TEXAS V. UNITED STATES – HOUSE OF REPRESENTATIVES AND DEFENDER STATES PETITION SUPREME COURT FOR REVIEW: WILL OBAMACARE FALL?

On December 18, 2019, in a 2-1 decision, the U.S. Court of Appeals for the Fifth Circuit held that the plaintiffs in *Texas v. United States*[1] had standing to bring a case challenging a provision of the Affordable Care Act ("ACA") known as the individual mandate (26 U.S.C. §5000A) and that the individual mandate requiring most U.S. citizens to purchase health insurance (i.e., minimal essential coverage) or pay a penalty is unconstitutional.[2] As to the District Court for the Northern District of Texas holding that the entire ACA must fall because the individual mandate is *inseverable* from the remainder of the statute, the Fifth Circuit declined to uphold this portion of the district court's decision, having concluded that the district court's "severability analysis" was incomplete.[3] The Fifth Circuit remanded the case back to the district court for a more careful and thorough analysis addressing why the remainder of the ACA is inseverable from the individual mandate.

On January 3, 2020, the U.S. House of Representatives, having intervened in *Texas v. United States* on February 14, 2019, and 21 appellant Democratic states ("Petitioners") filed a petition for a writ of certiorari with the Supreme Court asking the Supreme Court to review the case. The Petitioners also requested expedited review of the certiorari petition as well as expedited merits briefing and oral argument, if certiorari is granted. The Petitioners hope for resolution of the case in 2020 given the high stakes nature of a lower court decision that would overturn the entire ACA. In a quick response on January 6, 2020, the Supreme Court directed the Trump administration and the states opposed to the ACA to file a response to the request for expedited review with the Supreme Court by Friday, January 10, 2020. [4] The fate of the ACA hangs in the balance.

BACKGROUND

Texas v. United States - Another Challenge to the ACA

On February 26, 2018, multiple states filed a lawsuit challenging the ACA in the District Court for the Northern District of Texas. This lawsuit was filed two months after Congress passed the Tax Cuts and Jobs Act of 2017 ("TCJA")[5], and named the United States, the Department of Health and Human Services ("HHS"), Alex Azar as the Secretary of HHS, and the Internal Revenue Service along with its Acting Commissioner as defendants. Later, the eighteen state plaintiffs were joined by two individual plaintiffs.

The plaintiffs in *Texas v. United States* reasoned that since the penalty for not purchasing health insurance pursuant to Section 5000A was now zero, the individual mandate no longer could be considered constitutional as an exercise of Congress's authority to tax and spend, as articulated by Chief Justice John Roberts in *National Federation of Independent Businesses v. Sebelius*[6] ("NFIB") because the penalty no longer produced revenue for the federal government - an essential feature of a tax. Nor, the plaintiffs contended, was the individual mandate sustainable under the Interstate Commerce Clause, which gives Congress the power to regulate commerce. And, since the remainder of the ACA relied on the existence of the individual mandate as an essential feature of the ACA, the individual mandate was inseverable from the remainder of the ACA; accordingly, if the individual mandate was no longer valid, the ACA must fall with it.

On December 14, 2018, the District Court for the Northern District of Texas issued its opinion ruling in favor of the plaintiffs. The court held that: (1) the individual plaintiffs had standing to file suit because the individual mandate compelled them to buy insurance (an injury) even though they would not have been penalized had they failed to do so; (2) setting the shared responsibility payment to zero dollars rendered the individual mandate unconstitutional because the payment could no longer properly be viewed as a tax pursuant to Congress's taxing power; and (3) the unconstitutional individual mandate could not be severed from the remainder of the ACA. The court granted the plaintiffs' claim for declaratory relief, declaring the individual mandate to be unconstitutional and the remaining portions of the ACA inseverable from the individual mandate and therefore invalid. This decision effectively struck down the ACA. The district court stayed judgment pending appeal.

THE APPEAL

In January 2019, Democratic attorneys general who had intervened in the lower court case in May 2018 and the Department of Justice appealed the Texas trial court decision to the Fifth Circuit. [7] Additional states and the House of Representatives moved to intervene to

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defend the ACA. A three-judge panel of the Fifth Circuit considered the following questions:

1. Whether there was a "live case or controversy" before the court as required by Article III of the Constitution, even though the federal defendants had conceded many aspects of the dispute;
2. Whether the plaintiffs, intervenor defendant states, and the House of Representatives had standing to bring the appeal;
3. Whether the individual mandate was constitutional given that the associated penalty for failing to purchase minimum essential coverage (i.e., health insurance) was amended to zero dollars by the TJCA; and
4. Whether the individual mandate, if determined to be unconstitutional, could be severed from the remainder of the ACA or whether other provisions of the ACA also would be invalidated.

