

OUR TAKE ON THE FEDERAL COURT RULING ON THE AFFORDABLE CARE ACT

In light of the confusion created by the [U.S. District Court ruling](#) on the ACA, we wanted to provide some detail regarding what it really means and potential future developments. In brief, the ACA remains the law of the land and we believe it is highly likely to continue to be so indefinitely.

WHAT THE COURT SAID

The judge from the Northern District of Texas held that, because the tax enforcement provision of the individual mandate was repealed by Congress, the mandate itself can no longer be upheld as a tax (recall that is the basis by which the Supreme Court upheld it in *NFIB v. Sebelius*). It must be struck down then, he concludes, as an improper exercise of the Commerce Clause.

The judge went further, though, in refusing to “sever” the mandate from the rest of the ACA, finding that the entire law must be rendered invalid. To draw such a conclusion, the judge finds the mandate to be an “essential” component of the entire law and one without which it cannot properly function. He also finds that Congress must have intended for the whole ACA to be struck down if the mandate were deemed unconstitutional.

The net result of this ruling, if it were actually implemented, is that each and every provision of the ACA – the Medicaid expansion, the Medicare reimbursement cuts, establishment of CMMI, Exchange subsidies, etc. etc. – would all be rendered inoperative. In other words, given that the law has been in effect for 8.5 years, considerable chaos. It is a very aggressive, activist ruling.

WHAT IT MEANS NOW

Both the White House and CMS issued statements on Friday instructing that the ACA remains the law of the land pending appeal of the case, a determination echoed by numerous legal authorities and press outlets. Exchange enrollment continues, Medicaid expansion will still be funded, etc. For practical purposes, nothing has changed and it is highly unlikely anything will until the case is decided by the Supreme Court.

LIKELY FINAL OUTCOME OF THE CASE

The Texas judge’s decision is dubious on at least three grounds: (1) the holding on the individual mandate itself; (2) the ruling on severability; and (3) the finding that plaintiffs have standing. We believe it is highly likely the Supreme Court will reject this decision on at least one of these grounds and that the ACA will stand regardless of what becomes of the individual mandate provision.

In brief, respectively, the Supreme Court could uphold the law by finding that: (1) because the individual mandate now has no enforcement mechanism, it is not actually regulating any economic activity and thus does not violate the Commerce Clause; (2) Congress clearly did not intend for the entire ACA to be struck down if the mandate is rendered invalid because it just repealed the mandate enforcement mechanism while keeping the rest of the law in place (even if you look back to 2010 when the law passed, no one who voted for it could plausibly be suspected of intending the entire law be rescinded now...); and (3) plaintiffs do not have standing to sue because there is no actual harm to them under the mandate because there is now no penalty for noncompliance.

Given the clear predisposition of the Roberts Court to defer to Congress and avoid overtly politicized decisions, again we believe it highly likely he and at least the four left-leaning Justices will use at least one of these three grounds to uphold the currently operative provisions of the ACA. If one of these Justices is not on the Court when the case arrives, that analysis could change. Even then, we suspect some limitation of the impact of the case via severability of the mandate from most, if not all, of the law.

POTENTIAL CONGRESSIONAL RESPONSES

While the White House's statement (and President Trump's tweets) also celebrated the decision, some Republican offices have been more restrained, reiterating their support for preexisting condition protections. Ascending Finance Committee Chairman Chuck Grassley, however, called for hearings on the ACA in what eerily looked like a remounting of the "repeal and replace" crusade.

Suffice it to say this ruling puts Republicans in a very difficult position between placating their base, which is thrilled by the ruling, and maintaining the appearance of support for the consumer protections the public has grown accustomed to under the ACA. They also must realize, if reticently, that replacing the ACA, if it is in fact stricken, with the policies they've identified was dead when they controlled Congress and is now certainly dead with Democrats taking the House.

Democrats are predictably decrying the Court's ruling while, also quietly, celebrating the way it highlights Republican fissures over the ACA and its consumer protections. They are confident the Supreme Court will uphold the law and will not feel compelled to support Republican-driven efforts to "replace" it.

So do not expect Congress to jump in and provide clarity to the legal equation any time soon. If, in a highly theoretical context where the Supreme Court strikes down components of the ACA beyond the mandate itself (and Congress has the collective will to act), a minimalist "fix" would be to enact an explicit clause severing the mandate policy from the rest of the law.

NEXT STEPS

Other than loud political reverberations, the next important step for this case is its appeal to the 5th Circuit. A final decision from that Court could take several months, at least. In a reasonably expeditious scenario, the case could reach the Supreme Court during its 2019-2020 term, with a decision likely rendered in late

spring 2020 (yes, just before the presidential conventions...). It's possible a final decision could take longer than that.

For now, while there are no actual implications of the Texas judge's decision, it remains to be seen how much impact it will have on consumer confusion, and thus enrollment in ACA programs, and on the political landscape heading into the 2020 election.