Texas Judge Strikes Down Affordable Care Act as States Set the Stage for an Appeal

Employee Benefits Alert
12.18.2018

In the latest twist in the Affordable Care Act (ACA) litigation saga, on December 14, 2018, Judge Reed O'Connor held the entire ACA unconstitutional. In the case, *Texas v. United States*,[1] Judge O'Connor of the United States District Court for the Northern District of Texas held that the ACA's individual mandate, which had been upheld by the Supreme Court as a valid exercise of Congress's taxing authority, cannot survive after the Tax Cuts and Jobs Act of 2017 (TCJA) eliminated the monetary exaction associated with non-compliance with the individual mandate. Judge O'Connor further held that the individual mandate was inseverable from the ACA, thus rendering the ACA unconstitutional.

The plaintiffs, comprised of 20 states[2] and two individuals, requested a preliminary injunction, which the court construed as a motion for partial summary judgment. Sixteen states[3] and the District of Columbia intervened to join the original defendants—the United States, the Department of Health and Human Services (HHS), the Secretary of the Department of Labor (DOL), the Internal Revenue Service (IRS), and the acting Commissioner of the IRS. The original federal defendants largely agreed with the plaintiffs on the individual mandate being unconstitutional, though they differed with the plaintiffs on the extent to which the rest of the ACA was inseverable. The intervenors, as a result, were effectively the only parties fighting to save the entire statute from unconstitutionality.

After finding that the plaintiffs had standing to challenge the ACA's constitutionality, Judge O'Connor held "that both plain text and Supreme Court precedent dictate that the Individual Mandate is unconstitutional under either [Congress's tax power or the interstate commerce clause]."[4] In holding the individual mandate unconstitutional, Judge O'Connor first concluded that the individual mandate would no longer be a valid exercise of Congress's tax power as of January 1, 2019 (when the monetary exaction becomes zero for non-compliance), and then concluded that the intervenors' commerce clause arguments constituted "logical gymnastics."[5] Judge O'Connor further suggested that the intervenors were trying to "have their cake and eat it too."[6]

Having found the individual mandate unconstitutional, Judge O'Connor then addressed the severability issue, which was to identify "what Congress would have intended had it known that part of its statute was unconstitutional."[7] According to Judge O'Connor, this analysis required a "bread-and-butter exercise: parsing a provision's text and gleaning the ordinary meaning," to identify whether the text remaining after the unconstitutional provision is severed can function independently.[8] Judge O'Connor concluded that Congress expressed its "unambiguous intent that the Individual Mandate not be severed from the ACA"[9] by declaring the requirement to be an "*essential* part of this larger regulation."[10] On these grounds, Judge O'Connor held that the entire ACA is unconstitutional.

What Happens Next?

The intervenor states have already announced their intent to appeal the decision, but they must first overcome some procedural hurdles. Because the district court's order is in the form of a *partial* summary judgment, rather than a preliminary injunction or final judgment, the intervenor states filed a motion on December 17 requesting, on an expedited basis, "immediate clarification" that the court's order "does not relieve the parties to this litigation—or any other State, entity, or individual—of their rights and obligations under the [ACA] until appellate review is complete." Alternatively, they requested a stay of the order pending appeal, and, in addition, an order giving them grounds for an immediate appeal. The intervenor states have requested that Judge O'Connor rule on their motion by December 21.

In the meantime, HHS issued a statement that it plans to continue to enforce the ACA at this time, though it is unclear as to how HHS could do so without a further directive from Judge O'Connor, given that it specifically told Judge O'Connor earlier that he

need not issue an injunction because the federal government would agree to enforce a declaratory ruling as if it were an injunction. At this point, it is also unclear whether HHS's position reflects the position that the larger Trump administration takes, or will take, on the enforceability of the ACA post-January 1, 2019.

ACA litigation watchers can expect uncertainty to follow in the wake of the district court decision as the order winds its way through the court system. With Congress remaining in gridlock for the foreseeable future, *Texas v. United States* shows, once again, that the court system continues to serve as the arbiter of ACA issues.

Judge O'Connor's decision raises significant implications and uncertainty for stakeholders, with considerations of its import varying by industry and role in the economy as insurer, service provider, or plan sponsor. Miller & Chevalier specializes in ACA issues and can assist you in navigating the current legal environment and considerations for any guardrail implementation for ACA and health and welfare issues in 2019.

For more information, please contact:

Anthony F. Shelley, ashelley@milchev.com, 202-626-5924

Erin M. Sweeney*

* *Former Miller & Chevalier attorney*

---

[1] Case 4:18-cv-00167-O, Slip Opinion (N.D. Tex. Dec. 14, 2018) ("Slip. Op.").

[2] The suit was filed by the States of Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin, and Governor Paul LePage of Maine.

[3] Intervening as defendants were the States of California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, along with the District of Columbia.

[4] *Texas v. United States*, Slip Op. at 19.

[5] *Id.* at 29.

[6] *Id.*

[7] *Id.* at 36 (citation and internal quotation marks omitted).

[8] *Id.* at 36-37.

[9] *Id.* at 37.

[10] *Id.* at 37 (emphasis in original) (internal quotation marks omitted).
