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Fifth Circuit Rules ACA Individual Mandate Unconstitutional; Other Provisions Intact For Now

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QUICK FACTS

- A Circuit Court has ruled that the ACA's individual shared responsibility mandate is unconstitutional, in agreement with an earlier District Court ruling.
- But the Circuit Court sent the case back to the District Court to reconsider whether the unconstitutionality of the individual mandate means that the entire ACA is unconstitutional.
- The case is likely to remain in litigation for the foreseeable future, as court decisions will likely continue to be appealed.
- In the meantime, all ACA employer obligations, such as the employer shared responsibility mandate and ACA reporting remain intact, as do all existing market reform rules.

The U.S. Court of Appeals for the Fifth Circuit (Circuit Court) on December 18, 2019, issued its long-awaited opinion in *Texas v. Azar* -- the case challenging the Patient Protection and Affordable Care Act (ACA) on constitutional grounds. The Circuit Court agreed with the portion of the U.S. District Court for the Northern District of Texas's (District Court) December 2018 opinion that the individual shared responsibility mandate is unconstitutional because the Tax Cuts and Jobs Act of 2017 (TCJA) zeroed it out. The litigation will continue, however, because the Circuit Court has remanded the case to the District Court for it to reconsider whether some or all of the ACA can survive with no individual mandate.

BACKGROUND

The ACA became law nearly a decade ago, ushering in a new age in American health care. Among its many provisions, the ACA included a so-called individual mandate which required most individuals to maintain health insurance coverage or make a shared responsibility payment to the IRS.

ACA opponents almost immediately challenged the ACA in general, and the individual mandate in particular, as an overreach of congressional authority. Legislative efforts to undo the ACA culminated in 2017 in a highly publicized push to repeal and replace the entire law; however, the law survived relatively intact.

Challengers also attacked the ACA in court, eventually leading to the watershed U.S. Supreme Court decision in *National Federation of Independent Business v. Sebelius (NFIB)* in 2012. The Supreme Court ruled in *NFIB* that the individual mandate was constitutional because it could be read as a tax on an individual's decision not to buy health insurance and,

therefore, was a proper exercise of congressional tax powers. Importantly, the Supreme Court opinion stated that the individual mandate would be unconstitutional if not for reading it as a tax.

In December 2017, Congress passed the TCJA, which effectively eliminated the individual mandate by reducing it to $0 as of January 1, 2019. Shortly thereafter, two individuals and 18 state attorneys general filed a lawsuit asking the District Court to rule that the individual mandate having been set to $0 rendered it unconstitutional because it no longer bore the hallmark of a tax – generating revenue – which was the only reason the Supreme Court had upheld it in *NFIB*. The plaintiffs further argued that the individual mandate could not be removed from the ACA, so the entire law should be deemed unconstitutional.

The District Court agreed with the plaintiffs, specifically holding that setting the individual mandate to $0 rendered it unconstitutional, and the unconstitutional provision could not be severed from any other part of the ACA. The District Court did not pronounce a final judgment on these issues, instead staying its judgment pending appeal – which occurred soon after the District Court issued its opinion.

On appeal, the defendants – U.S. Department of Health and Human Services, the IRS, and attorneys general from 16 states and the District of Columbia – have offered several defenses including the latest arguments that the judgment should be limited to remedies that actually address injuries to the two named plaintiffs, and that the judgment be enforced only in those states that filed the lawsuit.

CIRCUIT COURT MAJORITY OPINION

The Circuit Court, in a 2-1 majority opinion, has agreed with the District Court and ruled that the individual mandate can no longer be viewed as a proper exercise of Congress' tax powers. The Circuit Court refers to the *NFIB* opinion's four reasons justifying the individual mandate as a proper exercise of tax powers:

- It generates revenue;
- Taxpayers pay it to the IRS with their tax returns;
- The amount of the payment hinges on factors like taxable income, number of dependents and filing status; and
- It is written into the Internal Revenue Code and enforced by the IRS.

The Circuit Court reasons that all four factors no longer exist with the individual mandate having been reset to zero, so it cannot be seen as a legitimate exercise of taxing power. The Circuit Court concludes that the individual mandate is unconstitutional because, as the *NFIB* court ruled, neither the Interstate Commerce Clause nor the Necessary and Proper Clause of the Constitution support it.

The opinion then addresses whether, or how much of, the rest of the ACA can survive without the unconstitutional individual mandate. Rather than perform this analysis, the Circuit Court has sent the case back to the District Court with an order to explain more precisely what aspects of the ACA following the TCJA can be separated from the individual mandate, and whether the District Court's relief should be limited to stopping only the elements of the ACA that actually injure the two named plaintiffs and, if the entire law is unconstitutional, should that ruling be enforceable only in the 18 states that filed the lawsuit.

