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## Federal District Court Invalidates Affordable Care Act

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### Summary

Late on Friday, December 14, 2018, a federal district judge in Texas struck down the Affordable Care Act (ACA) in its entirety. The district court did not, however, issue an injunction requiring immediate compliance. The decision is certain to be appealed in due course, and the Trump Administration has said that the decision will have no impact until after the Supreme Court of the United States decides the case, which will likely not be until 2020 at the earliest. The decision and the ensuing developments are nonetheless potentially significant and merit attention by health care stakeholders.

### In Depth

### Background

In 2010, shortly after passage of the ACA, several parties challenged the constitutionality of the law on various grounds, including Congress' authority to regulate insurance under the Commerce Clause of the Constitution. In 2012, in *National Federation of Independent Businesses et al. v. Sebelius*, an amalgamation of various challenges brought through the federal courts, the Supreme Court concluded in an opinion by Chief Justice John Roberts that the "individual mandate" requiring all Americans to have health insurance or pay a tax penalty was within Congress' taxing power, and therefore within its constitutional authority.

In 2017, Congress approved the Tax Cuts and Jobs Act of 2017, which zeroed out the tax penalty associated with the individual mandate. In February 2019, 18 state attorneys general, two governors and two individual plaintiffs brought a lawsuit in the US District Court for the Northern District of Texas asserting that Congress' elimination of the ACA individual mandate tax penalty rendered the mandate unconstitutional, alleging that without a tax, the mandate could no longer be viewed as within the Congress' taxing power. The states then asserted that under the ACA's terms, the rest of the ACA's provisions depended on the mandate's existence and must fall along with the mandate.

Thereafter, the US Department of Justice (DOJ) announced that it would not defend the mandate or some of the ACA's key insurance market reform provisions. Sixteen state attorneys general intervened in the case to defend the ACA.

### Decision

US District Judge Reed O'Connor ruled in favor of the challenging states. Judge O'Connor first found the individual mandate unconstitutional, on grounds that in eliminating the mandate's enforcement penalty in 2017, Congress left the mandate in place but rendered it unconstitutional by eliminating the constitutional source for its enactment, the taxing power.

Judge O'Connor then concluded that the mandate was not "severable" from the rest of the ACA's provisions. Judge O'Connor reasoned that the mandate was the linchpin for the rest of the law, and without it the ACA's other provisions would not have been enacted. Judge O'Connor therefore held the entire ACA to be invalid. Judge

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O'Connor rejected the argument that in 2017 Congress effectively repealed the individual mandate and pointedly chose *not* to repeal any other ACA provision, making the choice to leave the remainder of the ACA in place without the mandate.

The DOJ did not defend the mandate or provisions requiring guaranteed issue and community rating of policies (without regard to pre-existing health conditions, for example), which it argued were *not* severable and should fall with the mandate. The DOJ argued that the remainder of the ACA was severable and should remain in place, however. The DOJ also asked the district court to postpone its ruling until the end of open enrollment to avoid disrupting enrollment for 2019, and not to issue an injunction.

Judge O'Connor's decision reached more broadly than the DOJ requested and came a day before open enrollment ended nationally. He did not issue an injunction, however, and instead simply issued a declaratory judgment expressing his view of the law. As a result, the decision should have no immediate impact except to create confusion and some possible near-term uncertainty regarding the ACA's ultimate fate.

## **Procedural Next Steps**

This decision is not immediately appealable because it does not resolve all issues in the case. In an unusual weekend order issued the Sunday after his late Friday ruling, Judge O'Connor ordered the parties to report to the court by January 4, 2019, with a plan to resolve the remaining issues in the case, which involve alternative legal theories asserted by the plaintiffs to invalidate the ACA.

Because the district court did not issue an injunction, immediate compliance by the federal government and affected private stakeholders is not yet required. Accordingly, the Trump Administration has already stated its view that the ACA will remain intact and enforceable until a final decision by the Supreme Court, and if necessary, the intervening states would likely request a stay of the ruling.

The states that intervened to defend the ACA can appeal Judge O'Connor's decision to the US Court of Appeals for the Fifth Circuit once all claims in the case are resolved. Democratic leaders in the US House of Representatives also have voiced interest in intervening.

If the Fifth Circuit were to affirm the decision, the Supreme Court would almost certainly grant review. The process of review by the Fifth Circuit and the Supreme Court, unless expedited, would likely extend into 2020 or 2021.

## **Implications**

The case will now proceed through various levels of appeals, and some steps are likely to be taken that would postpone any impact. Administration officials immediately communicated that the decision would not affect coverage for 2019.

The court's ruling implicates the entire ACA, including provisions unrelated to insurance reforms, although its reasoning has been criticized, and the ruling gives little explanation for why it considered *all* of the ACA's provisions to depend on the continued existence of the individual mandate. The ACA ranges broadly, including provisions related to provider quality improvement programs, delivery system reforms, Medicaid expansion and a host of tax provisions affecting major segments of the health care industry, all of which would be invalidated by the court's ruling. The decision would also have implications for the administration's own agenda. For example, the future of the US Center for Medicare and Medicaid Innovation projects, including the recently floated International Price Index model intended to address prescription drug pricing, would be affected.

Even if only the marketplace and insurance reforms were invalidated, the implications would be far reaching, as almost 12 million Americans received insurance through the exchange marketplace in 2018, and those provisions also affect the scope, pricing and availability of health insurance coverage to individuals well beyond just the individual exchange marketplace, including those with pre-existing conditions.

In the almost nine years since the ACA passed, the provisions of the law have become so interwoven into the US health care policy and legal landscape, it is almost impossible to comprehend how Congress, the administration and stakeholders could begin to unwind it.

## **Reaction**

Because of the potential implications for the generally popular ACA insurance reforms, the case was a substantial talking point during the 2018 midterm congressional elections. Democrats, who regain control of the US House of Representatives in 2019, demonstrated support for the insurance reforms and vowed to make a strong defense of the ACA a focus of their 2019 agenda. The court's decision is likely to further heighten the focus and level of congressional action, especially among Democrats, although many Republicans also worry about both the

practical and political consequences. In August 2018, in anticipation of oral arguments in the case, and in the face of mounting political rhetoric, 10 Republican Senators introduced S. 3388, the Ensuring Coverage for Patients with Pre-Existing Conditions Act, which attempted to maintain protection for persons with pre-existing conditions in the event of an adverse decision in the case. Several leading Republicans have already expressed an intent to hold hearings. The procedural timeframe also places the ACA at the center of yet another presidential election in 2020.

## **Considerations for Stakeholders**

Given the uncertainty and anticipated runway, health industry stakeholders likely do not need to begin contingency planning for the broadest possible outcome, *i.e.*, the Supreme Court upholding the federal district court decision and invalidating the ACA in its entirety. Nonetheless, stakeholders may begin thinking about the possible effects in 2020 or 2021 of a possible ruling limited to the insurance reform portions of the law.

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