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ACA Still In Force, But With Uncertain Fate

Charmaine Naut | Capital Management Enterprises, Inc | 610-265-9677 | cnaut@cme-group.com

On December 14, 2018, a Texas district court invalidated the entire Affordable Care Act (“ACA”). This includes the Individual Mandate, Employer Penalty, mandated benefits such as the prohibition against preexisting condition exclusions, taxes such as the PCOR fee, the establishment of the Marketplace and offering of subsidies, and reporting such as Form 1095-C reporting. The ruling does not constitute a final determination and the decision will be appealed. Therefore, there is no immediate impact.

Absent further direction, all provisions of the ACA remain in effect, including:

- The Employer Mandate and associated annual reporting on Forms 1094-C and 1095-C (due to employees by March 4, 2019 for calendar year 2018).
- Insurance market reforms, including the prohibition on preexisting condition exclusions, limitation on waiting periods, prohibition on lifetime and annual dollar limits, and coverage for children up to age 26.
- Availability of premium tax credits to assist certain low-to-middle income individuals in purchasing health insurance through the Marketplace.

This article summarizes this history of the challenges to the ACA and the potential effect a final ruling may have on its future.

Background

One of the ACA's major provisions is that Americans must have health insurance or pay a penalty. That provision was challenged and, on June 28, 2012, the Supreme Court ruled that the Individual Mandate is not a valid exercise of Congress' power under the Commerce Clause (i.e., the federal government cannot force individuals to buy insurance), but nevertheless upheld it due to Congress' power under the Taxing Clause (i.e., the federal government has broad authority to monetarily penalize individuals).

Numerous efforts to repeal the ACA have all failed. However, in December 2017, Congress, through the Tax Cuts and Jobs Act, changed the Individual Mandate Penalty to \$0, beginning January 1, 2019.

In a renewed effort to strike down the ACA, on February 26, 2018, Texas Attorney General Ken Paxton and 19 other Republican state attorneys general filed a lawsuit which charged that Congress' changes to the law in last year's tax bill rendered the entire ACA unconstitutional. The reasoning is as follows:

- **Step One:** If the Individual Mandate, per the Supreme Court, is only constitutional because it constitutes a tax, and if that tax has effectively been eliminated, then the Mandate sans tax that remains on the books is therefore unconstitutional.
- **Step Two:** Invalidating the Mandate should invalidate the whole ACA because the law cannot function the way Congress intended without the Mandate in place.

On June 7, 2018, in a departure from the Justice Department's custom of fighting to uphold all reasonable laws, then U.S. Attorney General Jeff Sessions indicated

in a brief that it would not participate in the defense of this lawsuit. While the Administration did call on the court to invalidate the Individual Mandate, guarantee issue requirement, and community rating requirement, it indicated that the remaining provisions should stand. It also asked the court to hold off on a broad ruling until after December 15, the end of this year's Marketplace open enrollment period, to avoid introducing "chaos in the insurance markets."

In May 2018, the court allowed the attorneys general from Democratic-leaning states to "intervene" in the case and defend the law. California Attorney General Xavier Becerra led the challenge with 15 other states and the District of Columbia. They refuted the Republican attorneys' general claim, noting that the ACA and its Individual Mandate have already survived two reviews by the Supreme Court and over 70 unsuccessful repeal attempts in Congress.

In addition, there is ongoing parallel litigation over the DOJ's decision not to defend the ACA.

The December 14, 2018 Decision

In *Texas v. Azar*, Judge O'Connor, a George W. Bush appointee who sits in the Northern District of Texas, came to three conclusions:

- the plaintiffs had standing to sue so the case was properly before the court;
- with the penalty at \$0, the Individual Mandate is no longer permissible under Congress' taxing power and is unconstitutional; and
- the Individual Mandate is essential to and inseparable from the entire ACA, meaning the entire ACA is invalid.

Judge O'Connor's ruling does not enjoin the ACA which means that the ACA's provisions remain in effect for the time being.

From here, the case will likely move to the Fifth Circuit Court of Appeals and then the Supreme Court where a final decision might not be made until 2020 or later.

Next Steps

While impossible to determine the final outcome, Judge O'Connor's arguments have been met with criticism, even by conservative legal scholars. In *King v. Burwell* (the most recent case before the Supreme Court challenging the validity of the ACA), Chief Justice Roberts alluded that the Court's current majority favored keeping the law intact:

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.

If the ACA is invalidated, the effects will be far-reaching, with the ACA touching almost every aspect of the American health care system (e.g., community rating and Medicaid expansion). In part, it would significantly impact employers who, among other things, would no longer have to evaluate affordability, define full-time employees as those working at least 30 hours per week, limit their waiting periods to 90 days, or file Forms 1095-C.

We will be monitoring this litigation and provide updates of further developments.