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"Improbable Rescue"? Supreme Court Punts As It Reverses Decision Finding Affordable Care Act Unconstitutional

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In a highly anticipated 7-2 decision last week, the United States Supreme Court reversed the decision of the Fifth Circuit Court of Appeals declaring the Affordable Care Act ("ACA") unconstitutional. The Court also remanded the matter to the Fifth Circuit with instructions to dismiss the case. *California et al. v. Texas et al.*[1] The Court chose to punt on procedural grounds.

Employers, small businesses enrolled in SHOP plans under ACA, individuals enrolled in public exchange plans ("ACA Marketplace Plans"), plan sponsors, plan administrators, health care issuers, in-house and outside health care law and employee benefits counsel, and Human Resource professionals need not scrap current ACA-compliant programs or coverage. ACA lives on, again, for now.

In dissent, Justice Alito (joined only by Justice Gorsuch) called the decision an "improbable result" in light of the Court's earlier, highly publicized ACA decisions.

How ACA Got Here: In the first ACA decision in 2012, the Court found a single constitutional source of authority under which Congress could enact ACA: the power of the government to levy taxes and to spend. Taking their cue from that decision, ACA opponents in Congress garnered enough votes in 2017 to reduce the act's penalty for failing to obtain health care coverage to zero. Their theory? No tax, no authority for the so-called "Individual Mandate" in ACA, or for ACA itself, so the act must fall.

What The Heck Is Standing to Sue? In this "third installment" of what Justice Alito dubbed the "ACA trilogy," the Supreme Court in essence punted without considering the merits of the arguments advanced by either side. It decided the case on standing alone.

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The state plaintiffs (led by Texas) complained that ACA caused them injury through increased costs in the running of state-operated insurance programs, as well as increased administrative expenses necessitated by compliance with ACA's minimum value and essential coverage requirements. The individual plaintiffs complained that ACA forced them to obtain health care coverage that they did not want.

The 7-person majority opinion ruled that, despite an extensive evidentiary hearing in the federal district court, *no* plaintiff had demonstrated **1)** the type of injury "fairly traceable" to the statutory provision challenged, or **2)** the type of remedy that the Court could take even if it found a constitutional violation.

The Court's Reasoning: The individual plaintiffs faced only a voluntary choice (to paraphrase Hamlet, to buy coverage or not to buy coverage), but no injury or damage if they chose not to buy coverage with the penalty at zero. The state plaintiffs complained about ACA requirements not contained in the Individual Mandate provision. Therefore, the Court held, the plaintiffs could not sue (in legalese, "lacked standing to sue") to invalidate ACA. It also expressly punted on the merits.

Impact During the Pandemic:

Punting in the middle of a global pandemic may not be the worst result.

Just two days before the Supreme Court's decision, *Bloomberg News* reported that, according to the U.S. Department of Health and Human Services (HHS), more than 1.2 million individuals had already signed up for ACA Marketplace Plans during the special enrollment period extended by the Biden Administration. HHS also reported that 1 million new and returning consumers will pay monthly premium costs under those plans of \$10 or less through premium tax credits under the American Rescue Plan.

The 7-2 decision has saved millions of individuals from losing affordable, comprehensive health care coverage in the midst of the resurging global COVID pandemic and uncertainty surrounding vaccine rollouts and new strains of the coronavirus.

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Punting in Controversial Cases:

The Court has punted before in controversial cases. In *Perry v. Brown*, the Court also found that plaintiffs lacked standing to bring their legal appeal and sidestepped the merits of the marriage equality question for another day. There, the Ninth Circuit Court of Appeals had enjoined California from enforcing Proposition 8 ("Prop 8") language permitting marriage only between one man and one woman, grafted onto the state constitution by popular vote. The appellate court stayed its injunction pending Supreme Court review.

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Unlike last week's decision, the *Perry* Court did *not* remand to the Ninth Circuit with instructions to dismiss the case. That remand left the Ninth Circuit injunction against enforcing the Prop 8 language intact.

