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CLIENT ALERT

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Is the Affordable Care Act a House of Cards? If Yes, What Does the Recent Texas Court Decision Mean for the US Health Insurance Market and Employers?

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In an unexpectedly broad ruling issued December 14, 2018, the U.S. District Court for the Northern District of Texas declared the Affordable Care Act ("ACA") as unconstitutional in its entirety.[1] This decision, if ultimately upheld through the appeals process, would eliminate not only the Marketplaces, Medicaid expansion, premium subsidies, employer mandate, and other provisions governing individual insurance and employer-sponsored health plans, but also provisions that created the Center for Medicare and Medicaid Innovation, that apply the Mental Health Parity and Addiction Equity Act to individual and small group plans, that close the Medicare Part D donut hole, and that created an approvals process for biosimilar drugs, among numerous other provisions. Nonetheless, given the form of the judge's order and the near certainty that any impact from the decision will ultimately be stayed while it works its way through the appellate process, the decision will not likely have an immediate effect on the ACA and related programs. In the meantime, the Trump administration has stated that the ruling will have no impact on current year coverage or coverage for 2019 and that the government will continue to enforce the law.[2] Should the administration change course and seek to dismantle the ACA based on the Texas decision, the district court could issue a stay of judgment pending resolution of appeals, or the Fifth Circuit or the Supreme Court could do so.

Set forth below is a discussion of the Texas decision and its potential impact on employer/plan sponsors and other stakeholders.

The Texas Court's Decision

The decision from the Texas court looks back at the Supreme Court's original decision upholding the Affordable Care Act under *National Federation of Independent Businesses*

[1] *Texas, et al., v. United States of America, et al.,* Civil Action No. 4:18-cv-00167-O, (D. Tex, Dec. 14, 2018). This case was brought by the State of Texas and nineteen other states.

[2] See https://twitter.com/SeemaCMS/status/1073792926029885440.

v. Sebelius[3] ("NFIB") as later amended by the Tax Cuts and Jobs Act of 2017[4] ("TCJA"). The NFIB case specifically challenged the constitutionality of the ACA, arguing that the law exceeded Congress' authority as defined under the United States Constitution by mandating that individuals purchase health insurance.[5] The Supreme Court agreed that Congress did not have the authority to require private individuals to engage in a private transaction (that is, purchase health insurance) but the Court upheld the law as a proper exercise of Congress' power to tax. In the view of the Court's majority, Congress created a tax on those who refused to purchase health insurance as defined under the ACA.

After a string of failed efforts to repeal the ACA, through the TCJA, Congress reduced to zero the penalty to be imposed on those who failed to purchase health insurance as defined under the ACA, eliminating its impact but at the same time leaving the mandate intact. The plaintiffs in the present case of *Texas v. US* challenged the constitutionality of the ACA mandate given the "removal" of the "tax" on which the Supreme Court upheld the law in NFIB. In other words, absent the penalty for failing to purchase health insurance, the plaintiffs argued that the law was no longer an exercise of Congress' taxing power and, therefore, should be assessed under other Congressional powers that the Supreme Court had previously found insufficient. The Texas court agreed, finding the post-TCJA ACA mandate to be unconstitutional. More momentously and more controversially, the court also held that the unconstitutional mandate cannot be severed from the rest of the ACA, citing the text of the law itself and Supreme Court decisions describing the individual mandate as essential to the proper functioning of the ACA, and that without the mandate, the entire ACA must fall.

Criticism and Likely Appeal of the Texas Court's Decision

As both liberal and conservative commentators have noted, the Texas court's ruling is extremely weak. In opinion editorials in *The New York Times* and *The Washington Post*, legal scholars that filed amicus briefs on the sides of both plaintiffs and defense in *NFIB v. Sebelius* have criticized the Texas District Court's finding that the individual mandate is not severable from the rest of the ACA. The question of severability hinges on Congressional intent, and the editorial writers argue that it was clear in the TCJA that Congress did not intend to repeal the entirety of the ACA, and in fact had enough votes only to zero out the tax penalty. The Texas judge noted as much in his opinion, writing that: "Congress passed the TCJA through budget reconciliation, which limits congressional action to fiscal matters. … Although Congress was able to revoke the tax penalty, it could not have revoked the guaranteed-issue or community-rating provisions through reconciliation." These critics note that the Texas judge found that Congress simultaneously intended to zero out the tax penalty for breach of the individual mandate, and yet still retain the individual mandate as an essential, non-severable key to the entire ACA, a position that critics assert is nonsensical. (Instead they argue that a far more reasonable interpretation of Congressional intent is that by eliminating the tax penalty—

[3] *National Federation of Independent Business Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519 (2012).
[4] Tax Cuts and Jobs Act of 2017 (P.L. 115-97).
[5] In NFIB, the Court also upheld a challenge to the mandatory nature of the ACA Medicaid expansion, ruling that the provision coerced states into expanding Medicaid programs and was therefore unconstitutional.

effectively severing the individual mandate from the ACA—Congress intended to signal that the individual mandate is severable from the ACA.)

While not legally determinative, it is interesting that previous challenges to the ACA did find the mandate severable from the remainder of the law, including the Court of Appeals for the Eleventh Circuit when deciding the appeal that was subsequently overturned by the Supreme Court as *NFIB v. Sebelius.* The Eleventh Circuit affirmed the lower court's holding that the individual mandate exceeded Congress's legislative powers but found the requirement severable from the remainder of the Act:

> The presumption of severability is rooted in notions of judicial restraint and respect for the separation of powers in our constitutional system. The Act's other provisions remain legally operative after the mandate's excision, and the high burden needed under Supreme Court precedent to rebut the presumption of severability has not been met.[6]

Critics also argue that the plaintiffs in the Texas case lack standing to challenge the constitutionality of the individual mandate because the tax penalty was zeroed out, meaning that the individual mandate has no legal effect. The Texas court's decision notes that standing requires the showing of an injury, and finds that this holding has the effect of freeing plaintiffs from "arbitrary governance." [7] However, critics dispute that the toothless mandate could give rise to an injury to the interests of the plaintiffs, pointing out that the individual mandate is legally moot without a penalty, and therefore argue that plaintiffs lack standing to challenge it.

