

Are We Nearing the End of the ACA?: Return to *California v. Texas*

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Healthcare Alert

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This alert is Part 1 of a three-part series where White and Williams will examine the United States Supreme Court case, *California v. Texas*. Part 1, below, examines the case in full and how the decision in the case will affect the healthcare system and healthcare insurance marketplace. In Part 2, we will explore the oral arguments advanced by the litigants and the Court's questions and comments from its November 10 oral argument. Finally, in Part 3, we will explore the possible outcomes, including impacts to the healthcare and insurance industries and employers, which the Court's decision will have.

On November 10, the U.S. Supreme Court will hear arguments in *California v. Texas*, the latest challenge to the constitutionality of the individual mandate portion of the Affordable Care Act (ACA). Because of certain aspects of the case, the entire law, including portions only tangentially related to the mandate, is potentially at stake.

In 2012, the Supreme Court ruled in *National Federation of Independent Business v. Sebelius (NFIB)* that the individual mandate was a defensible use of Congress's taxing power. But a plurality of the Court also held that the mandate would *not* be a permissible use of the generally broader power to regulate interstate commerce. Generally, in order to utilize the taxing power, legislation needs to contain a revenue raising component. Writing in *NFIB*, Chief Justice Roberts held that the "shared responsibility payments" met this requirement. However, in 2017, Congress, in the Tax Cuts and Jobs Act (TCJA), reduced this payment to zero, thereby eliminating the revenue raising component. Several states, based on the earlier *NFIB* decision, immediately challenged the continued constitutionality of the law under the taxing power as no revenue was being derived under this section of the ACA.

Importantly, the positions of the parties in *California v. Texas* (and its consolidated companion case, *Texas v. California*), including the federal government's position in defending the law, have changed several times throughout the course of the litigation. However, as now presented to the Supreme Court, two questions are at issue:

- first, whether the removal of the revenue raising component means that the individual mandate is no longer a constitutionally permissible exercise of Congress's power; and
- second, and to be decided *only* if the individual mandate is stricken, whether that portion of the ACA is "severable," *i.e.*, whether the remainder of the massively complex law can remain enforceable without the individual mandate.

It should be noted that this decision does not take place in a vacuum. Congress explicitly amended the ACA in the TCJA by reducing the shared responsibility payment that could be levied on individuals who failed to obtain insurance coverage to zero. But Congress also left the rest of the ACA in place, recognizing that the tax aspect was removed. There is no indication that Congress thought it was wholly eliminating the ACA by its actions. Some could argue that Congress's action provides clear evidence that Congress considered the mandate to be severable from the rest of the ACA.

But many of the ACA's market reform provisions have the overall effect of raising health insurance costs. The most cited example is the limitation on individual insurance policies imposing preexisting condition exclusions. Where an insurer is denied the ability to reduce its exposure with such a provision, it needs to increase premiums for that individual in order for the insurance to be a financially

viable policy. Because the ACA also provides for limitations on denial of individual insurance and on the differential in premiums between individuals, this could have the net effect of causing premiums to rise in the individual marketplace. This theory was borne out in the early phases of the ACA's implementation, before the individual mandate went into full effect.

We should note that there is significant confusion over individual and group healthcare plans in this area. For example, a similar limitation concerning preexisting conditions has been in place in the group market (*i.e.*, health insurance provided through employers) for over 20 years under HIPAA. However, group insurance is different from individual insurance in that it groups individuals in a manner unrelated to health, allowing the insurer to spread its risk over a wide swath of individuals. In other words, a single preexisting condition will have less of a financial impact on a policy issued to a group of 100 than it would in an individual policy. This is precisely what the individual mandate attempted to duplicate, *i.e.*, namely, spreading the insurance risk to a wide group of individuals, by mandating insurance coverage for all individuals. The question that arises is whether Congress, by eliminating this "core feature," could have caused the entire ACA to be upended, because, as has been argued by the states challenging the ACA, the individual mandate cannot be severed from the rest of the ACA because of the mandate's interconnected statutory scheme inherent within the ACA.

For example, the argument goes that without the individual mandate, insurers will not be able to duplicate this spreading of risk, and, therefore, individual insurance prices will skyrocket. The states that seek to undo the ACA maintain that this is directly contrary to the stated purpose of the ACA, such that there is a serious question as to whether the mandate can ever be considered "severable."

Importantly, should the mandate be stricken and ruled not to be severable, then the remainder of ACA would be stricken. It is, however, quite possible that the Supreme Court, based on its prior decisions, could go to great lengths to uphold the law. But if the Court does toss out the ACA, as noted above, the limitation on preexisting condition exclusions would be eliminated, but only in the individual market. Contrary to various news media reports, the pre-ACA protections afforded to Americans who receive health insurance through their employers (over 50% of the insured population) will continue. However, it is very true that there would still be broad impacts across the *entire* health delivery and payment marketplace. In fact, given the extreme impact on our healthcare system, it would seem likely that the Supreme Court would give Congress time to implement mitigation efforts, including new legislation, in the event it struck down the ACA as any immediate application of its ruling would cause considerable chaos with respect to the delivery and payment of healthcare services.

For example, a non-exhaustive list of issues addressed by the ACA illustrates how broad the ACA is and how individuals would be impacted:

- the FDA's ability to approve generic drugs;
- employer requirements to allow space for breastfeeding;
- nutritional information requirements on fast food restaurants;
- additional funding for Medicaid programs; and
- a number of programs, governmental and private, aimed at tying provider compensation to quality of care.

As noted, this is just a short list of the many areas that could be impacted if the ACA was eliminated in full. These are all in addition to the areas that have received extensive attention in the press (*e.g.*, expanded dependent coverage, preexisting condition limitations and coverage for preventative care, among others).

Importantly, a number of things could happen, even if the Supreme Court strikes down the entire law. Most notably, Congress could, in theory, re-impose the shared responsibility payment, which could moot the challenge. It is, however, unlikely that Congress will go there, even on a fully partisan basis. Given the timing of the case – arguments are scheduled for November 10 – another option would

be the possibility of a legislative fix that mandates the most popular aspects of the ACA that the public favors.

Another possible outcome might be the expansion of Medicaid. If Medicaid is expanded, then the demise of the public exchange would presumably result in millions of more Americans on Medicaid. At the same time, however, the elimination of Medicaid funding to the states, which is a key part of the ACA, would create a massive issue for those states that have expanded Medicaid under the expectation that such funding would continue under the ACA. In short, the Supreme Court's actions may very well accelerate significant changes to the entire healthcare system.

Part 2 of this series will explore the oral arguments advanced by the litigants and the Court's questions and comments from its November 10 oral argument. If you have questions or would like more information, please contact Stephen Bowers (bowers@whiteandwilliams.com; 215.864.6247) or Jim Anelli (anelli@whiteandwilliams.com; 201.368.7224).

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