

Judge Trims Archdiocese's Suit Over Headstone Sales Ban

[Charles Toutant](#), New Jersey Law Journal

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J. Albert Diaz

In a constitutional challenge by the Archdiocese of Newark to a state ban on the sale of monuments by operators of religious cemeteries, a federal judge has dismissed two of the four counts but ruled that dismissal of the other two would be premature.

The archdiocese claims that a 2015 New Jersey law prohibiting private religious cemeteries from selling monuments is unconstitutional. U.S. District Judge Michael Shipp of the District of New Jersey dismissed a claim under the Contracts Clause of the U.S. Constitution, and the parties agreed to the dismissal of a claim under the Privileges and Immunities Clause. But the Due Process and Equal Protection claims are not ripe for dismissal, said Shipp, who denied motions to dismiss those counts for failure to state a claim. He called for the parties to agree to a schedule of discovery, supplemental briefing and oral argument on those motions.

In its July 2015 suit, the archdiocese claims that N.J.S.A. 16:1-7.1, which prohibits private religious cemeteries from sale or ownership of memorials, burial vaults or mausoleums, was written for the benefit of funeral directors and companies selling monuments.

Shipp rejected the plaintiff's Contracts Clause claim upon finding that the statute does not prevent the archdiocese from carrying out its obligations under roughly 600 existing contracts to maintain monuments that become damaged. Because the statute applies only prospectively, Shipp rejected the plaintiff's claim that it interferes with its ability to carry out existing contracts.

Shipp, at the parties' request, also dismissed the Privileges and Immunities Clause claim, which the plaintiff brought in order to preserve the issue for appeal.

The archdiocese claimed that no rational basis exists for the government to restrict anyone from selling a monument, and that under current U.S. Supreme Court case law, the claim should be dismissed, said Jeff Rowes, a senior attorney for the Institute for Justice, an Arlington, Virginia, public interest law firm that represents the archdiocese. The Institute included that claim in its complaint because the Supreme Court might some day reverse its position on that issue, Rowes said.

The state's motion to dismiss counts under the Due Process and Equal Protection clauses for failure to state a claim were denied as premature. Shipp adopted a description of the rational basis review from a 2013 case where the U.S. Court of Appeals for the Fifth Circuit held that a Louisiana law banning the sale of caskets made by monks was unconstitutional, *St. Joseph Abbey v. Castille*. Shipp said that case was "persuasive" where it recognized that "although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by aducing evidence of irrationality."

The suit claims the purpose of the statute is to prevent the archdiocese from earning money from consumers that might have otherwise been spent at monument dealers or funeral homes, and that such protectionism is not a legitimate government interest.

The archdiocese, which operates 11 cemeteries, began offering an inscription-rights program for its private family mausoleums in 2006, in which it maintains ownership of the monument and agrees to provide perpetual maintenance. In 2013, it expanded the program to include headstones.

A private trade association, the Monument Builders Association of New Jersey, objected to the program, and in July 2013 it filed a suit against the archdiocese in state court. In April 2014, a judge found it was not illegal for the archdiocese to sell monuments to parishioners under the program.

The state Legislature responded to the verdict by enacting an amendment of the Religious Corporations Law to prohibit private religious cemeteries from selling monuments.

Rowes said he was pleased with Shipp's ruling. He said the two remaining counts represent the "core claims" in the plaintiff's case. He added that Shipp's embrace of the reasoning set forth in the *St. Joseph Abbey* ruling will help the archdiocese make its case.

A ruling in the case is expected in early 2017, Rowes said.

Deputy Attorneys General Kevin Jespersen and Eric Pasternack represent the state. The Attorney General's Office did not immediately respond to a request for comment on the ruling. Karen Confoy of Fox Rothschild in Lawrenceville, representing the intervenor New Jersey State Funeral Director's Association, did not return a call for comment.