interest. And they are pointing to a section that's in
9 the LLC agreement called Section 13.2. There's no
10 question 13.1 is an outright prohibition against any
11 hypothecation or transfer of their interest. 13.2 has
12 some exceptions. However, where they're wrong and
13 where we disagree is in 13.1 it says if there's a
14 transfer otherwise permitted by this article, which
15 would be 13.2, then a member may sell their interest
16 only if certain conditions are satisfied.
17 And one of the those conditions is there needs
18 to be an opinion of counsel satisfactory to the manager
19 covering federal and state securities, healthcare and
20 tax laws and other aspects of the proposed transfers
21 the manager may reasonably request. In other words, if
22 something is going to happen that's going to impact the
23 interest held by CCCB, that needs to be done in
24 accordance with all rules, regulations that govern the
25 ownership of an interest in this hospital. And that is

1 just in there for that very reason.
2 So again, I think the Court can navigate around
3 this by just putting some conditions or some
4 constraints on what the receiver can do going forward
5 once the settlement is approved. And that's really
6 what we're asking the Court to do. The Prospect
7 entities are not -- even though it may be hard to tell
8 from all the argument here today, but the Prospect
9 entities would like to see the monies that are in the
10 hands of these settling defendants go into this plan,
11 but we want to see it done in a way that doesn't
12 prejudice our rights either under the Hospital
13 Conversion Act or the LLC agreement or under this
14 statute that may or may not apply in the future.
15 The provisions your Honor mentioned about that
16 the non-settling defendants have a greater fault or
17 that the value is $125 million, I'm not sure why that's
18 in that agreement, but it seemed like it was some
19 effort to create some collusion because it's clearly
20 not factually correct. It's not even -- it doesn't
21 even make any sense that the parties who ran the plan
22 for all those years could have less fault than a party
23 who had nothing to do with it. They even acknowledged
24 it in their petition that we had nothing to do with the
25 valuation of the plan or handling of the plan.

1 Certainly we couldn't have; we weren't there until
2 2014.
3 So it sort of on its face looked collusive and
4 that's why we brought it up in light of the statute
5 that talks about collusion. But again, easily
6 navigated around if the Court approves the settlement.
7 THE COURT: So can I navigate around these
8 things without making this a federal receivership just
9 by crafting the order approving in a way that
10 essentially protects against these various things which
11 you raised or does it actually require me to be in a
12 position of overseeing it as a receiver?
13 MR. HALPERIN: I would greatly prefer because of
14 the allegation this is an ERISA case, that this Court
15 oversee and direct the receiver on issues that are
16 going to come up that relate to ERISA, and that's where
17 this is all heading but, aside from that, I'm concerned
18 that the settlement agreement has -- once the Court
19 approves this particular settlement agreement, it has
20 provisions that we then have to go litigate whether or
21 not the Court essentially blessed the release.
22 And there's specific language in the settlement
23 agreement -- rather, in the release that references
24 that special act. So what happens if the Court
25 approves this? Does that mean that the parties haven't

1 actually gotten the settlement agreement they thought
2 they were getting or is the Court approving a slightly
3 modified version that the parties need to step forward
4 and say we agree to that change that this special act
5 is not going to be applicable because it's written
6 right into the release.
7 THE COURT: I'm making it clear right now that
8 whatever I do, I'm not going to rule on the
9 applicability of this act. I mean, that's for another
10 time, me or another judge, who will rule on that. And
11 I think I made that clear with my questions, but in
12 case I didn't, that's where I stand on it.
13 So any order of approval would explicitly
14 disclaim any rulings with respect to the special act.
15 MR. HALPERIN: I think that's appropriate and I
16 think that would work, but I would still encourage the
17 Court to make this a joint receivership.
18 THE COURT: I could see merit in doing that.
19 I'm just trying to think through all the scenarios, and
20 some of the things you suggested, frankly, most of the
21 things you suggested sound more like state law kinds of
22 concerns, you know, the compliance with the Hospital
23 Conversion Act and so forth.
24 MR. HALPERIN: It goes to the future direction
25 of the receiver which is why -- the Court would

1 probably allow us to be heard if the receiver was
2 taking an action that was going to jeopardize the
3 hospital. And we would like that to be a possibility
4 to come into this Court since the Court is going to be
5 much more familiar with all the proceedings going
6 forward.
7 THE COURT: All right. Thank you.
8 MR. HALPERIN: Thank you.
9 MR. McGOWAN: Your Honor, if I might. My
10 understanding is that the Court's heard all the
11 ERISA-related issues.
12 THE COURT: Correct.
13 MR. McGOWAN: And if that being the case, I was
14 wondering if I could be excused to try to beat the
15 weather out of town?
16 THE COURT: Sure. Wherever you're getting out.
17 You may.
18 MR. McGOWAN: Thank you, your Honor.
19 THE COURT: Mr. Wistow, I'm going to hear from
20 the Diocesan defendant first and then you.
21 MR. KESSIMIAN: Good afternoon, your Honor.
22 Paul Kessimian for the Diocesan defendants. I'd like
23 to start off in terms of I think the remarkable
24 difference between where we are now and where the
25 motions set us up. So the motions sought relief under