The Fifth Circuit issued its opinion on December 18, 2019 and revised it on December 20, 2019. It held the following:

1. There is a live case or controversy because the intervenor defendant states had standing to appeal (they would lose funding under the ACA if it were struck down as standing requires a showing of "injury, causation, and redressability"[8]), and even if they didn't, there was a live case or controversy between the plaintiffs and the federal defendants.
2. The individual plaintiffs had standing to challenge the ACA-the individual mandate injured them by requiring them to buy insurance they didn't want (even though there would have been no monetary penalty if they declined to comply with the law). The mandate also injured the state plaintiffs by increasing their costs of complying with the reporting requirements that relate to the individual mandate. The matter of the U.S. House of Representatives' standing to intervene was questionable but was not necessary to resolve as other parties in the case were deemed to have standing and sought the same "ultimate relief" as the House.[9]
3. The individual mandate is unconstitutional because it cannot be viewed as a tax under Congress's spend and tax powers as the penalty for noncompliance is zero. Related, the shared responsibility payment no longer possesses the "essential feature of any tax" because it does not produce revenue for the government.[10] No other provision of the Constitution supports the individual mandate.[11]
4. The case must be remanded to the district court for additional consideration and analysis of the severability question. Specifically, the district court must explain what provisions of the ACA are inseverable from the individual mandate. The Fifth Circuit opined that the district court opinion did not explain with sufficient precision how particular provisions of the extensive and complex ACA are "inextricably linked to the individual mandate"[12] and "rise or fall on the constitutionality of the individual mandate." [13] The district court was also tasked with considering the federal defendants' new suggestions for addressing the appropriate scope of relief in this case. For example, the federal defendants suggested enjoining enforcement of only those provisions of the ACA that injure the plaintiffs or declaring the ACA unconstitutional only as to the plaintiff states and the two individual plaintiffs.

ANALYSIS AND PRACTICAL TAKEAWAYS

The ACA will remain law while the case is either reconsidered in the District Court for the Northern District of Texas or reviewed by the Supreme Court if the Supreme Court agrees to grant certiorari. If the Supreme Court agrees to hear the case, it is possible the fate of the ACA will be decided in the Supreme Court's current term. Otherwise, this case may not be resolved for some time. In either case, the constitutional challenge to a significant piece of legislation will be certain to garner attention in this presidential election year.

Texas v. United States creates uncertainty as to whether any or all of the ACA will be struck down, which, in turn, creates operational risk for the entire health care industry, including hospitals. For example, if the ACA were struck down in its entirety, there would be far-reaching effects:

- *Lost Insurance Coverage*. Roughly 21 million people could lose their insurance.[14] This includes millions who purchase health insurance through the health care exchanges and millions who are insured as a result of the Medicaid expansion established by the ACA. This, in turn, could negatively affect, among other health care providers, hospitals that, likely, would have many more uninsured and underinsured patients presenting to their emergency rooms for treatment resulting in a rise in uncompensated care and a significant financial strain on hospitals.
- *Heavier Burden for States*. States that expanded Medicaid under the ACA would have to decide whether they could afford to continue the expansion without the federal subsidies for Medicaid expansion provided by the ACA. If states walked back their Medicaid expansion,

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low-income families could lose their Medicaid coverage. An election to maintain expanded Medicaid coverage, could potentially increase state taxes to make up for the federal subsidy shortfall.

