FIFTH CIRCUIT ISSUES DECISION ON THE CONSTITUTIONALITY OF THE ACA: WHAT TO EXPECT NEXT

Date: 20 December 2019

U.S. Public Policy and Law and Health Care Alert

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On December 18, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued its long-awaited decision in *Texas v. United States*. [1] The Fifth Circuit held that the Affordable Care Act's ("ACA") individual mandate to maintain health insurance is unconstitutional because it can no longer be justified under Congress' taxing power after the penalty for failing to comply with the mandate was set to zero dollars. The Fifth Circuit, however, vacated the district court's ruling that required striking down the rest of the ACA. It remanded the case to the district court for a careful and complete analysis as to which provisions of the ACA are inseverable from the individual mandate and thus would have to be struck down with it. The district court will also have to determine whether any relief should be limited to residents of the Plaintiff states or to those who can show actual harm from the mandate. Although the long-term future of the ACA is likely to remain uncertain in 2020, the Fifth Circuit's ruling is poised to shape the health policy debate. The K&L Gates' Public Policy and Law and Health Care and FDA practices are ready to assist stakeholders assess the potential impact of the ruling and engage in the health policy debate.

BACKGROUND

National Federation of Independent Business v. Sebelius

In 2012, the Supreme Court upheld the ACA's individual mandate to maintain health insurance as a constitutional exercise of Congress' taxing powers. In the opinion, Chief Justice Roberts noted that "[t]he most straightforward reading of the [individual] mandate is that it commands individuals to purchase insurance." [2] In this regard, the Court found that the mandate could not be upheld as a valid exercise of Congress' power under the Commerce Clause because the clause does not give Congress the power to compel commerce. [3] The Court also found that it could not be upheld under the Necessary and Proper Clause because it greatly expanded federal power. [4]

However, the Court ultimately found that the individual mandate could be read as an option to purchase insurance or pay a tax that is justified under Congress' taxing powers. Most importantly, the Court reasoned, the penalty yields "the essential feature of any tax: it produce[d] at least some revenue for the Government." [5] The penalty is also "paid into the Treasury by taxpayers." [6] Moreover, the penalty amount is "determined by such familiar factors as taxable income, number of dependents, and joint filing status." [7] Finally, the "requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which collected it in the same manner as taxes." [8]

2017 ACA Amendments and Texas v. United States

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In 2017, after numerous attempts to rollback the ACA, Congress set the amount that an individual must pay for failing to comply with the individual mandate to the lesser of “zero percent” of an individual's household income or “0,” effective January 2019. [9] Shortly thereafter, 18 states and two private citizens brought suit in federal district court arguing, in part, that the individual mandate is no longer constitutional because the 2017 amendments to the ACA undermined the reading of the mandate as a tax. [10] Plaintiffs also argued that the individual mandate is essential and inseverable from the rest of the ACA, requiring the entire law to be struck down.

The district court held that the 2017 amendments setting the amount for failing to comply to zero rendered the individual mandate unconstitutional. [11] In addition, the court held that the individual mandate could not be severed from the rest of the ACA, and thus declared the entire Act invalid. [12] The district court did not enjoin enforcement of any portion of the Act, however, entering a partial final judgment and staying that judgment pending appeal.

FIFTH CIRCUIT'S RULING

Constitutionality of the Individual Mandate

Affirming the district court's ruling, the Fifth Circuit found that the 2017 amendments undermine the reading of the individual mandate as an option to purchase insurance or pay a tax. The Fifth Circuit noted that the tax attributes that the Supreme Court had identified in upholding the mandate no longer exist. In particular, the provision no longer produces “at least some revenue for the Government.” [13] As a result, it is no longer “paid into the Treasury by taxpayers” and the amount is no longer “determined by such familiar factors as taxable income, number of dependents, and joint filing status.” [14] Finally, the Internal Revenue Service cannot collect payment in the same manner as taxes. [15]