Wedding bells chimed. HBO produced an award-winning documentary (*The Case Against 8*) with David Boies and Ted Olson (former adversaries from the Bush/Gore election controversy) in lead roles, along with four same-sex couples with compelling stories. The California Attorney General (Kamala Harris) married one of those couples on camera. After a rapid shift in the nation's perspective, the Court affirmed marriage equality on the merits.

Last Week's Punt:

Before a district court in Texas known for its hostility to ACA and before the Fifth Circuit, the state and individual plaintiffs had successfully argued that reducing the ACA Penalty to zero for individuals required to obtain ACA-compliant health care coverage rendered the Individual Mandate unconstitutional. Joined by the Federal Government after the appointment of Attorney General William Barr to head the Department of Justice, the plaintiffs had further contended that the entire act must fall.

Entering the fray in February 2021, the Biden Administration reversed course and supported ACA. In the midst of the global pandemic, the Court faced whether to terminate the ACA-compliant health care of millions of employed and unemployed individuals.

A brief recap: When Congress reduced the penalty to zero in 2017, it actually left intact the Individual Mandate passed by the 2010 Congress.

That mandate required, beginning in 2019, that individuals obtain health care coverage unless the act exempted them from doing so (e.g., for reasons of religious belief). Other ACA sections set forth the statute's requirements for health care coverage, both in terms of essential health care requirements and affordability.

Individuals could obtain such coverage through ACA-compliant insured or self-insured employer-sponsored programs or through ACA Marketplace Plans. The ACA penalty provision then required taxpayers to prove that they had done so; and the IRS blessed forms to be submitted, either proving exemptions from the act or proving ACA-compliant coverage. Originally, to begin in 2019, Congress set a nominal penalty of less than the cost to an individual of health care coverage. In later years, the ACA Penalty would increase substantially.

In 2018 and thereafter, Texas and its state allies and the individual plaintiffs sought to have ACA declared unconstitutional, arguing that the Individual Mandate had become unenforceable without the ACA Penalty. Other states, led by California, contended that reducing the ACA Penalty to zero did not render the Individual Mandate or the entire act unconstitutional, and that Congress clearly did not intend all of ACA to fall because it had left the Individual Mandate and "shared responsibility" provisions untouched in 2017.

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The majority decision: On standing grounds alone, the Court reversed the decision finding ACA unconstitutional and remanded with instructions to dismiss.

The Court rejected the above-described injuries asserted by the plaintiffs as insufficient to demonstrate constitutional standing to bring their claims. The Court reasoned that Article III, § 2 of the Federal Constitution required a “live case or controversy” and precluded advisory opinions by the Court. Therefore, the Court required plaintiffs to “trace” their alleged pocketbook injury to the Individual Mandate sans penalty, the section that they challenged as unconstitutional.

With the penalty provision alone rendered unenforceable by Congress, in the Court’s view the individual plaintiffs could not show any kind of governmental action or conduct that had caused or would cause them the injury that they attributed to §5000A(a). Whom could they enjoin? The Secretaries of HHS or Treasury? Neither could enforce a zero penalty.

Similarly, the Court concluded that the states had not shown injuries fairly traceable to the Individual Mandate. Instead, the states only pointed to asserted increased costs in the running of state-operated insurance programs, as well as increased administrative expenses necessitated by compliance with ACA’s minimum essential coverage requirements, i.e., requirements -- the Court noted -- imposed by other ACA provisions than the Individual Mandate provision.

In the absence of standing, the Court felt that it had no choice but to reverse and remand for dismissal.

QUESTIONS?

If you have any questions regarding the Supreme Court decision or any issues raised in this article, please contact Diane M. Soubly (soubly@butzel.com) or Lynn McGuire (mcguire@butzel.com), or a member of the Butzel Long Labor & Employment & Employee Benefits Practice Group.

Diane M. Soubly

734.213.3625
soubly@butzel.com

Lynn McGuire

734.213.3261
mcguire@butzel.com

[1] Case No. 19-840, “together with” *Texas et al. v. California et al.*, Case No. 19-1019, June 17, 2021, 2021 WL 2459255 (2021).