CLIENT ALERT

Christmas Comes Early for Trump Administration, as Federal District Court Strikes Down Entire ACA

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Early Friday evening, U.S. District Judge Reed O'Connor sided with states that challenged the constitutionality of the Affordable Care Act (ACA) following the elimination of the individual mandate's tax penalty in the Tax Cuts and Jobs Act of 2017 (TCJA). Although the individual mandate itself was perhaps vulnerable after the TCJA, Judge O'Connor's ruling went farther, holding that the entire ACA must fall because without the tax, the ACA's individual mandate cannot be supported under Congress's Tax Power (as the Supreme Court held in *Nat'l Fed'n Indep. Business v. Sebelius*, 567 U.S. 519 (2012)), is unsustainable under the Interstate Commerce Clause, and cannot be severed from the remainder of the Act. While the individual mandate had long been a political target, the ruling in *Texas et al. v. U.S. et al.*, No. 4:18-cv-00167 (N.D.Tex. Dec. 14, 2018) has far-reaching consequences, eliminating politically popular community underwriting, guaranteed issuance requirements, and invalidating Medicaid expansion, the creation of the Center for Medicare & Medicaid Innovation (CMMI), fraud and abuse provisions, and more. If upheld, this decision could potentially upend the wide-ranging changes to federal and state health care law, implemented over the past eight years, with nothing to replace it.

The legal issues will take some time to play out. The court granted summary judgment on only one count of the complaint, so we expect a coalition of Attorneys General supportive of the ACA to appeal it to the Fifth Circuit, while some portion of the remaining litigation will continue in the district court. Despite the potential disruption of the case if the summary judgment ruling is upheld on appeal, the immediate impact of the ruling is limited because the court did not issue an injunction. The open enrollment period is closed and issuers are locked into the products they offered on the exchanges. The legal impact is therefore limited since it's not immediately operative.

Late Friday, the Trump Administration acknowledged as much, stating that, "We expect this ruling will be appealed to the Supreme Court. Pending the appeal process, the law remains in place." To be sure, however, the Administration has taken other steps that arguably have an adverse impact on ACA individual and small group markets, such as the recent expansion of association health plans and non-ACA compliant insurance products but this ruling is unlikely to impact the 2019 plan year. The court's ruling may embolden more executive actions to loosen the impact of the ACA while the case works its way through the courts.

In addition, a number of lawsuits are pending in the U.S. Court of Appeals for the Federal Circuit and U.S. Court of Federal Claims seeking damages against the United States for failure to make good on payments promised under the ACA. Those cases are not affected, at least to the extent they seek damages only for past conduct.

Potential Legislative Action

House Democrats immediately decried the ruling and pledged to defend the ACA when they take control of that chamber in January, while House Republican leadership urged their Democratic colleagues to work with Republicans in 2019 to finally enact patient-centered reforms to our nation's health care system. The current Chairman of the House Energy and Commerce

Committee, Representative Greg Walden (R-OR), issued a statement emphasizing that he believes the Texas court ruling will certainly be appealed and will not impact insurance premiums or plans for next year. He further stated that Congress will have a rare opportunity for truly bipartisan health care reform that protects those with pre-existing conditions, increases transparency and choice, and lowers costs.

Meanwhile, Senate Republicans—who will retain their Senate majority next year—have indicated that they will remain focused on passing a federal spending bill, criminal justice reform, and judicial confirmations for the balance of 2018.

In 2019, though, Congress may seek to find a path to the bipartisan compromise on the ACA's future that has proven elusive in recent years. If the Fifth Circuit decision is ultimately upheld, the burden of preserving popular aspects of the law will fall to a sharply-divided 116th Congress.

Both parties are motivated to find common ground in the desire to preserve protections for pre-existing conditions, maintain coverage for adult children under the age of 26 on their parent's insurance plan, and for the continuation of CMMI, which has spearheaded the drive toward value based payment reforms, many of which embrace market-based principles that are typically a cornerstone of Republican health care policy.

Finally, President Trump tweeted that the incoming Congress should enact a new healthcare law that preserves politically popular aspects of the ACA.

