The Fate Of The ACA And What's Next For Health Care

Law360 (October 22, 2020)

Michael King

Emily Felder

Health care policy and business face consequential times ahead, with Election Day on Nov. 3 and a challenge to the Affordable Care Act being heard before the U.S. Supreme Court on Nov. 10. In February 2018, two months after Congress eliminated the individual mandate penalty, the Texas attorney general joined with 17 states and two individuals to bring a suit, Texas v. U.S., challenging the constitutionality of the ACA.

In spring of 2019, the U.S. Department of Justice, on behalf of the Trump administration, filed a brief in Texas v. U.S.,[1] arguing that, given the elimination of the penalty for noncompliance with the individual mandate, the entire ACA should be declared unconstitutional because the individual mandate is inseparable from the ACA as a whole.

With Texas v. U.S. now coming before the Supreme Court, the court's reasoning on prior ACA litigation offers crucial insight — and could result in the ACA being found unconstitutional in whole or in part.

Background

In December 2017, Congress passed the Tax Cuts and Jobs Act[2] and President Donald Trump signed it into law. Among a number of tax cuts granted for individuals and businesses, Congress changed an important tax provision in the ACA, effectively eliminating the tax penalty for not purchasing health insurance.

The ACA's individual mandate had required individuals to purchase health insurance or incur a tax penalty. The TCJA changed that penalty amount to $0 starting in January 2019. Still smarting from the failure to repeal and replace the ACA, congressional Republicans and the White House were eager for a victory on health care, settling for a policy to weaken the individual mandate that could be neatly tucked into the tax law.

In February 2018, two months after Congress eliminated the individual mandate penalty, the Texas attorney general joined with 17 states and two individuals to bring a suit, Texas v. U.S., challenging the constitutionality of the ACA.

The Department of Justice, then led by Attorney General Jeff Sessions, declined to defend the ACA in its entirety, and agreed that the individual mandate and related provisions should be struck down by the court as unconstitutional. The DOJ took the position, however, that the rest of the ACA should be upheld. A group of 18 attorneys general, led by California, intervened to defend the law.

In December 2018, U.S. District Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas ruled for the plaintiffs and declared the entirety of the ACA to be invalid.[3]

Complicating matters, in March 2019, the Department of Justice under the new leadership of Attorney General William Barr, reversed its position. The Department of Justice will now argue to affirm Judge O'Connor's opinion that the entirety of the ACA — not just the individual mandate — should be struck down. The case was appealed to the U.S. Court of Appeals for the Fifth Circuit and oral arguments were held in July 2019, after which the case was appealed to the Supreme Court for the current session.

The ACA's Constitutionality: Before and After the Tax Cuts and Jobs Act

In National Federation of Independent Business v. Sebelius,[4] the Supreme Court upheld the power of Congress to enact most provisions of the Patient Protection and Affordable Care Act. In an opinion written by Chief Justice John Roberts, the Supreme Court found by a vote of 5-4 that Congress has the power under the U.S. Constitution to enact an individual mandate requiring the purchase of insurance.

Justice Roberts reasoned that with the requirement that individuals shall maintain coverage, the "most straightforward reading of the mandate is that it commands individuals to purchase insurance." Justice Roberts agreed with the four dissenters, Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito, that the commerce clause does not authorize such command.

Justice Roberts also concurred with the four dissenters that the individual mandate could not be upheld under the necessary and proper clause of the Constitution.

However, Justice Roberts saved the ACA by determining that the mandate should be interpreted "as imposing a tax on those who do not buy" health insurance instead of "ordering individuals to buy insurance." Justice Roberts noted the importance of the individual mandate to the success of the ACA.

In passing the ACA, Congress found that the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold."

Justice Roberts found that the "individual mandate was Congress' solution to these problems," noting that "[b]y requiring that individuals purchase health insurance, the mandate prevents cost shifting by those who would otherwise go without it" and "forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses."

The TCJA changed the ACA landscape by eliminating the individual mandate tax for noncompliance. With Justice Roberts having ruled out the commerce clause and the necessary and proper clause as grounds for upholding the ACA, and having asserted that the ACA would not "function in a coherent way and as Congress would have intended" without the individual mandate working in tandem with the guarantee of insurance despite preexisting conditions, avenues for the majority to spare the individual mandate portion of the ACA appear limited.

Paths to Spare the ACA

Like all litigation, the plaintiffs must first meet the threshold test that they have standing to bring their claim, proving that they have been harmed and that the litigation seeks to address some concrete harm. With the TCJA having reduced the penalty associated with the individual mandate to zero, justices may find that with no harm to the plaintiffs, they do not have standing to challenge the ACA.

Many legal scholars believe a majority on the court could also ultimately spare the ACA by striking down only the individual mandate, while preserving the balance of the law.