1 the Rhode Island special statute. It sought approval
2 under that statute which, as we know, has implications
3 for contribution rights.
4 To the extent that the plaintiffs are seeking
5 preliminary approval of the settlement without seeking
6 any finding, that statute either applies or that
7 the -- this is the key part, Judge: It's not just
8 about that, it's about the scope of the release in the
9 settlement agreement. So we have the issue of the
10 statute and how that works when a case is settled under
11 Rhode Island law which raises the ERISA issues. We
12 also have a settlement agreement that purports to
13 include a release that releases the directors and
14 officers.
15 And we raised in our brief, and I'll have to
16 rest on my papers given the time I have, your Honor,
17 but we raised in our brief that there's a bunch of
18 information we don't have on this record. Among them,
19 did they look into the assets of the remaining
20 defendants? Have they looked at the assets of the
21 agents, directors and officers who may not be parties
22 to the agreement but are being released?
23 And what we don't want to have happen at this
24 juncture is to have any preliminary settlement approval
25 affect the defendants' rights in contribution or other

1 rights against the settling defendants as well as those
2 directors and officers. And if that's carved out and
3 there's no potential preclusive effect on us, that goes
4 a long way, but it's different than what they asked for
5 in the motion. I just wanted to point that out.
6 And I did want to also point out the scope of
7 release issue as separate and distinct from the Rhode
8 Island special statute. And I think that needs to be
9 addressed. I also wanted to point out, your Honor,
10 that an issue was raised about the scope of adopting
11 findings in state court. And I'll just briefly say on
12 that, it's important to note that at least the Diocesan
13 defendants weren't parties to that receivership. We
14 were subpoenaed. We produced documents. But the
15 receiver has argued, and we certainly agree, that we
16 are a party to that proceeding. We were not parties to
17 that proceeding. We didn't file objections to the
18 settlement in that proceeding.
19 Our position has been that since the receiver
20 has brought suit in federal court, has elected that
21 option and we are parties in that proceeding, the place
22 and time to contest issues like that are in this court
23 and only this court with respect to us.
24 It's also important to note when the settlement
25 was approved by the state court, your Honor, which was

1 referenced earlier, I did want to note that the
2 standard of review is different than under 23(e) and
3 good-faith certification that is before this Court. My
4 recollection from that decision is Judge Stern
5 specifically identifies a bankruptcy analog approval
6 process which grants the receiver basically an abuse of
7 discretion standard. So when the Court is reviewing
8 the settlement in state court, it asks and grants
9 deference to the receiver.
10 In this case, the receiver is a litigant. The
11 receiver is not entitled to deference in terms of the
12 reasonableness and good faith of this purported
13 putative settlement. And we have raised in our brief
14 questions that go to the very heart of whether this
15 Court should approve this settlement as either meeting
16 the standards of good faith or, more importantly,
17 23(e)'s requirement that it be adequate, fair and
18 reasonable.
19 And part of that, your Honor, stretches to how
20 much of these funds that are going in. And I did want
21 to start off, your Honor, and agree with Mr. Halperin.
22 We don't object, and we said in our brief, we don't
23 object to the monies being transferred. We're just
24 concerned about all these ancillary facts that the
25 plaintiffs' motion may have. And one of the issues

1 that was raised that we saw was the release of these
2 directors and officers who may be fiduciaries under
3 ERISA law.
4 We also saw the liquid sums of these defendants.
5 It appeared to us, and I can't go through it now given
6 the time but we briefed it, your Honor, that it looks
7 to us a large part of these sums were destined for the
8 plan absent litigation. And there is no tick tock in
9 any declaration that explains when the settlement
10 negotiations began, whether the settling defendants
11 offered to settle before suit commenced and, as your
12 Honor knows, there's a big difference in the attorneys'
13 fees.
14 Now, I'm not contesting the fees right now.
15 What I'm saying is that question filters into the
16 analysis.
17 THE COURT: But doesn't that argument really
18 come up when the petition --
19 MR. KESSIMIAN: Yes, it absolutely does. What
20 I'm trying to argue is it would also come up in any
21 certification you would make that the settlement
22 agreement was reached in good faith or is adequate,
23 fair and reasonable because we don't know what else
24 they gave up for that. And we briefed that the monies
25 looked to be predestined for the plan anyway.

