



The Advocate's Guide to:

THE HEALTH CARE REPEAL LAWSUIT



DECEMBER 2019

Introduction

In December 2019, a federal Court of Appeals for the 5th Circuit issued a decision in *Texas v. United States*, a court case brought by Texas and 20 Republican states claiming that the individual mandate is no longer constitutional because Congress removed the tax penalty. The plaintiffs also argued that the mandate was so central to the law that no part of the Affordable Care Act (ACA) should be allowed to stand.

The U.S. Department of Justice (DOJ) has refused to defend the mandate, but has switched its litigation position repeatedly. DOJ initially argued that all but a few provisions of the law related to protections for people with preexisting conditions were severable from the mandate, and therefore should stand. They later changed this position to mirror the plaintiffs, arguing that the entire law must be thrown out. Democratic Attorneys General from 16 states and the District of Columbia intervened to defend the law because of the substantial effect on their state if the law is overturned, later joined by the U.S. House of Representatives.

In December 2018 a Texas district court judge, Judge O’Conner, ruled the ACA’s individual mandate is unconstitutional and that the entire law must be thrown out. The intervenor-states appealed and oral argument was held in the 5th Circuit in July 2019.

There were three major questions before the Court: (1) whether the intervening states and the U.S. House of Representatives have standing to appeal, (2) whether the individual mandate is unconstitutional and (3) if the mandate is unconstitutional, which parts of the ACA, if any, are severable and can stand.

5th Circuit Decision

A three judge panel of the 5th Circuit issued a 2-1 ruling in December 2019. They ruled that the intervening states and U.S House of Representatives do have standing, which means they were able to bring the case and will be able to continue to appeal. This is an important procedural step to make sure that the ACA continues to be defended in this lawsuit.

As for the substance, the 5th Circuit ruled that the individual mandate is now unconstitutional under the commerce clause because it is no longer part of Congress’ taxing power. As for what parts of the ACA should remain, the 5th Circuit effectively punted that question back to Judge O’Conner in the district court. They remanded the case to Judge O’Conner to use “a careful, granular approach” in determining which parts of the ACA should remain, following a two-part test: (1) whether it is evident that Congress would have passed the law without the individual mandate and (2) whether the ACA is fully operative without the mandate.

The first question is complicated because the ACA has been amended numerous times, including by the 2017 elimination of the individual mandate penalty. The court instructed Judge O’Conner to consider this in his analysis, but offered no true guidance as to what provisions the 5th Circuit believes should or should not remain standing.

The next steps are that Judge O’Conner must make a new ruling under the 5th Circuit’s ruling. The new ruling could be the same, repealing the entire ACA, along with an analysis of the process he used to arrive at that decision. The ruling is likely to take months and we can expect another appeal to the 5th Circuit, where the next appeal would most likely be heard by a different panel of three justices.

In addition, the DOJ raised an argument near the end of the briefings for the 5th Circuit that the ACA could just be repealed in the plaintiff states. While this would be a completely illogical and unworkable outcome, the 5th Circuit decision directs Judge O’Conner to consider this option and provide opportunity for the Defendant states to weigh in on the issue.

At the same time, it is expected that the California Attorney General will appeal the 5th Circuit’s decision invalidating the mandate to the Supreme Court.

What’s at Stake?

This decision makes no changes in coverage for 2020. The ACA is still the law of the land. That means that there is no change for consumers enrolling in coverage for 2020, no change to the states that have extended open enrollment, and no change in employer coverage protections.

However, all of the ACA’s protections are still at stake as this case continues through the courts. Depending on the final outcome, any or all parts of the ACA are still at risk to be overturned by the Supreme Court once this case makes it there. Here is a partial list of what is at stake:

- The end of marketplace tax credits and coverage for over **10 million people** and the likely collapse of the individual health insurance market.
- The end of Medicaid coverage for approximately **17 million people**.
- The end of insurance protections for an estimated **133 million people** who have a pre-existing condition.
- The end of minimum standards for insurance companies, including essential health benefits.
- The end of young adults up to age 26 being allowed to stay on their parents’ plan.
- The return of lifetime and annual dollar limits on insurance coverage.
- The end of the cap on consumers’ annual out-of-pocket costs for health care services.
- The end of cost protections for seniors with Medicare prescription drug coverage.

There is a potential that the harm of a final decision will be limited to just those residing in the plaintiff states. However, since so many protections are provided through large employers that provide coverage to people living in multiple states, it’s difficult to see how this would work. At a minimum, the people living in these states may be more at risk of losing coverage expansions and protections in the individual and group markets.

What's Next

The legal steps that lie ahead are likely to take several months or more at each step, meaning the uncertainty surrounding the ACA may well continue into 2021 or 2022. The case is back in Judge O'Conner's hands, which will almost certainly involve another round of briefing and argument by the parties. The timing of a ruling at this stage is uncertain but is likely months away. It's also unclear what the substance of that ruling may be, but Judge O'Conner has consistently been hostile to the ACA in this and other cases, so his decision may again strike down many or even all of the ACA's consumer protections and coverage expansions.

Once a decision is issued in the district court for a second time, that decision will be appealed to the 5th Circuit and the appeals court will again involve another round of briefing and argument by the parties, likely delaying a decision from the appeals court until late 2020 or early 2021. At that point, the Supreme Court will be asked to step in, with a final decision there possible in the summer of 2021 or 2022.

There is a chance the Supreme Court will take up the case on an accelerated schedule, with the potential for a decision in July. Some of the Democratic-led intervening states have suggested they will ask the Supreme Court to take the case promptly, in lieu of remand. But the Court is generally reluctant to take up cases that have been returned to a lower court for further analysis. The more likely timeline to know the fate of the ACA with this latest challenge is still more than a year away – ensuring health care will again be an issue in elections for the President, Congress and many statehouses.