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ACA pronounced dead by Texas court—What's next for the health care industry?

By Michael Taubin, Valerie Breslin Montague and Ethan Domsten

On December 14, a Texas district court struck down the entirety of the Affordable Care Act (ACA) after finding the individual mandate, unmoored from a tax, an unconstitutional exercise of Congress' power.[1] This ruling rested on Judge O'Connor's determination that the individual mandate was so essential to the overall construction of the ACA that it was inseverable from the remainder of the law, and that by ruling the individual mandate unconstitutional, the rest of the law must be invalidated as well.

The decision

The individual mandate has been the subject of judicial challenge in the past. Most notably, the plaintiffs in *National Federation of Independent Businesses et al. v. Sebelius* argued that the ACA's individual mandate and Medicaid expansion were unconstitutional exercises of Congress' powers. This challenge was successful in striking down mandatory Medicaid expansion, but the Supreme Court held that individual mandate was constitutional as an exercise of Congress' Tax Power because it triggered a tax, even though it was beyond Congress' Interstate Commerce Power.

With the passage of the Tax Cuts and Jobs Act of 2017 (TCJA), the shared responsibility payment —the tax the individual mandate triggered—was eliminated. Relying on the *Sebelius* decision, a coalition of Republican attorneys general successfully argued that the individual mandate, which cannot stand under the Interstate Commerce Clause, must now likewise fail as an exercise of Congress' power to tax because there no longer is a tax associated with the mandate.

Citing the enacted text of the ACA and prior Supreme Court cases, including *Sebelius*, Judge O'Connor held that the individual mandate stood as the keystone to the ACA, without which the key provisions of the act could not function. If the remainder of the ACA were to be preserved, the judge reasoned, it would introduce an entirely new regulatory scheme never intended by Congress that could lead to an unsustainable death spiral of costs, thus crippling the entire law.

[1] *Texas et al. v. United States of America et al.*, 4:18-cv-00167 (N.D. Tex. Dec. 14, 2018)

Importantly, the judge did not issue an injunction barring enforcement of the ACA. In a statement Monday, the Department of Health and Human Services (HHS) reiterated this point and assured industry stakeholders that it "will continue administering and enforcing all aspects of the ACA as it had before the court issued its decision." The White House, echoing this sentiment, has stated that during the appeals process, the ACA will remain in place. It is a near certainty that this decision will be appealed, and it could very well reach the Supreme Court for final review. In the meantime, the future of American health care is as uncertain as ever.

New uncertainties

The potential invalidation of the ACA could affect nearly every provider and stakeholder in the health care industry. From the Medicare Shared Savings Program and the transition to value based health care to the regulation of biosimilar drugs and nursing home quality of care, the ACA has become intertwined with nearly every segment of the national health care system.

With nearly 11 million Americans covered by ACA marketplace plans, even if the ruling is narrowed to only invalidate the portions of the ACA pertaining to insurance marketplace reforms, the effects would be widespread. If these people are left without meaningful access to health insurance, providers could see large increases in the amount of uncompensated care they provide.

Moving forward

Given the procedural posture of the current case, it may be premature for most industry stakeholders to begin strategic planning for the potential invalidation of the entire ACA. As the decision did not resolve all of the plaintiffs' claims, it is not immediately appealable. The judge has ordered the parties to submit a proposed schedule to resolve the outstanding claims by January 4, 2019. Once appealable, the case will almost certainly be appealed to the Fifth Circuit and, from there, to the Supreme Court. It may be 2020 or 2021 by the time a final decision on this case and the fate of the ACA is rendered.

It will be increasingly important for industry stakeholders to monitor Congress' response to this decision and the political climate as it relates to further reform efforts meant to fill the crater that would result from the ACA's invalidation. Already a hot button issue in American politics, the political energy surrounding health care reform is sure to increase as the nation prepares for the 2020 presidential election, with campaigns likely to kick off in Summer 2019.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

- Michael Taubin at **mtaubin@nixonpeabody.com** or (516) 832-7521
- Valerie Breslin Montague at **vbmontague@nixonpeabody.com** or (312) 977-4485
- Ethan Domsten at **edomsten@nixonpeabody.com** or (312) 977-9250