1 We also -- I will note, there's no description
2 as to when the settlement negotiations really began,
3 what the issues were and there are many cases under
4 23(e) and for good faith certifications where courts
5 ask for that. So we're saying, you don't have it; it's
6 not in the record before you. And we called it out in
7 our opposition paper and said could you explain this.
8 We got no response. We got no response about whether
9 the money was predestined to the plan previous to
10 litigation, and we laid out why we thought it was.
11 I'll also point out, we just found this recently
12 on the receiver's website, that on a June 5th letter, I
13 have a copy, to the Speaker of the House, the Senate
14 President, the House Majority Leader that on June 5th
15 -- this is before suit was filed in this case -- that
16 they are writing a settlement statute asking to be
17 enacted. And it says, "You should know that we already
18 have parties who have expressed a willingness to settle
19 and avoid even the filing of a complaint because we can
20 not entertain those discussions until this legislation
21 is in place.
22 So I think it's a very important question to
23 find out when those settlement negotiations began and
24 was this money predestined for the plaintiff. And I
25 think that is an important question that goes to

1 whether this settlement is fair, adequate and
2 reasonable.
3 And on this record, I would suggest that that
4 finding can't be made because the information has not
5 been provided.
6 THE COURT: Even if I was to find that it was
7 predestined for the plan and it didn't happen as early
8 as it could have or attorneys' fees were incurred when
9 they shouldn't have been or whatever, why would that
10 mean that I wouldn't approve the plan? I mean, isn't
11 it still in everybody's interest to get the money into
12 the receivership for the benefit of the participants?
13 I mean, I might take that up later in the
14 context of the attorney fee application, I guess,
15 that's one place it can come up, but it doesn't seem
16 like that's an argument that would preclude the
17 settlement from being approved.
18 MR. KESSIMIAN: I think if the Court carves that
19 out on the attorneys' fees, that would go a long way.
20 If the Court also carves out on the releases. Because
21 the other issue is we don't know what else could have
22 been accomplished for the releases.
23 THE COURT: I just don't see why I have to get
24 into that. That seems to me just the flipside of the
25 coin about the effectiveness of the special statute. I

1 mean, your interest, your client's interest, in all of
2 this, only arises if and when you have liability. And
3 if you have liability, then you go back against the
4 settling defendants and presumably against their
5 principals or their fiduciaries for contribution.
6 Now, they may say, well, we've got this special
7 statute. They may say we've got a release. To that
8 you will say, we don't care about any of that. We're
9 not parties to that. The special statute's
10 unconstitutional. We get to recover or we get
11 contribution from you. And at that point that would be
12 litigated.
13 MR. KESSIMIAN: I'd point out a couple things,
14 your Honor. Admit, it's a very good, interesting
15 question. The first response I would have to that is I
16 don't know whether it's true that our contribution
17 rights would arise at a time you suggested. I know my
18 brother mentioned that on the other side. But I
19 thought in *Brown*, in the Depco case, at least as far as
20 the Rhode Island Supreme Court was concerned, when
21 engaged in a due process analysis of whether the
22 changing of contribution rights could be challenged,
23 the Supreme Court of Rhode Island suggested in that
24 Depco case that the rights to contribution arise at the
25 time of the underlying tort.

1 So I'm not sure that the contribution rights
2 aren't extant at this point. The plaintiffs'
3 allegations of the underlying tort certainly predate
4 this suit.
5 The second question I have, and this applies to
6 the securities context, which is -- and I can cite the
7 case, your Honor, *In re Jiffy Lube Securities*
8 *Litigation*, 927 F.2d 155, where the Court suggests
9 there that at the time of approving a settlement, that
10 the non-settling defendants are entitled to know how
11 their contribution rights will be affected and what the
12 mechanism for setoff would be.
13 I think it's okay if everything is kind of
14 preserved on some level, but I do think it's not
15 entirely true to say that there's no interest in terms
16 of analyzing this precise question at this point in
17 time. And I think if we proceed along the lines I
18 suggested at the beginning of my discussion where we're
19 preserving any preclusive effect not only on the
20 settlement statute but on the releases, I think we
21 might avoid that problem. But if we don't, I think we
22 face it. And I think there we're going to have to
23 grapple with it.
24 One more thing. I know my time is up, your
25 Honor. There is a question about, you know, proceeding

