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ACA Intrigue to Continue into 2019 – Federal Court in Texas Issues Ruling with Potentially Far-Reaching Implications for Health Care and Employer Group Health Plans

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Last Friday, a U.S. District Court held in *Texas, et al. v. United States of America, et al.* that the individual mandate in the Patient Protection and Affordable Care Act (ACA) is unconstitutional, and that the other provisions in the ACA are invalid because they are inseparable from the individual mandate. The federal judge left certain issues undecided, and did not issue a final order or grant an injunction preventing enforcement of the ACA provisions.

The U.S. Department of Health and Human Services issued a statement indicating that the decision “is not an injunction that halts the enforcement of the law and not a final judgment. Therefore, HHS will continue administering and enforcing all aspects of the ACA as it had before the court issued its decision.” The Centers for Medicare and Medicaid Services also indicated on its healthcare.gov website that the decision does not impact enrollment or coverage on the health care exchanges for 2019. While it is business as usual for now, this decision is far-reaching and eventually could significantly impact employer health plans, individuals, health care providers, and federal- and state-administered health programs.

Generally, the decision can be summarized in two parts: one with regard to the individual mandate, the other with regard to severability.

Individual Mandate

First, Judge Reed O’Connor holds that the ACA’s individual mandate to purchase health insurance, and the related penalty if an individual does not, can no longer be upheld under Congress’ taxing power since Congress acted to zero out the individual mandate penalty in the Tax Cuts and Jobs Act of 2017. Key to this decision, the federal court finds that the individual mandate continues to obligate individuals to purchase health insurance, despite there being no penalty for not doing so. Drawing on a combination of the majority and dissenting opinions in the U.S. Supreme Court’s 2012 ACA decision, Judge O’Connor concludes that the individual mandate cannot be sustained under the Interstate Commerce Clause, which allows Congress to regulate commerce but not to compel commerce by

forcing individuals to purchase insurance. Thus, *Texas, et al.* holds that “the Individual Mandate, unmoored from a tax, is unconstitutional.”

Severability

The second part of the decision holds that the ACA’s individual mandate provision is not severable from the rest of the ACA. Thus, the remaining provisions of the ACA are invalid. Based on its “plain text” review of Congress’ intent, the federal court determines that the individual mandate is essential to, and must work together with, the ACA’s larger regulation of the health insurance market. In so doing, the court looked to Congress’ statement in the ACA itself that “if there were no individual mandate, individuals would wait to purchase health insurance until they needed care.” The court also noted language from the dissenters’ opinion in the 2012 Supreme Court decision upholding the constitutionality of the ACA, stating that the ACA was designed to spread “its costs to individuals, insurers, governments, hospitals, and employers - while, at the same time, offsetting significant portions of those costs with new benefits to each group.”

Potential Impact

The scope of the ACA is broad, and, in addition to insuring 12 million Americans through the exchange (marketplace) in 2018, includes Medicaid expansion, delivery system reforms, provider quality improvement programs, the employer shared responsibility mandate and related reporting requirements, as well as insurance reforms, such as allowing children under age 26 to remain on their parents’ health plans, restrictions on annual and lifetime dollar limits, and the prohibition against insurers discriminating against those with pre-existing conditions. As many of these provisions have been in effect for almost a decade and have become entrenched into our health care system, were the court’s decision to be upheld, it is difficult to see a clear path to unwind the ACA.

Drinker Biddle Note for Employer Health Plan

Sponsors: *Obligations under the ACA, from the employer shared responsibility mandate to market reform mandates, may end. Other federal and state mandates unrelated to the ACA would remain in place (e.g., COBRA continuation coverage obligations, state insurance coverage mandates). An added complexity in unwinding the ACA is that many pre-ACA obligations were modified (or eliminated) in favor of ACA protections. It is possible that some of those pre-ACA obligations would be reinstated over time.*

States Act Quickly to Clarify and Appeal

Sixteen states and the District of Columbia filed a motion on Monday asking the federal court to clarify that its ruling does not have immediate impact on any legal rights or obligations under the ACA, or alternatively, stay the effect of its decision pending appeal. The 16 states also asked the court to issue a partial final order, or certify the decision for immediate appeal to the Fifth U.S. Circuit Court of Appeals.

What Happens Next?

It is likely that this opinion and order will be appealed, but it is unclear procedurally whether that will happen immediately, or after other claims in the case are addressed at the District Court level. The timing of this case puts its appeal – and the potential implications of an ACA unwind – front and center for the 2020 presidential elections. Some legal scholars have questioned the reasoning of the opinion, for example noting that the Department of Justice position is that the individual mandate penalty is severable from the remaining provisions of the ACA. It remains to be seen which arguments will ultimately win out on appeal. In the meantime, the ruling means the ACA returns to the Congressional agenda in a year and session when both sides were planning to focus on other health care and non-health care issues (e.g., it is expected that both sides and both chambers will hold hearings on the ACA). Given the substantial uncertainty of its fate, and long runway for political and legal reaction, stakeholders have time to think through the implications, clarify their positions, file amicus briefs on appeal, and talk to their legislators.

Drinker Biddle's interdisciplinary team of lawyers and professionals, including our bipartisan public policy and lobbying team, District Policy Group, will continue to follow these and related developments closely and assess the possible future impact on group health plans and the health care industry generally.

Health Care Team

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