- *Insurance Discrimination*. Roughly 133 million Americans with pre-existing conditions would lose important protections from insurance discrimination. Without statutory protections, and with the likelihood that many healthier Americans will choose to forgo health insurance altogether, patients with chronic illnesses might not be able to afford insurance due to significant increases in health plan costs. Further, patients with pre-existing conditions could be denied coverage for certain health care services. Again, loss of health coverage could severely impact hospitals and other health care providers because they will be providing more unreimbursed care and their patients will be sicker.[15]
- *Removes Minimum Health Benefits*. The ACA established essential health benefits that guarantee a minimum package of important benefits. Without the ACA, the robustness of health benefit plans would diminish and overall population health would be affected.
- *Impact on Native American Communities*. The Indian Health Care Improvement Act, which provides the legal basis for the provision of health care to American Indians and Alaska Natives, was made permanent as part of the ACA. Theoretically, this authority would fold with the ACA.[16]
- *Stifles Innovation*. The Center for Medicare and Medicaid Innovation ("CMMI"), which tests innovative health care programs, was created as part of the ACA. Theoretically, the CMMI would go away along with pilot programs and health care delivery models that augment focus on quality and safety in health care delivery.[17]
- *Changes Fraud and Abuse Protections*. Fraud and abuse provisions incorporated in the ACA would be affected. For example, the Physician Payments Sunshine Act[18] requires drug and medical products manufacturers to disclose to the Centers for Medicare & Medicaid Services, gifts and payments to physicians and teaching hospitals as well as disclosure of physician ownership or investment interests in manufacturers and group purchasing organizations.
- *Effect on Medicare Trust Fund*. The Medicare Hospital Insurance Trust Fund might lose several years of fiscal solvency if the ACA falls.[19]
- *Contract Disruption and Increased Litigation Costs*. If the ACA is invalidated, agreements between health care providers and payors could be affected. Many of these agreements allow termination and amendment of contractual relationships if federal law changes. Payors and providers could quickly find themselves litigating insurance coverage disputes to determine whether payors would be required to continue paying for previously authorized and approved long-term treatment plans of patients who lose coverage as a result of ACA invalidation.

Hall Render will continue to follow developments on *Texas v. United States*. Stay tuned for further updates.

If you have any questions or would like any additional information about this topic, please contact:

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[references]

[1] Texas, et al. v. United States, et al., No. 4:18-cv-00167 (U.S. Dist., N.D. Tex. Dec. 14, 2018).

[2] State of Texas et al. v. United States, et al., No. 19-10011 (5th Cir. Dec. 18, 2019 as revised Dec. 20, 2019)

[3] *Id.* at p.56

[4] Harper Neidig, *Supreme Court sets Friday Deadline for Responses in Obamacare Case*, The Hill, Jan. 6, 2020 @ https://thehill.com/regulation/court-battles/477012-supreme-court-sets-friday-deadline-for-responses-in-obamacare-case (last visited on Jan. 8, 2020).

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[5] The TCJA effectively eliminated the individual mandate or "shared responsibility payment" by amending 26 U.S.C. §5000A to set the penalty at zero dollars.

[6] National Federation of Independent Businesses v. Sebelius, 567 U.S. 519 (2012).

[7] Of note, since the appeal to the 5th Circuit, the federal defendants have vacillated on the severability issue. After contending in the district court that only certain provisions were inseverable from the individual mandate, they later asserted in an opening brief that all of the ACA is inseverable. On appeal, the federal defendants stated the court should not enjoin enforcement of the ACA, or, alternatively, the district court's decision should be affirmed "except insofar as it purports to extend relief to ACA provisions that are unnecessary to remedy plaintiffs' injuries." State of Texas et al. v. United States, et al., No. 19-10011 (5th Cir. Dec. 18, 2019 as revised Dec. 20, 2019) at p.11.

[8] State of Texas et al. v. United States, et al., No. 19-10011 (5th Cir. Dec. 18, 2019 as revised Dec. 20, 2019) at p.12 and p.14.

[9] *Id*. at p.16.

[10] *Id*. at p.38.

[11]*Id*. at p.34. Under *NFIB* referenced by the Fifth Circuit, the individual mandate is not supported by the Interstate Commerce Clause because that clause gives Congress the "power to regulate commerce, not compel it." Nor could the individual mandate be sustained under the Constitution's Necessary and Proper Clause because the individual mandate was not "proper" because it expanded federal power. *Id*. at p.35.

[12] *Id*. at p.56.

[13] *Id*. at p.51.

[14] Reed Abelson, Abby Goodnough and Robert Pear *What Happens if Obamacare is Struck Down?* N. Y. Times, Mar. 26, 2019 updated Jul. 9, 2019) found at: https://www.nytimes.com/2019/03/26/health/obamacare-trump-health.html (last visited on 1/8/2020)

[15] *Id*.

[16] https://www.ihs.gov/ihcia/

[17] Juliette Cubanski, Tricia Neuman, Gretchen Jacobson and Cristina Boccuti, *What Are the Implications of Repealing the Affordable Care Act for Medicare Spending and Beneficiaries?* (Dec. 13, 2016) @ https://www.kff.org/health-reform/issue-brief/what-are-the-implications-of-repealing-the-affordable-care-act-for-medicare-spending-and-beneficiaries/

[18] Section 6002 of the Affordable Care Act (P.L. 111-148 (Mar. 23, 2010)).

[19]Cubanski et al., *supra* n.16.

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