1 on a receivership in federal court. Obviously, I
2 haven't spoken to the clients yet, but I'll throw out
3 an important consideration which is there's no doubt
4 that the retirement plan at this point in time is an
5 ERISA plan now. And so it raises the question if it is
6 an ERISA plan right now because indisputably the
7 fiduciary of the plan is certainly not associated with
8 the Catholic church, it's the receiver appointed by the
9 state court. I think it's an ERISA plan indisputably
10 at this point. Which I think raises all the questions
11 we talked about and it makes sense for this Court's
12 involvement.
13 Judge, could I incorporate all my arguments in
14 the brief on constitutionality?
15 THE COURT: Yes. Thank you.
16 All right. Mr. Wistow.
17 MR. WISTOW: Your Honor, I'm torn between your
18 obvious desire for me to be very, very brief and the
19 profound obligation I feel for the participants to
20 exhaust the many issues that have been raised here. I
21 will do my level best. I ask you to indulge me.
22 First of all, there was an unintentional
23 misstatement. The Diocese entered a general appearance
24 in the receivership. They were not shown the door for
25 lack of standing. They participated in the objections,

1 wrote extensive briefs. And I just want to read you
2 briefly what Judge Stern said about their standing
3 which will relate, I believe, to everything you need to
4 do here.
5 He said -- and I'm talking specifically about
6 Mr. Halperin's point, this convoluted issue about the
7 15 percent and are we breaching the agreement? Is it
8 covered by the hospital statute? Where does that thing
9 stand? When are you going to decide that, Judge?
10 Here's what Judge Stern said: Unless and until
11 the receiver attempts to enforce any rights in PCC
12 through CCB, this Court does not have the, quote,
13 luxury of rendering advisory opinions. Whereas here
14 the points are, quote, of an academic nature only. See
15 *Blue Cross of Rhode Island vs. Cannon*, a case from this
16 court in 1984 and he quotes a very eloquent statement,
17 quote, from Blue Cross, In the absence of a dispute
18 ripe for adjudication in the legal sense, these issues
19 cannot be scratched by this Court. The Prospect
20 entities have not suffered formal legal prejudice that
21 would justify this Court engaging in a nontraditional
22 task of dissecting a settlement agreement like the PSA.
23 I would also add, and like the complex statute.
24 In our briefs, we wrote two things. One, they
25 had no standing to raise this now. It's premature.

1 But in any event, there would be subsequent litigation
2 if we were fortunate enough and your Honor approved to
3 give us this admittedly questioned asset. It's a
4 disputed asset. They say it can't be transferred. We
5 say it can.
6 But the most elegant response to how to treat
7 that is made by Mr. Halperin himself in his brief,
8 document 101, page 34. He says, and I quote, Based
9 upon the arguments made by plaintiffs, only one thing
10 is clear. It is exceedingly likely that should the
11 settlement agreement be approved in its current form,
12 additional litigation will ensue based not only on the
13 security agreement already granted by CCB but any
14 future transfer or exercise of control not in
15 compliance with the provisions of the agreement.
16 THE COURT: Okay. I have great respect for what
17 Judge Stern said in his decision and he was being very
18 thoughtful --
19 MR. WISTOW: I'm referring to Mr. Halperin.
20 THE COURT: I know what you're referring to, but
21 you started with by quoting Judge Stern's opinion. The
22 question or point is going to go back to that.
23 He was being very careful to stay within the
24 lines of what he was being asked to do which was in the
25 context of the receivership. He was simply being asked

1 by the receiver for the authority to proceed with the
2 settlement which he knew would then be brought to this
3 Court with the present motion to approve the
4 settlement. So he was viewing the question that he was
5 being asked to rule on appropriately is a very narrow
6 question.
7 But the fact that he kept it narrow and kept his
8 decision narrow doesn't mean that these issues that Mr.
9 Halperin has raised go away. They don't go away.
10 MR. WISTOW: They don't go away.
11 THE COURT: And they are going to be ripe at
12 some point if the receiver attempts to exercise the
13 put.
14 MR. WISTOW: Without a question.
15 THE COURT: When that happens, something else is
16 going to happen. Now, I don't know if it's going to
17 happen in state court or it's going to happen here, and
18 I don't know exactly the forum that it's going to take,
19 whether it's going to be in the form of a further
20 objection to the request by the receiver to exercise
21 the put or if it's going to be the filing of a
22 temporary restraining order by the Prospect entities to
23 enjoin the receiver from exercising the put or taking
24 the steps, but they're not going to just sit back and
25 let it happen. They're going to --