The Court's Legal Reasoning

The decision hinges on the Tax Cuts and Jobs Act of 2017's elimination of the ACA's shared responsibility payment by setting it to $0 effective in 2019. Although the shared responsibility payment is distinct from the individual mandate, Judge O'Connor explained that the mandate itself was only permissible under Congress's taxing authority, and since the TCJA eliminated the tax, the mandate itself could not be supported by any other of Congress's constitutional powers and therefore was not valid.

After finding the mandate unconstitutional, the court turned to the proper remedy. The plaintiff States and the Trump Administration agreed, based on 42 U.S.C. § 18091 and *NFIB,* that the ACA's guaranteed-issue and community-rating provisions are inseverable from the individual mandate and, therefore, also must fall. But the court went further, reasoning that "the 2010 Congress expressed through plain text an unambiguous intent that the Individual Mandate not be severed from the ACA." Reviewing the ACA's plain text, Judge O'Connor noted that:

> Congress stated three separate times that the Individual Mandate is *essential* to the ACA. [. . .] Thirteen different times, Congress explained how the Individual Mandate stood as the keystone of the ACA. And six times, Congress explained it was not just the Individual Mandate, but the Individual Mandate "together with the other provisions" that allowed the ACA to function as Congress intended.

Slip Op. at 40. Thus, based on the statutory text, the court concluded the Individual Mandate is inseverable from the *entire* ACA.

The severability issue is likely to be a centerpiece of any appeal. The district court relied on evidence that the 2010 Congress, which passed the ACA, thought that the mandate was essential to the working of the entire Act, but the court was reviewing the TCJA, a bill passed in 2017, and that Congress made a different judgment. As explained in the court's decision, in 2017 Congress

decided to zero out the penalty and keep the mandate—effectively reducing the mandate to a nullity—thereby making a different legislative judgment on the centrality of the mandate to the proper functioning of the rest of the ACA's various provisions.

The Decision's Potential Impact

The district court's judgment on severability invalidating the ACA (and presumably any amendments thereto) is sure to draw a lot of interest from the health care policy and legal communities. If the decision stands on appeal, millions of people are at risk to lose their health insurance coverage—including persons insured via the ACA's optional Medicaid expansion and recipients of subsidies to purchase coverage on the exchanges. Additionally, insurers would no longer be required to, *inter alia*:

- Cover young adults up to age 26 on their parent's policies.
- Cap out-of-pocket costs.
- Eliminate annual and lifetime limits on coverage.
- Issue coverage regardless of pre-existing conditions.
- Cover the ACA's essential health benefits.

Of course, States may opt to enact state law analogs to the ACA, at least with respect to the commercial insurance markets, to preserve some of the ACA.

Medicaid and Medicare also would be disrupted. For example, under the ACA Medicaid programs benefit from increased prescription drug rebates. If the ruling stands, Medicaid drug costs may increase. Likewise, the Medicare program's coverage gap discount program, which helped reduce seniors' out-of-pocket drug costs, may end absent other legislative action.

Several other ACA provisions would also fall if the district court's ruling stands. A few of the key areas to watch:

- Fraud and abuse: As a result of the ACA, an overpayment must be returned within 60 days from the date on which the overpayment is identified. Any provider of services, supplier, Medicaid managed care organization, Medicare Advantage organization, or PDP sponsor that fails to do so is subject to potential False Claims Act (FCA) enforcement and related penalties.
- Nursing Homes: The ACA also was the first substantial reform for nursing homes since the Nursing Home Reform Act, adopted in OBRA 1987. The ACA required nursing home ownership transparency, mandated adoption of comprehensive compliance programs, and enacted the Elder Justice Act, requiring nursing home employees to report suspected crimes against nursing home residents directly to law enforcement. New legislation would be required to preserve these protections.
- CMMI: The ACA also established the Medicare Shared Savings Program (MSSP) and CMMI—so the MSSP and CMMI's programs testing accountable care, episode-based payment initiatives, and other value-based care models would likely end, unless Congress were to step in and create new legislative authority to continue the MSSP and CMMI's activities. This possibility creates significant uncertainty for health care providers and entities seeking to participate in the MSSP or to propose new pilots under CMMI's oversight.

The district court's judgment is sending shock waves through the health care law and policy communities. Watch this space for reports on further developments.

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