Affordable Care Act Hanging by a Thread in the Legal Tug of War

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In 2018, the Trump Administration issued a number of new regulations that gutted the Affordable Care Act (ACA) by effectively eliminating the ACA's safeguards and benefits. A multitude of lawsuits brought by cities, states and health plans challenging these administrative initiatives quickly followed suit. This post provides a litigation update on the prominent cases that highlight these challenges. There are three primary categories of lawsuits at issue: (1) state challenges on the constitutionality of the ACA's Individual Mandate; (2) city challenges on the Trump Administration's regulatory initiatives; and (3) private insurer lawsuits seeking federal claim payments under the ACA.

State Challenges on the Constitutionality of the ACA's Individual Mandate

In the landmark case, Texas v. Azar, Texas and nineteen other states claim the Tax Cuts and Jobs Act of 2017 zeroed out the individual mandate penalty and thus rendered the entire ACA unconstitutional. In United States v. Sibelius, a previous ACA challenge, the Supreme Court held the ACA was constitutional because the law was a proper exercise of Congress's power to tax. Plaintiffs argue that the removal of the individual mandate penalty and thus the tax element of the law means the remainder of the Affordable Care Act is unconstitutional and should be struck down in its entirety. In response to this challenge, seventeen Democratic State Attorney Generals joined together to defend the ACA. Simultaneously, Maryland filed a lawsuit seeking declaratory relief that the ACA was constitutional. That lawsuit has been dismissed, after Maryland's federal court held that Maryland lacked standing to bring the suit.

In December 2018, however, Judge Reed O'Connor of the Northern District of Texas sided with Plaintiffs in Texas v. Azar, and held the entire ACA was unconstitutional.

The Department of Justice and the seventeen Democratic states immediately appealed the decision to the Fifth Circuit. In January 2019, The United States House of Representatives filed a motion to intervene in the proceedings as defendants under Federal Rule of Civil Procedure Rule 24(a) and (b). In its motion, the House seeks to exercise its right to intervene and defend the ACA's constitutionality, as the House's interests likely will diverge in important respects from those of the Intervenor States.

In another blow to the ACA, the Department of Justice (DOJ) announced on March 25 that it agrees with the district court decision and will no longer defend the law on appeal. Meanwhile, the House and intervening State Defendants submitted their opening brief to the Fifth Circuit, asserting three main arguments. First, the Plaintiffs have not established standing because a statutory provision that gives individuals a choice between purchasing health insurance and doing nothing does not impose any legal harm. Second, the minimum coverage provision remains constitutional even though Congress has reduced the amount of the alternative tax to zero. Finally, even if the Court holds the minimum coverage provision as unconstitutional, it is readily severable from the rest of the ACA. The Fifth Circuit has granted the government's unopposed motion to speed up the appeal and has set oral arguments for July 2019.

City Challenges on the Trump Administration's Regulatory Initiatives

City of Columbus v. Trump is the case to watch for in terms of city challenges against the Trump Administration's regulatory initiatives. In August 2018, four cities – Baltimore, Chicago, Cincinnati, and Columbus – along with two private individuals – brought a lawsuit against the Trump Administration claiming the Administration's actions regarding the ACA violate the Constitution's Take Care Clause. Specifically, the cities assert the President is not fulfilling his duty to "take care that the laws be faithfully executed" by undermining and sabotaging the ACA via regulatory action and argue this is an improper exercise of power under the Take Care Clause. Plaintiffs seek declaratory relief and ask the Court to prevent the government from implementing executive orders and to direct the government to faithfully execute

the ACA.

In December 2018, the Trump Administration moved to dismiss the lawsuit arguing the Plaintiffs lack standing and that the Trump Administration has discretion to issue these regulations. The DOJ also asserts that the President cannot be enjoined in performing his official duties and that there is no private right of action under the Take Care Clause. Plaintiffs filed an amended complaint in January 2019 addressing these arguments. Plaintiffs also added the city of Philadelphia as a party. In March, the DOJ moved to dismiss the amended complaint citing the same defenses. Plaintiffs have until May 1, 2019 to respond to Defendant's motion to dismiss.