1 MR. WISTOW: Of course not.
2 THE COURT: -- address it. And so at some point
3 some judge is going to have to wrestle with the issues
4 that Mr. Halperin has, I think, legitimately brought
5 up. And this question of compliance with the Hospital
6 Conversion Act and so forth is going to have to be
7 examined. So you don't -- you're not going to be able
8 to weave around it.
9 MR. WISTOW: I'm not trying to. I'm willing to
10 stipulate, your Honor, that all I'm asking for is an
11 assignment of that claim. And I will be forced, as Mr.
12 Halperin acknowledges, to get involved in litigation.
13 This happens in bankruptcy very frequently in the
14 settlement of cases. There may be an assignment by the
15 debtor to a creditor of a claim that's going to be
16 disputed. And that dispute is not resolved in the
17 bankruptcy court. It's the person who gets the
18 assignment goes off and he brings his suit wherever it
19 is. And the fact that it was assigned does not
20 indicate there's any merit.
21 In fact, I remember we cited a case where there
22 was a Texas district court approving a bankruptcy
23 settlement of an assignment of a legal malpractice
24 case. And the Texas district court judge said, you
25 know, I think it's rather doubtful that this is even

1 assignable. But he allowed the assignment as part of
2 the settlement and off they went. It really is not
3 relevant for our purposes which way it ended up.
4 That's all -- I'm willing to stipulate on the
5 record that if your Honor approves the transfer of that
6 claim, you are not saying at all that we are
7 legitimately entitled under the Hospital Conversion Act
8 or the AHM to have this, nor am I saying that the
9 transfer to us was not a breach. All I'm saying is
10 that the court allowed us to transfer. Whether we
11 pursue it, whether we don't pursue it, that's another
12 issue and where we pursue it.
13 I would respectfully submit that a pursuit of
14 those claims would be a court of general jurisdiction,
15 not actually the receivership court. Just the way it
16 wouldn't be a bankruptcy court that decided what was
17 the malpractice case; was it a good case or a bad case?
18 Now, I want to go on to say, your Honor, that
19 this issue about not getting the information from the
20 directors -- bear with me for one moment if you would.
21 That would really -- if I may backtrack.
22 The purpose of a good-faith settlement, the
23 purpose of a decision for a good-faith settlement, is
24 under the new statute, 23-17.14-35 and a couple of
25 things have to be shown to get around a good-faith

1 settlement finding. Because it says for purposes of
2 this section, a good-faith settlement is one that does
3 not exhibit collusion, fraud, dishonesty or other
4 wrongful or tortuous conduct intended to prejudice the
5 non-settling tortfeasors. So they are going to show
6 two things --
7 THE COURT: I'm not going to rule under that
8 statute. Nothing I'm doing is going to
9 relate -- whatever order I issue, I can assure you, is
10 going to exclude any reference or the ability to read
11 it as expressing any view about the applicability or
12 the compliance with that statute.
13 MR. WISTOW: Will you -- I must ask you to make
14 a finding as to whether it's a good-faith settlement or
15 not in general.
16 THE COURT: I'm going to find --
17 MR. WISTOW: Otherwise, it's useless.
18 THE COURT: I'm going to stick to Rule 23 and
19 what the requirements of Rule 23 are.
20 MR. WISTOW: Will you not make a finding as to
21 whether or not it's a good-faith settlement because --
22 THE COURT: How is that required by Rule 23?
23 MR. WISTOW: It's not. But it's required by the
24 settlement agreement.
25 THE COURT: But that's between you and the

1 settling parties.
2 MR. WISTOW: That's the settlement we submitted
3 to this Court.
4 THE COURT: Okay. Then what I need to find is
5 numerosity of the class, the common effects.
6 MR. WISTOW: Right.
7 THE COURT: The typicality and their
8 representative parties fairly and ethically protect the
9 interest and then whatever -- I forget what -- you're
10 bringing this under 23(b), but I think it's -- is it
11 23(b)(3), was it?
12 MR. WISTOW: I'm not sure of the number, your
13 Honor, but at the risk of confusing the situation, I
14 must say clearly that a condition required by the
15 defendants to do all this was a finding of good faith
16 under the statute. I'm not asking you to find it's
17 constitutional. I'm not asking you to find anything
18 other than it was good faith.
19 THE COURT: Well, it seems like you're dialling
20 back what you said at the very beginning.
21 MR. WISTOW: How so?
22 THE COURT: That you didn't want me to make any
23 findings related to the applicability of the statute.
24 MR. WISTOW: No, no, that's not what I'm saying.
25 What I'm saying is, I'm not asking you to make a