The Circuit Court analyzes the history of judicial severability and states that the District Court is better equipped to analyze whether the individual mandate can be severed from any or all of the rest of the law. The Circuit Court then states a two-part severability test under which it says the District Court must determine whether the law without the individual mandate would still operate in a manner consistent with Congress' intent, and whether Congress would have enacted the remaining provisions without the individual mandate.

Though the Circuit Court admits that severability analysis is particularly vexing, it charges the District Court to perform a more careful, granular analysis than the Circuit Court sees in the original opinion. Perhaps shedding some light on how the Circuit Court might eventually view the matter, it notes that the District Court failed to give weight to how the individual mandate fits with the remaining provisions of the ACA as regulated post-2017.

The Circuit Court repeatedly refers to the District Court having originally focused too much on the intent of the 2010 Congress and notes that it now should pay particular attention to the 2017 Congress which took steps to address the amount of the mandate but not the other provisions of the law. The Circuit Court also declares that the District Court should do far more to explain how particular segments of the 900-page ACA are inextricably linked to the individual mandate. Ultimately stating:

> "We [direct] the district court to employ a finer-toothed comb on remand and conduct a more searching inquiry into which provisions of the ACA Congress intended to be inseverable from the individual mandate. . . . It may still be that none of the ACA is severable from the individual mandate, even after this inquiry is concluded. It may be that all of the ACA is severable from the individual mandate. It may also be that some of the ACA is severable from the individual mandate, and some is not. But it is no small thing for unelected, life-tenured judges to declare duly enacted legislation passed by the elected representatives of the American people unconstitutional. The rule of law demands a careful, precise explanation of whether the provisions of the ACA are affected by the unconstitutionality of the individual mandate as it exists today."

CIRCUIT COURT DISSENTING OPINION

In a strongly worded dissenting opinion, Justice King, states that the analysis should begin and end with the decision in *NFIB*. The dissent reminds the court that the Supreme Court ruled that the ACA's coverage requirement would be unconstitutional if it were a command, but that it was not a command because it merely presented individuals with the choice to get insurance or pay a tax to the IRS. That choice remains, according to the dissent, so it should likewise remain constitutional.

The dissent also states that the case should be dismissed because the plaintiffs do not have the right to bring their claims on the issue. The dissent reasons that the TCJA did not change the operation of the ACA's coverage requirement. Rather, Congress now simply requires an individual to pay nothing for choosing not to have coverage. So the challenged provision actually does nothing at all, which the dissent notes should end the analysis because no one can challenge a law that does nothing.

The dissent then addresses the merits of the majority opinion and responds that TCJA changed neither the text nor the meaning of the ACA's coverage requirement, but only changed the effect it produces. In essence, the choice to purchase insurance or not remains, and there is no impermissible coercion to purchase insurance.

Moreover, the dissent notes that the coverage requirement and the shared responsibility payment are distinct. Congress in 2017 determined to alter one of the distinct provisions – the payment – but not the other. Thus, the court has a clear insight as to Congress' intent, and it should be clear that Congress did not intend to turn a nonmandatory provision into a mandatory one by eliminating the only means of incentivizing compliance. Congress, states the dissent, in effect declawed the ACA's coverage provision without repealing any other part of the law; thus, its intent requires no judicial guesswork to find that Congress believed the ACA could stand without the unenforceable coverage requirement.

The dissent concludes by pointing to the prong of the long-accepted judicial severability test under which remaining provisions in a law are presumed severable from unconstitutional provisions unless it is clear that Congress would have preferred no law over the law with only the permissible provisions. The dissent reiterates that the ACA is obviously and easily severable because Congress in 2017 effectively declared its intent to keep the ACA intact when it only changed the shared responsibility payment provision.

KEY TAKEAWAYS

The Circuit Court's opinion does not make the entire ACA unconstitutional -- the majority merely agreed that the individual mandate is unconstitutional and did not address the balance of the law. Further, the opinion does not mean that any federal agency will stop enforcing other ACA provisions, such as the employer shared responsibility rules.

The key takeaway for employers is that, for now and the foreseeable future, the ACA's employer and health plan obligations remain intact. Thus, applicable large employers (ALEs) still must offer health coverage to full-time employees and their children up to age 26. Plans will still need to comply with various market reform rules regarding pre-existing conditions and lifetime limits. Administrators still must track employee hours, file ACA Forms 1095/1094 with the IRS and comply with other requirements like issuing Summaries of Benefits and Coverage (SBCs). Finally, employers will need to diligently respond to IRS inquiries about reporting failures or shared responsibility payment assessments.

In other words, status quo is the watchword as we await the next phases of the ongoing court case. As the dissenting opinion states, the majority's decision to remand the case "ensures that no end for this litigation is in sight." We will continue to monitor this case as it heads back to the District Court and likely eventually winds up being appealed again.

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