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ACA Held Unconstitutional

In *National Federation of Independent Business v. Sibelius*, 567 U.S.519 (2012)("NFIB"), the U.S. Supreme Court upheld the ACA Individual Mandate under the government's taxing powers, albeit having found the Individual Mandate unconstitutional under the Interstate Commerce Clause.

In *Texas, et al. v. United States of America, et al.*, (U.S.D.C. N.D. Texas No. 4:18-cv-00167-O), the plaintiff states alleged that the passage of the 2017 Tax Cuts and Jobs Act, which eliminated the "tax" under the ACA, thus rendered the ACA itself unconstitutional. The Court agreed in an opinion which at times is quixotic.

"The ACA's text and the Supreme Court's decision in NFIB … thus make it clear the Individual Mandate is inseverable from the ACA." (Id. at 47). "In the face of overwhelming textual and Supreme Court clarity, the Court finds 'it is unthinkable and impossible that the Congress would have created the' ACA's delicately balanced regulatory scheme without the Individual Mandate. … The Individual Mandate 'so affects the dominant aim of the whole statute as to carry it down with' it. (Id. at 51-52). … In some ways, the question before the Court involves the intent of both the 2010 and 2017 Congresses. The former enacted the ACA. The latter sawed off the last

Medicare Drug Notice

The Centers for Medicare & Medicaid Services (CMS) released an advanced notice of proposed rulemaking on October 25, 2018 proposing the adoption of an international drug price reference standard for some Part B drugs, in addition to a change in physician reimbursement from a percentage to a flat fee, and allowing private-sector vendors to negotiate prices and compete for physician and hospital business. See "Value-Based Clinical Pathways in the World of Reference-Priced Medicare Part B Drugs," Journal of Clinical Pathways, December 2018.

The proposed rules would establish an international drug price reference index for certain Medicare Part B drugs. "International reference pricing is a price control mechanism to determine a list price in a country based on the price of the same product in other countries." Id. The proposal would be phased in over five years and would apply to most Medicare Part B drugs, including pharmaceuticals administered by physicians. Currently, doctors purchase the drugs and are reimbursed by Medicare at the average sales price plus an "add-on" fee. Although it is the largest drug purchaser in the world, Medicare is precluded by law from negotiating drug prices. CMS will review comments and is considering issuing a proposed rule for the IPI in the spring of 2019, with a potential model start in spring 2020.

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leg it stood on. But however one slices it, the following is clear: The 2010 Congress memorialized that it knew the Individual Mandate was the ACA keystone…; the Supreme Court stated repeatedly that it knew Congress knew that … and knowing the Supreme Court knew what the 2010 Congress had known, the 2017 Congress did not repeal the Individual Mandate and did not repeal § 18091." (Id. At 54-55).

Because Judge Reed O'Connor did not issue an injunction, continued implementation of the ACA is not immediately curtailed. However, the potential ramifications upon the U.S. health care system should the decision be upheld are vast. The ACA is a vast piece of legislation, amounting to more than 1,000 pages. The ACA expanded Medicaid, created the exchanges for individuals, permits persons to be covered under their parents' policies to age 26, created protections for pre-existing conditions, among many other provisions.

Every commentator expects that Judge O'Connor's decision will be appealed with a final judgment by the Supreme Court. It is difficult to predict how the intermediate appellate court will rule and the eventual decision by the Supreme Court will be decided in a highly politicalized environment. With a divided Congress taking office in January 2019, a President under numerous investigations, uncertainty reigns. Given that a unified Republican government could not enact a replacement for the ACA, the prospects for a sound legislation solution in 2019 seem dim as well.