1 finding as to the constitutionality of the statute.
2 I'm just asking you to make a finding as to good faith
3 because that is an absolute requirement of the
4 settlement.
5 I'll tell you right now, your Honor, if your
6 Honor refuses to do that, then there is no settlement.
7 And I'm saying that so we all understand what exactly
8 the settlement is about. I am not for one moment
9 suggesting, and I'll stipulate that if your Honor makes
10 a finding of good faith under the settlement, I will
11 stipulate that that is not a finding that is
12 constitutional. It's not a finding that's binding on
13 the defendants in any subsequent challenge. It's
14 simply a finding of good faith.
15 And we've briefed this rather extensively. By
16 the way, in --
17 THE COURT: Good faith is the key -- isn't good
18 faith the key provision of the special statute?
19 MR. WISTOW: Yes, it is, absolutely. And I want
20 to say this, your Honor: This isn't the first time
21 this has come up. This has come up multiple times.
22 THE COURT: So how do I make a full
23 determination of good faith?
24 MR. WISTOW: With your Honor's indulgence, I'll
25 tell you.

1 THE COURT: All right. Go ahead.
2 MR. WISTOW: Judge Lagueux ruled on this very
3 same question in *Gray vs. Derderian*, the Station fire
4 case. What he said -- and this was in accordance with
5 law throughout the United States -- there is a
6 presumption that the settlement has been made in good
7 faith and the burden is on the challenging party to
8 show that the settlement is infected with collusion or
9 other tortuous or wrongful conduct. The First Circuit,
10 your Honor, in an earlier case said, and I quote, To
11 establish collusion intervenor must demonstrate fraud,
12 the use of fraudulent means or the use of lawful means
13 to achieve an unlawful purpose.
14 So I ask your Honor to please read the cases
15 that we've cited. I'm sure you have and I probably
16 didn't write it very well. But they have to show that
17 the settlement's infected with collusion. And they
18 must also show it was intended to prejudice the
19 non-settling tortfeasors. They can't use the
20 disproportionate sense --
21 THE COURT: Well, a great deal of their argument
22 with respect to prejudice was your own fault because
23 you put things in the settlement agreement that suggest
24 that their liability is greater than other parties'
25 liability.

1 MR. WISTOW: I didn't put that in.
2 THE COURT: Well, somebody put it in.
3 MR. WISTOW: Your Honor, what happened was the
4 plaintiff -- excuse me, the settling defendant wanted
5 to put that in. I did not agree with that. I didn't
6 disagree with that. It was a back-and-forth
7 negotiation. After all was said and done, I got almost
8 everything. That's a self-serving statement by the
9 plaintiff which may or may not mean anything.
10 THE COURT: Well, obviously, they are going to
11 object to that and they find they have issues with
12 that, it looks like collusion to them. I mean, you
13 can't blame them for objecting on those grounds.
14 MR. WISTOW: I don't blame them. I don't blame
15 them. But I ask your Honor to look at it. If it were
16 up to them to decide, it would be collusion, there's no
17 doubt about that. Fortunately, it's not up to them.
18 It's up to you.
19 THE COURT: Well, what I heard Mr. Halperin say
20 was, frankly, not a really vigorous objection to the
21 settlement going forward. I heard him say that they
22 support the idea of joint appointment. That they want
23 to see the money go to the plan. They've got issues
24 with respect to some of the provisions in
25 the -- particularly with respect to the put and the

1 implications for the Prospect entities' change of
2 voting rights and potential change of composition, and
3 that they think that ought to be -- there ought to be
4 some oversight to that. And they're concerned about
5 the contract breaches.
6 And of course, they're concerned about these
7 gratuitous statements about who is more at fault. But,
8 you know, what -- the gist of what I got from him, and
9 he can stand up and correct me if I'm wrong, was, you
10 know, if these issues were taken care of, we don't
11 really have a big problem with the money going to the
12 plan. That's what I got.
13 MR. WISTOW: Your Honor, this business, for
14 example, on the statement that was insisted on --
15 THE COURT: I'm just saying that doesn't sound
16 like a screaming objection that this is collusive and
17 in bad faith.
18 MR. WISTOW: You'll have to ask Mr. Land about
19 that. That was not something that I put in. It's a
20 contract, it's two parts. I want to read you something
21 that Judge Lagueux said on what I believe is the very
22 issue your Honor is addressing, this gratuitous
23 statement by CCB that their percentage is smaller in
24 terms of fault.
25 First of all, as a matter of substantive law, it