We expect these criticisms to be examined by the Fifth Circuit on appeal. The Department of Justice, as defendant in this case, did not defend the constitutionality of the individual mandate, and concurred with the plaintiffs that it is not severable from the entirety of the ACA. However, Democratic Attorneys General from 16 states and the District of Columbia were permitted to intervene on behalf of the ACA, and have already stated that they will appeal the Texas District Court's decision.

Meanwhile, a mirror-image lawsuit in Maryland seeks to establish that the ACA remains constitutional and enforceable—or alternatively that the elimination of the tax penalty in the TCJA is unconstitutional—and to compel the Trump administration to enforce the ACA.[8] It is unknown when a decision may be reached in that case—the court may first have to rule on the plaintiff's request for an injunction to prevent acting Attorney General Matthew Whitaker from representing the Department of Justice, alleging violations of the appointments clause and various federal laws—but the judge in that case has requested counsel to notify her immediately of any decision in *Texas v. U.S.*

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[6] *Florida v. U.S. Dep't of Health and Human Services*, 648 F. 3d 1235, 1328 (2011).
[7] The order found standing for the two individuals who were joined to the lawsuit but was silent as to the standing of the 18 Republican Attorneys General and two governors who originated the lawsuit.
[8] *Maryland v. U.S. Dep't of Health and Human Services, et al.,* 1:18-cv-02849, (D. MD 2018).

Posture and Reach of the Texas Court's Decision

The Texas court's order finding the post-TCJA ACA to be unconstitutional is national in scope, but it came in the form of a declaratory judgment without injunctive relief. Accordingly, it will have no immediate impact on the programs and requirements effectuated under the ACA. Also of note, the declaratory judgment entered this past Friday may not be immediately appealable, given that it only resolves only the first of five complaints filed by the sixteen state plaintiffs, and an order issued yesterday requires the parties to submit a schedule for resolving the remaining claims.

Employer/Plan Sponsor Takeaways

Following the path of this decision will surely be of interest to all employers since, if the district court's decision is upheld, it will have significant implications on employers' obligations and the group health plans that they sponsor.

For example, under the ACA, in order to avoid applicable employer shared responsibility penalties, applicable large employers ("ALEs")—those employing on average at least 50 full-time employees and full-time equivalents in the prior calendar year—are required to offer "minimum essential coverage" to at least 95 percent of their full-time employees (and their dependents) that is "affordable" and provides "minimum value." If the district court's decision is ultimately upheld, employers would once again have greater flexibility to determine eligibility for group health plan coverage without fear of tax penalties and to provide group health plan coverage without regard to whether it meets "affordability" or "minimum value" requirements. In addition, employers and other plan sponsors would no longer have reporting obligations associated with those requirements.

In addition, employers and other plan sponsors of group health plans are subject to various insurance market reforms under the ACA, such as:

- Prohibition on pre-existing condition exclusions;
- Dependent coverage until age 26; and
- Various rules related to cost-sharing (such as no cost-sharing on preventive services, limits on out-of-pocket maximums for in-network benefits, and no annual or lifetime limits).

To the extent that any ultimate decision upholds the unconstitutionality of the ACA in its entirety, employers and plan sponsors will have greater plan design flexibility. However, given the popularity of many of the law's provisions (such as dependent coverage until age 26 and protections for those with pre-existing conditions), it is possible that employers and plan sponsors will wish to exercise their discretion to maintain those provisions. In addition, Congressional action would possibly be taken to re-enact the ACA's more popular provisions, or states could take a more activist approach and enact provisions mirroring certain of ACA's insurance market requirements under state law.

Finally, the ACA made various changes to the Internal Revenue Code. To reduce health care costs and raise revenue for insurance expansion, the ACA imposed an excise tax on high-cost health plans (the so-called "Cadillac Tax," the effective date of which has been delayed several times). To raise additional revenue for health care reform, the ACA imposed excise taxes on health insurers, pharmaceutical companies, and manufacturers of medical devices; raised taxes on high-income families; and increased limits on the income tax deduction for medical expenses. It also implemented new limits and restrictions on health flexible spending accounts and health savings accounts. Presumably, these limits, restrictions, and taxes would be eliminated.

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Given the form of the district court's decision and the likelihood of appeal, employers and other plan sponsors should consider staying the course on their ACA compliance for now, pending the outcome of the litigation. Moreover, as the court did not enjoin the ACA, the law currently remains in effect in all fifty states and D.C. This means that employers should continue, among other things, to prepare for Form 1094/1095 reporting for 2018 to the IRS and to individuals, the deadline for which was recently extended as reported here.

While the Texas decision may again raise the anxiety of private individuals, health care providers, and other stakeholders in the health insurance market and cast uncertainty on reporting obligations and coverage requirements applicable to employer-sponsored health plans, this case will need to make its way through the appeals process to determine whether it will have any lasting impact. In the meantime, private individuals, health care providers, insurers, investors, employers and other stakeholders should continue to monitor this case, the Maryland lawsuit, and the enforcement posture of the Trump administration for further developments and should abide by the requirements of the ACA as currently interpreted and applied at the federal and state level.

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