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Legal Sidebar

Pending ACA Legal Challenges Remain as Congress Pursues Health Care Reform

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Update: This Legal Sidebar post, originally published in January 2017, has been updated to reflect legislative and judicial developments.

Since its enactment, the Patient Protection and Affordable Care Act (ACA) has been the subject of litigation. Many constitutional challenges to the ACA were put to rest by the Supreme Court's 2012 decision in *NFIB v. Sebelius*, a major ruling on key provisions of the Act. In 2015, the Court handed down another important decision in *King v. Burwell*, a lawsuit that had also threatened the operation of core provisions of the Act. But while the ACA survived these fundamental legal challenges, they were by no means the end of the litigation, and lawsuits involving the Act continue to make their way through the courts. As the 115th Congress contemplates or considers legislation to amend the ACA (such as the House-passed American Health Care Act of 2017 (AHCA), H.R. 1628, or the Better Care Reconciliation Act of 2017 (BCRA), a draft legislative amendment to the AHCA published by the Senate Committee on the Budget), and the Trump Administration moves forward with changes to the implementation of the ACA through executive action, questions may be raised about how these efforts could affect litigation concerning ACA-related requirements. While some lawsuits discussed below could be affected by the legislative proposals mentioned above or future executive action, in other cases, these measures could have little direct consequence upon the legal challenges.

House of Representatives v. Burwell and Cost-Sharing Reductions

In order to promote more affordable health insurance for certain lower-income individuals and families, the ACA requires insurers to reduce cost sharing (i.e., out-of-pocket expenses, such as co-payments or deductibles) that must otherwise be paid for coverage under qualified health plans. The Act also directs the Secretaries of Health and Human Services (HHS) and the Treasury to reimburse insurers for the required reductions, but the ACA does not explicitly appropriate funds for the cost-sharing payments. Nevertheless, the Obama Administration made such payments, and the House of Representatives filed suit, claiming that the payments violate the Appropriations Clause of the Constitution.

Following an earlier holding that the House has standing to sue the Obama Administration, the U.S. District Court for the District of Columbia concluded in May 2016 that the Administration's payment of the cost-sharing reimbursements was unconstitutional for lack of a valid appropriation enacted by Congress. The court barred the Administration from making the cost-sharing payments, but stayed its decision pending appeal. Following the November 2016 election, the court granted a motion sought by the House to delay proceedings, in order to give the incoming Trump Administration time to consider whether to further pursue the appeal. In March 2017, the district court agreed to further delay the case to "allow time for a resolution that would obviate the need for judicial determination of this appeal, including potential legislative action." While the case has been on hold, attorneys general from 15 states and the District of Columbia have filed a motion to intervene, claiming they have a cognizable interest in defending the legality of the federal government's payment of cost-sharing reductions. The states' motion is currently pending before the U.S. Court of Appeals for the D.C. Circuit.

Should the appeal of the case not go forward, the district court's decision would likely take effect and prevent the federal government from reimbursing insurers for these required cost-sharing reductions, absent a subsequent

appropriation of funds or other action by Congress. In other words, it appears that the district court's ruling would prevent the government from reimbursing insurers for those reductions absent a subsequent congressional appropriation, but it would not remove the insurers' statutory obligation to reduce cost-sharing for health plan enrollees. If insurers of qualified health plans are compelled to pay these cost-sharing amounts but are not reimbursed for these expenditures, some predict that insurers could potentially, among other things, attempt to raise premiums for the coverage to recoup these losses, or opt to not continue to offer coverage in the health insurance exchange. While both the AHCA and the BRCA would repeal the ACA's requirement to provide cost-sharing reductions beginning in 2020, only the BRCA would appropriate funding for the cost-sharing payments in the interim, through December 31, 2019. Alternatively, if Congress chooses not to take action with respect to the cost-sharing requirements, the Trump Administration may need to determine whether it wants to further litigate this case, or drop the appeal and let the district court's decision stand.

Risk Corridors Litigation

To address insurance market uncertainty and stabilize premiums in the early years of the ACA's implementation, the Act provided for a temporary risk corridors program to balance profits and losses of applicable insurers within a permissible range. The Act specified that, for years 2014 through 2016, insurers with costs exceeding the amount of premiums collected may be eligible to receive a payment from HHS, but insurers with costs less than collected premiums may be required to make a payment to the agency, subject to certain adjustments. The ACA does not expressly include an appropriation for the risk corridors program, and in annual appropriations acts, Congress has effectively limited the funds available under the risk corridors program to the amounts received from insurers. Accordingly, for the 2014 year, when receipts from profitable insurers under the program fell short of the amount needed to pay insurers experiencing losses, these non-profitable insurers only received a prorated share of roughly 12.6% of the total amount due to them for the year. Additionally, HHS announced that based on amounts received, it would make no payments to insurers for 2015 risk corridors amounts owed and all 2015 collections would be used toward the remaining 2014 payment balances. While the risk corridors program ended in 2016, data for this last benefit year is not required to be submitted until July 31, 2017, and any amounts that insurers must remit to HHS, or are owed, for the prior three years have not been ascertained.