1 doesn't really matter because if they were 99 percent
2 at fault and the Prospect entities were 1 percent at
3 fault, at common law, I would collect a hundred percent
4 if I wanted from the 1 percent as your Honor knows.
5 But here's what -- the same argument was made to oppose
6 the settlement in the *Station* fire where they were
7 saying, look, this is ridiculous, you're letting go one
8 of the most culpable people and you're not paying any
9 attention to the degree of fault. And here's a quote
10 from the *Derderian* case. Judge Lagueux said, It would
11 be incongruous to conclude that while the 2006
12 amendments expressly removed the proportionate
13 liability requirement from 10-6-7 and 10-6-8 to
14 encourage pretrial settlements in single occurrence
15 mass torts, the General Assembly simultaneously
16 intended to silently restore proportionate liability as
17 a component in the good faith analysis of the
18 settlement and reintroduce that impediment, reading
19 proportionate liability into the 2006 amendments which
20 are expressly excluded by applying the proportionate
21 liability or totality of the circumstances standards
22 for good faith after it had been expressly removed as
23 it has here would frustrate, if not negate, the entire
24 purpose of the amendments. That's what we have here.
25 I personally have no objection, if Mr. Land

1 doesn't want that in there, but it was a contract and I
2 got him -- you know, one of the things that has been
3 said here, your Honor, that really is most disturbing
4 to me of anything in the case, as a point of personal
5 privilege, your Honor, I would ask you to give me a
6 little bit of time to address it. And it's the idea
7 that all of this money was going to go flow into the
8 fund anyway and we accomplished nothing.
9 THE COURT: We're going to deal with that on the
10 attorneys' fees.
11 MR. WISTOW: It has to do with good faith. And
12 as a matter of fact, your Honor, if your Honor is ready
13 to put that out of your mind, I won't press it. But
14 they have misstated completely what the record is on
15 that. And I can show your Honor where they're
16 absolutely wrong on that and I --
17 THE COURT: Well, you'll have a chance to do
18 that when we get to the attorney fees.
19 MR. WISTOW: Then I'm going to implore your
20 Honor to disregard those statements in connection --
21 THE COURT: Here's what I'm concerned about is
22 you have a settlement that has a lot of statements in
23 it, representations in it. These non-settling
24 defendants say, look, all these statements, those look
25 collusive to us, those look problematical to us. And

1 you want me to approve them as all in good faith and
2 noncollusive so that you can -- let me finish. You
3 want me to approve the settlement precluding all of
4 those statements to -- as made in good faith so you can
5 fit them into the parameters of the special statute.
6 I'm not sure I'm prepared to do that. I may
7 well be prepared to say this settlement complies with
8 Rule 23 because the representations in the settlement
9 agreement between the parties, I don't really have
10 anything to say about that. People can say whatever
11 they want in their settlement agreements. Now you're
12 asking me to go a step further and say that it was all
13 done in good faith and so forth.
14 So, you know, but having said all that, I'm
15 hearing a little bit different argument from Mr.
16 Halperin than I thought I was going to hear.
17 MR. WISTOW: May I point out, your Honor, that
18 what we're asking the Court to do is set forth
19 expressly in docket 632. And the only reference to
20 good faith is with reference to the new statute. We
21 are not asking the Court to -- and I have no problem
22 whatever in the Court saying that it is not passing in
23 any way, shape or form on any representations
24 unilateral or what on most specifically the one that
25 seems to bother them the most, the statement that Land

1 says he has little liability which wouldn't be binding
2 on anybody anyway.
3 But I have no problem with your Honor saying you
4 absolutely paid no attention to that, you give no
5 imprimatur to that. And I again implore your Honor to
6 look at the proposed order we're asking you to sign.
7 THE COURT: All right. What I'm going to ask
8 you to do -- I'm going to ask you to do two things.
9 First is I think you should go back to that order and
10 take a look at it and see if you think any -- based on
11 all that's been discussed today, do you think there's
12 any changes to that order that should be made. And
13 then I'm going to ask that you submit that to
14 defendants and they can comment on that order on the
15 aspects of it that they agree with or would not have a
16 problem with and those that they would have a problem
17 with with the understanding that where my thinking is
18 right now --
19 MR. WISTOW: I see what you're saying.
20 THE COURT: Let me just explain so they see.
21 MR. WISTOW: Forgive me, your Honor.
22 THE COURT: Where my thinking is right now is
23 that this settlement complies with Rule 23 and probably
24 should be approved, but that these issues that have
25 been raised I think are legitimate issues and need to

1 be at some point addressed. And I'd like the
2 defendants to comment on the order with that
3 understanding of what my feeling is about it.
4 And then the second thing I'd like you to do,
5 just to make sure that this is done in a thoughtful
6 way, is to give me any submission that you think you
7 should with respect to whether this should be converted
8 into a joint receivership. I haven't had a chance to
9 talk to Judge Stern about that idea or to really give
10 it much thought myself, but I think I'd like to hear
11 from the parties about that after you've had a chance
12 to kind of think it through a little bit. So that's
13 what I think you should do.
14 The third thing that you might want to think
15 about is whether your -- well, if it can be done in the
16 proposed order, essentially whether the statements that
17 are offensive to the non-settling defendants can be
18 disclaimed sufficiently and a finding of good faith
19 made for those who need to be completely excised from
20 the settlement agreement. So I'd like you to think
21 about that and start to figure it out.
22 MR. WISTOW: I'm starting to premise that your
23 Honor doesn't want to inadvertently seem to be giving
24 an imprimatur to statements that you shouldn't be
25 giving an imprimatur to. I'm going to try to draft an