Lawsuits Brought by Insurers Seeking Payment of Claims Under the ACA

- Cost-Sharing Reduction Payments

Cost-Sharing Reduction Payments (CSRs) are payments that reward insurers for reducing deductibles, copayments, and coinsurance for enrollees with incomes below 250% of the federal poverty level. In one of his regulations seeking to undermine the ACA, President Trump ordered the Department of Health and Human Services (HHS) to stop making CSR payments to insurers, claiming the Department lacked appropriation from Congress for these payments. In response, insurers brought suit against the administration for unpaid CSRs. As of date, six insurers – including Montana Health CO-OP, Sanford Health Plan, and Common Ground Healthcare Cooperative (a class action that includes more than 90 insurers) – have succeeded in their challenges over unpaid CSRs. In each case, the court held Section 1402 of the ACA requires the federal government to make CSR payments for 2017-2018. Specifically, Section 1402 of the ACA sets forth an unambiguous mandate that the government must make timely CSR payments regardless of whether they are explicitly appropriated by Congress. The government is not relieved of this statutory duty because Congress did not explicitly appropriate funds for CSRs. HHS immediately appealed the holdings in the Montana Health CO-OP and Sanford Health Plan decisions to the Federal Circuit, which have since been consolidated.

- Risk Corridors

The ACA's temporary risk corridor program was designed to discourage insurers from setting high premiums in the early years of the exchanges (2014-2016). Under Section 1342 of the ACA, marketplace insurers are incentivized to spend 80% of premium dollars on healthcare and quality improvement. If insurers meet this target, Section 1342 requires the government to make full risk corridor payments. However, in 2018, Congressed passed appropriation riders limiting HHS risk corridor payments from the funds it collected from insurers. In Moda Health Plan Inc., v. United States, insurers brought suit alleging the government violated Section 1342 of the ACA by failing to make risk corridor payments.

On June 14, 2018, the Court of Appeals for the Federal Circuit held the government does not have to pay health insurers offering qualified health plans the full amount owed under the risk corridor program. Chief Judge Prost explained the risk corridor program does not impose an official contractual agreement between HHS and health plans for the full amount of rick corridor payments. Instead, he asserts it is an incentive program that imposes no obligation because the government did not provide budgetary authority to HHS to administer the payments. Additionally, the Federal Circuit Court held HHS has already paid a satisfactory amount to insurers. This marked the first victory for the Government in risk corridor litigation. Unsurprisingly, Moda Health Plan appealed the decision to the Supreme Court on February 4, 2019. The question presented before the Supreme Court is whether Congress can use its appropriation power to amend or repeal unambiguous statutory payment obligations and whether Congress may apply such change retroactively.

- Risk Adjustments

Lastly, insurers have brought suits against the government alleging violations of the ACA's risk adjustment program. The risk adjustment program establishes rules that prohibit risk selection by insurers. Specifically, the program transfers funds from plans with lower-risk enrollees to plans with higher-risk enrollees. Under Section 1343 of the ACA, HHS is tasked with developing standards for the risk adjustment program. The risk adjustment program applies to non-grandfathered plans in the individual and small group insurance markets, both inside and outside of the exchanges. In New Mexico Health Connections v. United States Department of

Health and Human Services, et al., a New Mexico Health plan brought suit arguing the Department's final rule on 2017 risk adjustment, which bases fund transfers on statewide average premiums and not on each plan's premiums, violates the Administrative Procedure Act and the Due Process Clause under the Fifth Amendment.

On February 28, 2018, the District Court of New Mexico granted partial summary judgement for New Mexico Health Connections.Judge Browning concluded that HHS' decision to use statewide average premiums in the risk adjustment formula—instead of using each plan's premium—was arbitrary and capricious. He set aside this component of the formula and remanded the case to HHS to address the court's concerns. The Federal Government appealed the decision to the Tenth Circuit. The Tenth Circuit requested the parties show the case is ripe for review since Judge Browning vacated part of the risk adjustment methodology and remanded the case to HHS. During this litigation, HHS released another final rule, which justified its risk adjustment methodology for 2017. New Mexico Health Connections brought a second suit challenging the second final rule. The second case has been stayed by Judge Browning while the original lawsuit is on appeal.

Conclusion

The issues litigated in Texas v. Azar will likely make their way to the Supreme Court. As the ultimate Supreme Court decision will not occur for some time, with the ACA's constitutionality hanging in the balance, House Democrats have taken matters into their own hands to strengthen ACA protections. On March 26, 2019, House Democrats introduced the Protecting Preexisting Conditions and Making Health Care More Affordable Care Act of 2019, which proposes to 1) expand eligibility for premium tax credits beyond 400 percent of the federal poverty line and increase the size of the tax credit for all income brackets: 2) rescind the Trump Administration's final rule on expanding non-ACA compliant short-term, limited-duration health plans; and 3) allocate $100 million in Consumer Assistance Program grants to states to support consumer protection activities regarding health insurance.

While the House has the numbers and the will to pass the bill, the Senate

Republicans will likely not follow suit. Senate Majority Leader Mitch McConnell said Republicans will not introduce a replacement ACA bill until after upcoming 2020 elections, at which the ACA and ACA reform efforts promise to be a central issue. In the meantime, the pending litigation regarding the law on multiple fronts is worth following and could have major political indications.