Severability and Proper Scope of Relief

The Fifth Circuit vacated, however, the district court's ruling that the rest of the ACA should be struck down as well. The Fifth Circuit noted that “it is no small thing … to declare duly enacted legislation passed by the elected representatives of the American people unconstitutional,” adding that the rule of law demands a “precise explanation of whether the provisions of the ACA are affected by the unconstitutionality of the individual mandate as it exists today.” [16]

In this regard, the Fifth Circuit criticized the district court for not explaining fully how particular sections of the ACA “rise or fall on the constitutionality of the individual mandate.” [17] The Fifth Circuit also noted that the district court focused on the 2010 Congress' description of the mandate as “essential” to the goal of “creating effective health insurance marketplaces,” without discussing the post-2017 ACA scheme, and in particular that Congress' decision to keep the rest of the Act in place while zeroing out the mandate. [18] Accordingly, the Fifth Circuit remanded the case to the lower court to explain with precision how the rest of the ACA is affected by the individual mandate, and the proper scope of relief.

WHAT TO EXPECT IN 2020

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Heading into 2020, the long-term future of the ACA remains uncertain. As an initial step, the district court must address the severability question and proper scope of relief, and its decision on that point will almost certainly be appealed again to the Fifth Circuit. California Attorney General Xavier Becerra, who has led a coalition of states in defending the ACA, has stated that he will petition the Supreme Court to hear the case, given the harms caused by the continuing legal uncertainty. [19] The Supreme Court does not have to take the case, and may choose not to weigh in while the matter is still before lower courts. In either case, it is expected to be at least a year before any provisions of the Act could potentially be enjoined.

Even though we do not expect near-term disruption of the ACA for at least a year, the Fifth Circuit's ruling is poised to shape the health policy debate in 2020 and to influence the coming elections. Shortly after the Fifth Circuit issued its ruling, the White House issued a statement supporting the decision while emphasizing that it would not immediately affect anyone's health care. [20] The White House has not advanced an ACA replacement plan to date, but the ruling may prompt the White House to formally endorse an alternative, such as the plan recently released by the Republican Study Committee, or to release a new proposal. It is also likely to play into the current debate leading up to the Presidential election surrounding options to expand public insurance, including Medicare-for-all, Medicare-for-more, and the public option. These discussions will likely set the stage for legislation to be proposed and considered after the Presidential election next November.

CONCLUSION

As the health policy debate intensifies in 2020, stakeholders should assess the likely impact of *Texas v. United States* and the possibility of health reform more broadly. The present uncertainty concerning the health policy landscape only highlights the importance of staying engaged and active as policy proposals begin to take shape. K&L Gates' Public Policy and Law and Health Care and FDA practices are ready to assist stakeholders engage in the debate on these proposals and develop government relations and regulatory strategies to position them in the years ahead.

NOTES:

[1] *See* Texas v. United States, No. 19-10011 2019, U.S. App. LEXIS 37567 (5th Cir. Dec. 18, 2019).
[2] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012).
[3] *Id.* at 552-555.
[4] *Id.* at 560.
[5] *Id.* at 563-564.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).
[10] *See* Texas v. United States, 340 F. Supp. 3d 579 (N.D. Tex. 2018).
[11] *Id.* at 598.
[12] *Id.* at 608-610.

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[13] *See* Texas, slip op. at 38.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 60.
[17] *Id.* at 51.
[18] *Id.*
[19] *See* Press Release, State of California Department of Justice Office of the Attorney General, *Attorney General Becerra: Life Without Healthcare Is Not an Option, We Continue the Fight to Protect Americans' Healthcare*, https://oag.ca.gov/news/press-releases/today-attorney-general-becerra-hold-press-conference-aca-case (last accessed Dec. 18, 2019).
[20] *See* White House, Statement by the President, https://www.whitehouse.gov/briefings-statements/statement-by-the-president-31/ (last accessed Dec. 18, 2019).

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