Affordable Care Act

Supreme Court upholds ACA for third time, but new threats loom

One would think, after last week's *California v. Texas* decision in the Supreme Court, that supporters of the Affordable Care Act (ACA) could breathe a little easier. It was the third SCOTUS case that threatened to overturn the law and, like the Court's previous two decisions, this one, announced on June 17, saved the health care program also known as Obamacare — and by a wider margin than before.

But experts say while future legal attacks on the ACA may not be as sweeping as the one the Court just shut down, and there may be a period of quiet on that front, opponents will continue to come after the law by other means.

California v. Texas originated in a case called *Texas v. Azar*, a suit brought by several Republican state attorneys general and Republican governors as a challenge to the ACA. It was premised on an argument that the individual mandate part of the law — which had originally required Americans to either obtain insurance, usually at some cost to themselves, or pay a penalty — was unconstitutional, and that the ACA relied so heavily on the mandate that if the mandate were unconstitutional, the whole law must be as well.

The mandate was a bone of contention in the first Supreme Court ACA case, *National Federation of Independent Business (NFIB) v. Sebelius* in 2012, in which the plaintiffs argued that Congress could not require citizens to buy services as the mandate required (PBN 2/1/11). The Court, in a 5-4 decision, declared that the mandate payments were in effect taxes, which Congress was empowered to collect under the Constitution.

A second case in 2015, *King v. Burwell*, attacked the constitutionality of the tax credits offered in the ACA's federal exchanges and made available to residents of states that had opted out of the exchanges. The Court turned this challenge aside 6-3 (PBN 6/29/15).

Texas v. Azar — which, as it made its way through the courts, was joined by other states on either side and became *California v. Texas* — came in the wake of the Tax Cuts and Jobs Act (TCJA) of 2017, which set the mandate penalty for failure to obtain insurance at zero. Plaintiffs maintained their rights were infringed by imposition of the mandate, notwithstanding that the TCJA prevented the government from collecting a penalty from them for failing to acquire health care coverage, because the mandate could no longer be considered a tax, since it collected no revenue.

The plaintiffs further argued that if the mandate were unconstitutional, that rendered the whole law unconstitutional, on the grounds that the ACA could not function properly without it. This argument, expressed by Justice Alito in his dissent, is that while "it is certainly true that the repeal of the tax or penalty has not caused the collapse of the entire ACA apparatus," the "critical question… is not whether the ACA could operate in some way without the individual mandate but whether it could operate in anything like the manner Congress designed."

Thus, the plaintiffs invited the Court to rule on whether the mandate was "severable" — that is, whether they could strike it down on constitutional grounds without also declaring the whole thing unconstitutional as well.

"When the case was argued, a large portion of the time was spent on the question of whether the remainder of the ACA could be upheld if the mandate were simply severed," says Stuart Gerson, member of Epstein Becker Green in the Litigation and Health Care & Life Sciences practices in Washington, D.C. "The plaintiff states raised a number of hypothetical arguments about burdens that would befall them if individuals, who no longer could be mandated to buy health insurance, somehow increased the cost of running their Medicaid programs both administratively and with respect to the Act's minimum essential coverage provision."

The Northern District of Texas Court bought these arguments, ruling that the whole law was unconstitutional in 2018, eventually leading to the case's promotion to the SCOTUS docket (PBN blog 12/17/18). But the Supreme Court Justices didn't take the bait, advancing instead a ruling on standing — that is, whether the plaintiffs had any business bringing the suit, based on any injury they could reasonably claim the government did to them — which the Court said did not exist.

The Court's opinion, written by Justice Stephen Breyer, noted that plaintiffs protested "injuries anticipated in the future from a statute's later enforcement. Here, the plaintiffs say, they have already suffered a pocketbook injury, for they have already bought health insurance."

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But, the Court went on, "here no unlawful Government action 'fairly traceable' to §5000A(a)" — the mandate clause — "caused the plaintiffs' pocketbook harm. Here, there is no action — actual or threatened — whatsoever. There is only the statute's textually unenforceable language" — that is, the zero-dollar penalty.

The Court held that without an actual injury to be redressed, the plaintiffs did not have standing to challenge the mandate because they "have not shown a past or future injury fairly traceable to defendants' conduct enforcing the specific statutory provision they attack as unconstitutional." The Court added that the TCJA had made the mandate "unenforceable," and "unenforceable statutory language alone is not sufficient to establish standing."

Not interested

Ha Kung Wong, a partner with Venable LLP in New York City, says with this decision the Court has shown its lack of enthusiasm for providing a judicial remedy for whatever political and administrative problems the ACA might have.

"It seems pretty clear that the Supreme Court doesn't want to address these issues on a subject matter level because they don't think it's the right forum for it," Wong says.

