Friday, June 15, 2018

On February 26, 2018, twenty states (the “Plaintiffs”) jointly filed a lawsuit[1] in the U.S. District Court for the Northern District of Texas requesting that the court strike down the Patient Protection and Affordable Care Act (“ACA”), as amended by the Tax Cuts and Jobs Act of 2017 (the “TCJA”), as unconstitutional. The Plaintiffs’ suit gained support from the White House last week, when Attorney General Jeff Sessions delivered a letter to House Speaker Paul Ryan on June 7, 2018 (the “Letter”), indicating that the Attorney General’s Office, with approval from President Trump, will not defend the constitutionality of the individual mandate – 26 U.S.C. 5000(A)(a) – and will argue that “certain provisions” of the ACA are inseverable from that provision. [2] The Letter indicates that this is “a rare case where the proper course is to forgo defense” of the individual mandate, reasoning that the Justice Department has declined to defend statutes in the past when the President has concluded that the statute is unconstitutional and clearly indicated that it should not be defended.

Acknowledging that such a position breaks from a longstanding tradition of defending the constitutionality of duly enacted legislation, the Letter offers support for both of the Plaintiffs’ main arguments: first, the Plaintiffs claim that the individual mandate is no longer constitutional, because individuals will no longer pay a penalty for being uninsured after December 31, 2018; second, if the individual mandate is unconstitutional, then the other provisions of the ACA are also unconstitutional because they are inseverable from the individual mandate.
mandate is unconstitutional, the ACA is also unconstitutional, because the ACA cannot continue to function without the individual mandate. These arguments are discussed in further detail below.

The Individual Mandate

The Plaintiffs argue that the individual mandate, which requires individuals to be insured under the ACA or pay a tax if uninsured, is no longer constitutional following passage of the TCJA. When the United States Supreme Court reviewed the constitutionality of the individual mandate in 2012, the Court determined that Congress could not direct people to buy insurance under the Commerce Clause or Necessary and Proper Clause, but requiring individuals to buy health insurance or pay a fee was a constitutional use of Congress’s taxing powers.[3]

The Plaintiffs argue that the individual mandate can no longer be considered a valid use of Congress’s taxing power, because the TCJA reduces the fee for being uninsured to $0 beginning January 1, 2019. Although the TCJA effectively eliminated the individual mandate’s tax provisions, the requirement for individuals to buy insurance remains unaffected. The Plaintiffs argue that the individual mandate cannot be interpreted as a tax, because it lacks the central feature of any tax – the ability to generate revenue for the government. The individual mandate, therefore, cannot be upheld as a use of Congress’s taxation powers, and the Supreme Court also determined that it could not be upheld under the Commerce Clause or the Necessary and Proper Clause. Absent a constitutional basis, the Plaintiffs argue that the individual mandate can no longer be upheld.

The ACA Without the Individual Mandate

The Plaintiffs go on to argue that, if the individual mandate is unconstitutional, so too is the entire ACA. Citing the ACA and the Supreme Court, the Plaintiffs claim that the individual mandate is essential to creating effective health insurance markets and, because it is so “closely intertwined” with the rest of the ACA, severing the individual mandate would cause the rest of the ACA to cease functioning.[4] The Plaintiffs assert several arguments in furtherance of the charge that the “unconstitutional individual mandate” and ACA significantly harm and impact State sovereignty:

- The ACA imposes a “burdensome and unsustainable panoply of regulations” on markets that each State has sovereign responsibility to regulate, including requirements for States to offer health insurance exchanges and minimum coverage standards for health insurance products.[5] Forcing the Plaintiffs to comply with ACA rules and regulations harms the States in their sovereign capacity, because the States lose the ability to enact or enforce their own laws or policies that conflict with the ACA.

- States are significantly harmed by ACA rules and regulations compelling them to take costly corrective actions to stabilize insurance markets. The Plaintiffs argue that ACA regulations of the individual insurance market caused insurers to pull out of State marketplaces due to unsustainable rising costs. This, in
turn, leads to costs rising further, as less competition exists in the healthcare markets. To escape the cycle of rising costs, the Plaintiffs argue that the States have to expend significant sums of money to stabilize healthcare markets.

- States are significantly harmed as Medicaid and Children’s Health Insurance Plan (CHIP) providers. The Plaintiffs argue that the individual mandate and the ACA caused millions of individuals to enroll in Medicaid and CHIP, either because the ACA expanded program eligibility or the individual mandate forced individuals to enroll in one of the programs if they could not afford to purchase insurance in the marketplace. The influx of new Medicaid and CHIP enrollees caused states to incur “significant monetary injuries,” because the States are obligated to “share the expenses of coverage with the federal government.”[6]

- States are harmed in their capacity as large employers. The ACA requires States, as large employers, to offer health insurance plans to eligible employees. The plans must contain minimum essential benefits defined under the ACA. Additionally, the ACA imposes a 40% excise tax on high cost employer-sponsored health coverage.[7] To comply with these, and other, ACA requirements, States must expend significant amounts of money to provide health coverage to employees. Some states, including Wisconsin, restructured their employer-sponsored health insurance plans to avoid the ACA excise tax. Other states, including Missouri and South Dakota, have cut other parts of their budgets to account for increased employer-provided healthcare costs.

Based on the allegations discussed above, the Plaintiffs request that the District Court declare the ACA, as amended by the TCJA, to be unconstitutional either in part or in whole, declare unlawful all rules and regulations promulgated pursuant to the ACA, and enjoin the defendants from enforcing the ACA. A ruling in favor of the Plaintiffs could not only eliminate the requirement for individuals to purchase health insurance, but could disrupt or eliminate some or all of the healthcare programs and mandates established under the ACA.

While the litigation aims high, numerous legal scholars and stakeholders have blasted the merits of the DOJ’s latest intervention (or lack thereof). Republican Senator Lamar Alexander released a statement remarking that “[t]he Justice Department argument in the Texas case is as far-fetched as any I’ve ever heard.” Jonathan H. Adler, a law professor at Case Western Reserve University School of Law who helped develop the arguments against the ACA in prior litigation (most notably, King vs. Burwell), described the Department of Justice argument as “just absurd,” arguing that there “is no legal basis for applying severability doctrine in this way, and no precedent for the Justice Department to accept such an argument.” While the merits of the litigation appear to be dubious, it nonetheless represents a mortal threat to the ACA and its popular protections for pre-existing conditions. Over the coming months, we will observe how this plays out legally and politically.


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