Notably, in July, Justice Brett Kavanaugh directly addressed severability in a 7-2 ruling on Barr v. American Association of Political Consultants, finding an unconstitutional carveout for collection of government debt to the federal prohibition on robocalls to cell phones to be severable from the balance of the Telephone Consumer Protection Act.

In finding for severability, Justice Kavanaugh wrote, "Constitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute."

Justice Roberts has also written and ruled in favor of severability, but his prior comments on the balance between the individual mandate and the cost of insurance mandates in the ACA may indicate otherwise in this instance. The legislative intent of multiple Congresses could also factor into the analysis.

On the one hand, the ACA was intended to carefully balance important mandates with a variety of payment streams and behavioral carrots and sticks, and removing the teeth behind the individual mandate eliminates the tool intended to drive healthy people into insurance pools, which was intended to bring down the de facto average cost per insured person.

However, if Congress intended to strike down the ACA in its entirety with the TCJA, it should have done so; instead, it merely struck the individual mandate penalty and retained the balance of the statute.

In critiquing the Supreme Court decision upholding the ACA, Supreme Court nominee Amy Coney Barrett wrote "deference to a democratic majority should not supersede a judge's duty to apply clear text." Although Barrett has not written legal opinions or articles on the critical question of severability, she weighed in on the topic during her Senate confirmation hearings, indicating a presumption in favor of severability.

Another possible scenario: a split decision in which five justices may rule for survival of the ACA, but under different logic paths outlined in separate legal opinions.

What Comes Next

If the ACA is struck down in its entirety, it will present Democrats an opportunity to replace the ACA with a more progressive health care policy if they win the Senate and the presidency in November.

Despite former Vice President Joe Biden's adamant opposition, there will be tremendous

pressure from the Democratic rank and file on a Biden administration for a single payer Medicare for All solution.

Notably, proponents of Medicare for All tend to gloss over the price tag and funding mechanisms for such an ambitious program. Biden's own position on the ACA focuses on bolstering the statute, including offering a more robust public insurance option for individuals to choose from. Many believe that such a robust public option will eventually lead to a single payer system.

Meanwhile, although the Trump administration has not rolled out a plan for a comprehensive repeal and replacement of the ACA akin to the American Health Care Act crafted during the GOP's 2017 repeal and replace attempts, it has promoted its recent health care-related executive orders and prescription drug pricing proposals.

On Sept. 24, the administration announced its America First Health Care Vision, with executive orders directing the U.S. Department of Health and Human Services to create protections for patients with preexisting conditions and to work with Congress for an end to surprise medical billing.

Before any implementation, these executive orders must be followed by much more detailed congressional and regulatory action, likely involving stakeholder provider, physician and insurer groups. The administration is also promoting avenues for states to expand drug importation with proposals to the U.S. Food and Drug Administration, touting the potential for reductions in drug prices.

While each party may find one another's core proposals unacceptable, could the urgency of losing the ACA prompt a bipartisan grand compromise with a blend of public support for those in need and market-oriented solutions?

In the current highly charged environment, the parties may fail to reach common ground on the polarizing issue of health care, leaving a stalemate over the path forward for a sector consuming over 18% of U.S. gross domestic product. This is particularly likely if the November elections result in a split Congress with a Democratic House and Republican Senate.

State legislatures may offer laboratories for ideas to drive health care savings, from legislation addressing surprise medical bills to permitting pharmaceutical imports from Canada. In the last several years, eight states have implemented their own reinsurance programs to bring down health care costs for their citizens, and many states have worked with government officials to negotiate expanding partial Medicaid benefits to a greater number of beneficiaries in a cost-effective manner.

The combination of the ACA challenge before the Supreme Court and the presidential election could drive a wide range of impacts on health care policy, businesses and patients. In our current political environment, in the absence of bipartisan federal leadership, states are perhaps best situated for swift action.

But if the Supreme Court overturns the ACA in whole or in part, it will be Congress — not the states — that must face that reality in the months following the 2020 election. With

health care and ancillary businesses comprising over one-fifth of the U.S. economy and the health care industry already stretched by COVID-19, the stakes for confusion and uncertainty are high and warrant careful attention as leaders navigate the shoals of health care policy.

Michael King is a shareholder at Brownstein Hyatt Farber Schreck LLP and the founder of its health care transactional practice group.

Emily Felder is a senior policy adviser and counsel at the firm and the former director of the Centers for Medicare & Medicaid Services' office of legislation.

[1] Texas v. U.S., Civil Action No. 4:18-cv-00167-O. National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).

[2] 115 P.L. 97.

[3] Texas v. United States, 340 F Supp 3d 579 (ND Tex 2018).

[4] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).