"That might be surprising to a lot of people because the Court became a lot more conservative in recent years," Wong says. "And that was often raised by opponents during the Amy Coney Barrett confirmation hearings: *She's going to strike down the ACA*. But though a lot of the Supreme Court Justices' personal or political beliefs might be at odds with many aspects of the ACA, I think this decision demonstrates that they understand that legislation is the way those aspects should be addressed."

Wong points to the increasingly widening spreads in the SCOTUS ACA decisions — 5-4 in *NFIB*, 6-3 in *King*, and 7-2 in *California*. "This is indicative that, although the composition of the Supreme Court is more conservative than it has been in recent times, the Supreme Court has moved past legal challenges to the ACA," he adds.

William Bike, senior vice president of Central Park Communications in Chicago, thinks another factor may be swaying both potential litigants and the courts: COVID-19.

"First, people who did not have health care coverage suddenly saw the need for it because of COVID dangers — including even some Republicans. Second, many people lost their jobs, and therefore lost their employer-provided health care coverage and suddenly needed health care coverage from somewhere else. Again, [this included] even some Republicans."

Sniper attacks

While a full-frontal assault such as Texas led in this case is unlikely in the near term, experts think ACA opponents will go for smaller actions that seek to pick off parts of the law, hobbling it in hopes of eventually taking it all down.

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Wong points to *Kelly v. Becerra* as an example. This case, currently before the same Northern District of Texas Court that originally found for Texas in the case just decided (and the same judge, Reed O'Connor), hinges on provisions of the ACA "that govern forms of preventive care like birth control, vaccinations, cancer screenings, things like that."

Because the ACA requires health insurers to cover this care without a copay from beneficiaries, Wong says, they have to name services that qualify — but because changes in medicine require flexibility, it would be cumbersome to list the services in the law. So the law gives three different organizations — the U.S. Preventive Task Force (USPTF), the CDC's Advisory Committee on Immunization Practices (ACIP), and the U.S. Health Resources and Services Administration (HRSA) — the authority to nominate services that should be covered.

"There are currently about 80 items on that preventive services list including contraceptive care — which appears to be the most politically charged issue of the group — but also screenings for things like mental health, HIV, and cancer," Wong says.

The *Kelly* plaintiffs plead on grounds of the Constitution's Appointments Clause, which directs how Congress can delegate authority. They say agencies at issue are not really properly classified as officers of the United States because, for instance, they're volunteers and they have jobs elsewhere," Wong says, "while the other side says they were properly appointed because although they may be volunteers, these organizations are permanent and they have set member terms. There are good arguments on both sides."

Wong says the arguments are similar to those seen in another case, *Arthrex, Inc. v. Smith & Nephew, Inc*, which hinged on whether the Administrative Patent Judges on the U.S. Patent Trial and Appeal Board (PTAB) are constitutionally appointed — and which was decided in a way that would allow the judges to keep their status, 5-4, on June 21.

In *Arthrex* the Court "held that there were issues with the appointments, but they could be corrected by simply allowing the Director of the U.S. Patent and Trademark Office (PTO) the ability to review the PTAB decisions. So the Supreme Court found a way to save the appointments, even though they felt there may have been some constitutionality issues."

Wong, who expected such a result, thinks this may bode well for the defense in *Kelly*.

Not out of the woods, but…

None of this means the ACA is bulletproof in the Court. Justice Alito, who joined Justice Neil Gorsuch in the minority, insisted in his dissent that "the provisions burdening the States are inseverable from the individual mandate." Justice Clarence Thomas, even though separately concurring with the majority on standing, nonetheless agreed with Alito on the inseverabilty argument, which he said "offers a connection between harm and unlawful conduct. And, it might well support standing in some circumstances, as it has some support in history and our case law."

"If a justiciable case ever is presented, Justice Thomas might join with Justice Alito and find the ACA an unconstitutional act of Congress," says Gerson. "On the other hand, Justice Kavanaugh, who has written extensively on the subject, would likely hold that the mandate is severable and that the rest of the ACA should survive."

Paul E. Petruska, an attorney with Greensfelder, Hemker & Gale, P.C., in southern Illinois, notes that "people like Texas Attorney General Ken Paxton have already indicated they're going to continue their fight." In fact, Paxton has filed a suit against HHS and the IRS, *Texas v. Rettig*, alleging that the ACA's certification rule, which requires that the state pay ACA health insurance provider fees, violates the Consitution. But these fights are likely to be on the order of small-ball like *Kelly*, not bold challenges and inseverability arguments like we have recently seen, and are less likely to kill the ACA outright. "I don't see the Court having an interest in another case like this, certainly for the next ten years," Petruska says. — *Roy Edroso* (*redroso@decisionhealth.com*) ■

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