1 order that is extremely limited and preserves whatever
2 rights the defendants may have that we think they
3 should have. And hopefully -- I doubt we'll come to an
4 agreement because I'm convinced they've just decided
5 they are going to starve the beast, but perhaps I can
6 convince your Honor the legitimacy of the order. So
7 we'll attempt to do that. Thank you, your Honor.
8 THE COURT: Let me just try to say one more time
9 so that I'm really clear on what I'm looking for. If
10 you want me to make a finding of good faith in addition
11 to findings under Rule 23, then I think it's important
12 that whatever is said in the order clearly preserves to
13 the non-settling defendants whatever rights they think
14 that they have and that this process, this settlement
15 that you have with the settling defendants, does not in
16 any way impede them or obstruct them with the exercise
17 of those rights, whether it's regarding the Hospital
18 Conversions Act in ownership or whether it's the
19 assertion of claims they may have against fiduciaries
20 or if it's their claim that the special statute is
21 either unconstitutional and unenforceable.
22 MR. WISTOW: Absolutely.
23 THE COURT: All of their claims should be fully
24 preserved. And if you can do that, then it seems to me
25 I can say that your settlement with the settling

1 defendants is in good faith and not collusive because
2 it doesn't attempt to prejudice them in any way.
3 That's sort of a compromise position. I hope I made
4 myself perfectly clear.
5 MR. WISTOW: Also with one exception. Of course
6 it's going to compromise them potentially. It's got to
7 wrongfully compromise them.
8 THE COURT: Well, it may compromise them in the
9 sense of their ability to seek contribution later on,
10 but their right to assert that it does not have to
11 be --
12 MR. WISTOW: Absolutely. I agree with that. 90
13 percent of my argument about the constitutionality of
14 the statute was just that, that it's premature. Judge
15 Selya's decision makes it absolutely clear. So, again,
16 I apologize for my ebullience, your Honor, but I've got
17 a lot of people here that will beat me up if I don't
18 stand up for them.
19 MR. SHEEHAN: Your Honor, may I just as a point
20 of clarification with what your Honor suggested, your
21 Honor, the finding by the Court that this is a
22 good-faith settlement within the parameters of the
23 definition in the special statute is intended to be
24 binding. It is not something that the defendants at a
25 later proceeding can say, well, it wasn't really in

1 good faith. If we cannot good that, then we have no
2 settlement.
3 THE COURT: Well, it can be binding on the
4 parties and it can be a finding that they operated in
5 good faith and as long as it doesn't compromise their
6 rights.
7 MR. SHEEHAN: As all their other rights,
8 absolutely, your Honor.
9 THE COURT: Then I don't really have a problem
10 saying it was in good faith, and I don't think that
11 they would either.
12 MR. SHEEHAN: Thank you. And I apologize for
13 perhaps asking that clarification.
14 THE COURT: It's fine. You all follow what I'm
15 getting at?
16 MR. HALPERIN: I follow what you're getting at,
17 but I don't think that we all have information that
18 relates to this settlement or to agree to anything.
19 Your Honor's finding will be based upon what your Honor
20 has heard and read. Other issues have been brought up
21 that we honestly know nothing about this settlement
22 other than the fact that we've read the agreement.
23 We're not in a position to agree or disagree that it's
24 in good faith.
25 THE COURT: Okay. Well, we'll see what comes

1 and then I'll try to figure it out then. Okay. We'll
2 be in recess. Thank you.
3 MR. WISTOW: Can we impose a timetable on this,
4 your Honor?
5 THE COURT: Sure. How about two weeks?
6 MR. WISTOW: Then the response?
7 THE COURT: Two weeks from when they file.
8 Okay. Thank you.
9 MR. WISTOW: Thank you, your Honor.
10 (Time noted: 1:18 p.m.)
11 (Proceedings concluded.)
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2 **CERTIFICATION**

3 I certify that the foregoing is a correct transcript from the

4 record of proceedings in the above-entitled matter.

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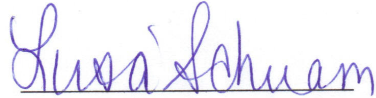
6 

7 Official Court Reporter March 11, 2019

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