

Health Care Reform Management Alert Series



Texas Judge Rules That The Affordable Care Act (Obamacare) is Unconstitutional -- Without Consequence (For Now) Issue 118

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On December 14, 2018, District Judge Reed O'Connor of the United States District Court for the Northern District of Texas ruled that the Affordable Care Act or ACA (a/k/a "ObamaCare") is unconstitutional and therefore invalid. The lawsuit, *Texas v. United States*, was commenced by a number of states and two individuals.

The reasoning of Judge O'Connor is straightforward:

- We are a nation of limited Congressional authority. If Congress is to act constitutionally, it must find a basis to do so in the Constitution.
- In 2012, in what is known as the NFIB case, the Supreme Court upheld the constitutionality of the individual mandate by saying that its individual mandate imposed a tax on those who did not buy ACA-approved insurance. A majority of the Supreme Court thus reasoned that the individual mandate represents a legitimate exercise of the Congressional power in the Constitution to levy taxes.
- At the time, the Solicitor General (arguing on behalf of the Obama administration) argued that the individual mandate was inseparable from the prohibition on pre-existing condition exclusions, meaning if the Court were to deem the individual mandate unconstitutional, other provisions of the law would likely have been struck down as well.
- In 2017, as part of the Republican tax cuts law known as the Tax Cuts and Jobs Act or TCJA, Congress reduced the ACA individual mandate tax to \$0, but did not repeal the mandate itself.
- The Constitution's taxing power cannot, after the TCJA eliminated the tax, be used to make the ACA constitutional because a tax is not a tax if there is no revenue generated -- it is more of a penalty.
- A majority of the Supreme Court in NFIB said that the Constitution's Commerce Clause power did not extend to mandating that Americans buy products, so there is no Constitutional underpinning for the ACA after the taxing power becomes irrelevant by virtue of TCJA.
- Lastly, the entire ACA, as opposed to just the individual mandate (or directly related provisions) is invalid because Congress, as recognized by the Supreme Court in NFIB, said that the individual mandate is essential to the ACA. (Thus, if you take away the mandate, Congress would intend that the entire ACA fails.)

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Judge O'Connor ruled on summary judgment, and did not enjoin the federal government from enforcing the non-individual mandate aspects of the ACA. Thus, he has not (yet) granted the plaintiffs' request for an injunction.

There are at least two aspects of this decision that present serious issues on appeal. First, the Supreme Court requires an injury in fact to sue in federal district court. If TCJA removes any possibility of a tax penalty, where is the injury? Second, if the individual mandate is essential to the ACA, why did Congress choose to keep the ACA in place in 2017 when it enacted TCJA?

The Trump Administration has announced that it will continue to enforce the ACA notwithstanding Judge O'Connor's decision. So, *Texas v. United States*, so far, has changed nothing.

Once a final judgment is issued in *Texas v. United States*, it may be appealed to the Court of Appeals for the Fifth Circuit, and perhaps then to the Supreme Court. It is possible, given how litigation moves in the Courts, that the Supreme Court could be considering this decision at the time of the 2020 election.

Although nothing now changes by virtue of *Texas v. United States*, the decision reopens the intense political discussion about how to legislate health care in this country. We can expect at times bitter political debate about "saving" the ACA, as well as about replacing it with ostensibly more patient-directed health care initiatives (such as expanded HSAs) or with a Single Payer system -- "Medicare for All". In sum, stay tuned. We will keep you advised of the coming political developments.

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