Over a dozen insurers that failed to receive the full amount of risk corridors payments for 2014 and 2015 have sued the federal government, seeking to obtain the payments not yet received. While the procedural issues and arguments made by the plaintiff insurers vary, a central claim is similar: the ACA's statutory language and accompanying regulations require that risk corridors payments be made annually and in full, even absent a congressional appropriation. The executive branch, on the other hand, has generally argued that these cases are premature, as the total amounts owed will not be determined until the end of 2017, i.e., once the government has calculated the entire amount due to each insurer under all three years of the program. Further, the Executive has contended the program is budget neutral, and any payment obligations to insurers are contingent upon the availability of payments made into the program.

So far, the results of these legal challenges have been mixed. For example, in the first decision regarding this issue, *Land of Lincoln Mutual Health Insurance Co. v. United States*, the U.S. Court of Federal Claims largely sided with the federal government and held, among other things, that the ACA does not clearly entitle insurers to receive risk corridor payments, and the government's interpretation of the Act warranted judicial deference. Conversely, in February 2017, a different district court judge handed down a decision in *Moda Health Plan, Inc. v. United States*, concluding that the federal government unlawfully withheld risk corridors payments from the plaintiff insurer and is liable for owed amounts. In April 2017, a third district court judge in *Blue Cross and Blue Shield of North Carolina. v. United States* ruled that the insurer's case was premature. However, the court did not expressly rule on whether the government would be on the hook for making full payments in the future.

Neither the AHCA nor the BRCA provides funding for the risk corridors program. Accordingly, if either proposal were enacted, insurers might still pursue claims against the federal government. However, the lawsuits could be affected if Congress opts to appropriate amounts owed under this program.

Contraceptive Coverage Challenges Based on Religious Objections

Some of the most prominent ACA lawsuits deal with the provision of contraceptive coverage. The Act generally

requires health plans and health insurers to cover a list of preventive services, including certain women's health services, with no out-of-pocket costs to participants. In 2012, HHS first issued guidelines calling for plans and insurers to cover all FDA-approved contraceptive methods, and an updated version was released in December 2016. The HHS guidelines sparked a clash between the Obama Administration, which viewed the provision of this coverage as an important public health objective, and certain employers who argued that the mandatory provision of this coverage to their employees violates an employer's constitutionally and statutorily protected religious beliefs.

To address this conflict, current regulations provide an "accommodation" for certain "eligible organizations" having religious objections to providing contraceptive coverage. Accordingly, eligible organizations can refuse to provide contraceptive coverage, and a plan's insurer or third-party administrator must provide this coverage to employees instead. Under an earlier version of the regulations, for-profit companies were ineligible for the accommodation and had to provide contraceptive coverage through their health plans. However, in 2014, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, ruled that certain for-profit companies could not be forced to provide this coverage due to protections available under the Religious Freedom Restoration Act. In light of this decision, HHS subsequently amended its regulations and extended the accommodation to these entities.

But legal challenges persisted after *Hobby Lobby*, primarily because the Supreme Court did not expressly rule on the legality of the regulatory accommodation itself. The crux of the matter is that in order to qualify for the accommodation, existing regulations specify that an eligible employer must self-certify its religious objections by either providing a standard form to an insurer or written notice to the Secretary of HHS. Numerous employers filed lawsuits, arguing that by being forced to self-certify their objections, they are facilitating the provision of contraceptive services that they object to on religious grounds.

The Supreme Court took up several of these cases in a consolidated appeal, *Zubik v. Burwell*. In *Zubik*, the Court unanimously declined to consider the merits of the issue and remanded the cases to the appeals courts, along with instructions giving parties an opportunity to "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women ... 'receive full and equal health coverage, including contraceptive coverage.'" In the wake of the *Zubik* opinion, and following the November 2016 election, lawsuits addressing the contraceptive coverage requirements are still pending in several appeals courts. The Trump Administration has requested that the courts keep these cases on hold while the Administration analyzes relevant legal and policy issues and engages in rulemaking activities that could alleviate the need for further judicial action. Currently, an interim final rule governing coverage of the preventive services is pending review with the Office of Management and Budget.

Neither the AHCA nor the BRCA would amend the ACA requirements concerning preventive health services. Accordingly, if one of these bills were enacted, health plans and health insurers would still need to offer preventive services with no out-of-pocket costs to participants. However, it appears that the Trump Administration would also retain the ability to alter existing HHS guidelines and modify the scope of contraceptive coverage (or certain other types of preventive services) that currently must be provided. Congress also may amend the requirements regarding coverage of preventive services, and such changes may affect these pending cases.

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