

Law Firms Battle For Lead Counsel In NJ Hospital ERISA Suit

By **Bill Wichert**

Law360, New York (August 29, 2016, 8:27 PM ET) -- Two sets of law firms filed competing motions Friday urging a New Jersey federal court to appoint them as interim co-lead class counsel in a putative class action alleging St. Joseph's Healthcare System Inc. is violating the federal Employee Retirement Income Security Act by underfunding an employee pension plan.

More than a month after the consolidation of two proposed class actions filed separately against St. Joseph's by each set of law firms, the motion from Cohen Milstein Sellers & Toll PLLC and Keller Rohrback LLP and the motion from Izard Kindall & Raabe LLP and Kessler Topaz Meltzer & Check LLP touted the respective firms' financial resources and experiences in handling similar matters.

"Cohen Milstein and Keller Rohrback are the architects of the legal theories and litigation strategies in this area of the law," those firms said.

Izard Kindall and Kessler Topaz countered, "IKR and KTMC will be able to draw heavily upon their collective experience and expertise to ensure that this case is litigated effectively and efficiently."

Cohen Milstein and Keller Rohrback filed its suit on May 13 on behalf of Donna Garbaccio, who was a nurse at St. Joseph's Hospital and Medical Center in Paterson from 1978 until 1998.

Three days later, Izard Kindall and Kessler Topaz filed a complaint on behalf of Mary Lynne Barker, who worked for the medical center from 1968 to 2003; Anne Marie Dalio, who worked there from 1984 to 1994; and Dorothy Flar, who worked for there from 1990 to 1995.

Each complaint challenges St. Joseph's claim that its plan is exempt under ERISA because it qualifies as a church plan. The Garbaccio complaint says the pension plan was underfunded by about \$183 million as of Dec. 31, 2014, while the other complaint put the figure at \$212.4 million.

On July 12, U.S. Magistrate Judge James B. Clark III consolidated the actions and ordered the plaintiffs to file a master consolidated complaint by Aug. 11.

But after the parties informed the court that they could not reach an agreement, U.S. District Judge John Michael Vazquez on Aug. 12 granted their joint request to file the competing motions seeking appointment as interim co-lead class counsel.

In addition to their financial resources and related experience, the firms' motions also stressed the

detailed investigations they conducted before filing their respective complaints.

“This investigation included a comprehensive review of the law concerning ‘church plans,’ plan documents, including those related to the plan’s financial condition, and other materials concerning defendants’ actions,” Izard Kindall and Kessler Topaz said. “The allegations are detailed and specific and based on KTMC and IKR’s thorough investigation and significant experience in analogous actions.”

Cohen Milstein and Keller Rohrback, who also are calling on the court to appoint Garbaccio as interim lead plaintiff, argued in their brief that they conducted a more thorough investigation and identified more claims than the other two firms did.

“A substantial investigation into the facts and legal theory is a significant factor in determining interim lead counsel, and weighs heavily in favor of appointing Garbaccio’s counsel as interim co-lead counsel,” the brief said. “The Garbaccio complaint is a result of this comprehensive investigation of the factual and legal theories underlying the church plan exemption and the culmination of an intensive investigation into the St. Joseph’s plan.”

Attorneys with the four law firms could not be immediately reached for comment on Monday.

Garbaccio is represented by Scott Lempert, Karen L. Handorf, Michelle C. Yau and Kira L. Hettinger of Cohen Milstein Sellers & Toll PLLC and Laura R. Gerber, Lynn Lincoln Sarko, Havila C. Unrein and Ron Kilgard of Keller Rohrback LLP.

Barker and her co-plaintiffs are represented by Edward W. Ciolko, David A. Bocian, Mark K. Gyandoh and Julie Siebert-Johnson of Kessler Topaz Meltzer & Check LLP and Robert A. Izard, Mark P. Kindall and Doug Needham of Izard Kindall & Raabe LLP.

St. Joseph's is represented by David R. Kott and Christopher S. Mayer of McCarter & English LLP and Stacey Cerrone, Lindsey Chopin and Howard Shapiro of Proskauer Rose LLP.

The case is Garbaccio v. St. Joseph's Hospital and Medical Center and subsidiaries et al., case number 2:16-cv-02740, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Kurt Orzeck. Editing by Brian Baresch.