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STRATEGIC PERSPECTIVES: Health law takes center stage at U.S. Supreme Court

An Affordable Care Act (ACA) case and a federal preemption case involving Medicare and ERISA are before the High Court, with possibly more health law cases to come.

By Cathleen Calhoun, J.D.

In the 2020-21 term, the U.S. Supreme Court justices will decide at least two important health law cases. The first is an Affordable Care Act (ACA) case on the constitutionality of the individual mandate, and the second is a case about the preemption of both ERISA and Medicare Part D over an Arkansas law on the conduct of pharmacy benefit managers. This Strategic Perspective examines both cases and expert commentary is provided from attorneys Michael Clark, of Counsel at Baker Donelson, and Eric Schillinger, Senior Compliance Counsel at Hall Benefits Law. As a special focus, the late Justice Ruth Bader Ginsburg's analysis of the ACA from selected past U.S. Supreme Court cases is also included.

Two Health Law Cases

ERISA and Medicare Part D decision. The Eighth Circuit case before the Court is *Pharmaceutical Care Management Association v. Rutledge,* where the court ruled that both ERISA and Medicare Part D preempted an Arkansas law that sought to govern the conduct of pharmacy benefit managers (PBMs) by mandating that pharmacies be reimbursed for generic drugs at a price equal to or higher than the pharmacies' cost for the drug. Ruling in favor of Pharmaceutical Care Management Association (PCMA), an association of PBMs, the court determined both that the Arkansas law implicitly "related to" ERISA in violation of ERISA's preemption provision and that the law "acted" with respect to standards that CMS had established, in violation of Medicare Part D's preemption provision (see *Part D preempt Arkansas law regulating pharmacy benefits managers*, June 11, 2018).

The question before the U.S. Supreme Court is whether the Eighth Circuit erred in holding that ERISA preempts Arkansas' statute regulating PBMs' drug-reimbursement rates. Arkansas argues that to hold that the statute is preempted by ERISA would go against the High Court's precedent that ERISA does not preempt rate regulation.

ACA decision. On November 10, 2020, the Supreme Court will hear another ACA case, *California v. Texas*. In that December 2019 case, the Fifth Circuit, in a 2-1 opinion, upheld the Texas federal district court's ruling that the individual mandate in section 5000A of the ACA was unconstitutional. The ACA individual mandate provision gives individuals a health care choice—either purchasing health insurance or paying to the IRS what is called in the law a

"shared responsibility payment," but Congress reduced the "shared responsibility payment" to zero without repealing the ACA. The Fifth Circuit agreed with the lower court and held that the individual mandate was no longer a constitutional exercise of congressional power, since the shared responsibility payment had been reduced to zero. The Fifth Circuit also concluded that in *National Federation of Independent Business v. Sebelius*, a case decided by the U.S. Supreme Court in 2012, a majority of justices rejected the argument that the Interstate Commerce Clause or the Necessary and Proper Clause were sources of congressional authority for the payment, leaving only the argument that Congress used the taxing authority as authority for the ACA. The Fifth Circuit agreed with the Texas court that since Congress changed the shared responsibility payment amount to $0, the tax authority argument was no longer applicable (see *ACA individual mandate unconstitutional; remanded for further study of severability*, December 19, 2019).

The questions presented before the U.S. Supreme Court are: (1) whether the individual and state plaintiffs in the case have established Article III standing to challenge the minimum coverage provision in section 5000A(a); (2) whether reducing the amount specified in section 5000A(c) to zero rendered the minimum coverage provision unconstitutional; and (3) if so, whether the minimum coverage provision is severable from the rest of the ACA.

Expert Commentary

Wolters Kluwer posed questions on the Eighth Circuit ERISA case to Eric Schillinger, Senior Compliance Counsel at Hall Benefits Law, and on the Fifth Circuit ACA case to Michael Clark, Of Counsel at Baker Donelson.

1. What are your thoughts on the 8th Circuit's decision in *Rutledge v. Pharmaceutical Care Management Association*, and do you have any predictions on how the U.S. Supreme Court may rule?

   Eric Schillinger: The Eighth Circuit based its decision in large part on a similar case in Iowa (*PCMA v. Gerhart*). Many practitioners and legal scholars (including the U.S. Solicitor General) thought that both rulings were incorrect because, among other reasons, the rulings applied an overly broad interpretation of what "relate[s]" to an employee benefit plan, the standard used in ERISA Section 514 (the preemption provision in question)… Under Supreme Court precedent, a state law is in "reference to" an ERISA plan if the law acts immediately and exclusively upon ERISA plans or if the existence of ERISA plans is essential to the law's operation. An "impermissible connection with" an employee benefit plan exists if the state law governs a central matter of plan administration or interferes with a nationally uniform plan administration. The Eighth Circuit accepted the Pharmaceutical Care Management Association's arguments that Arkansas law met both the "reference to" and "connection with" tests, but Arkansas, the U.S. Solicitor General, and states that joined in filing amicus curiae in support of Arkansas' petition argue that the Eighth Circuit holding conflicts with existing precedent (e.g., that a general law with an incidental impact on ERISA plans is not preempted). In some parts of its opinion, the Eighth Circuit appears confused about how maximum allowable cost laws like the Arkansas statute function and impact ERISA plans and administration (e.g., by Eighth Circuit accepting

the argument that such laws would require different ERISA plan procedures for each state)… I would not be surprised if the Supreme Court overturned the Eighth Circuit's decision and held that the Arkansas law is not preempted by ERISA, though it is a difficult ruling to predict and I could see the case going either way.

2. What are your predictions or thoughts on how the Court may rule in *California v. Texas* and what the ruling may mean for the future of the ACA?

   Michael Clark: This answer must be viewed in light of some major changes that have happened to both the statute and the Supreme Court in the interim following the Court's fractured opinion in *National Federation of Independent Businesses v. Sebelius (NFIB),* 567 U.S. 519 (2012), which saved the ACA from being held unconstitutional by a plurality finding that the individual mandate provision operated as a tax… Critically, the composition of the Court is now significantly different… The Fifth Circuit majority panels' analysis regarding the tax question that had earlier saved the ACA relies on the Chief Justice's analysis in *NFIB*. The intervening legislative changes to the ACA have made that a far more difficult question because by changing the penalty provision to zero dollars, it is hard to show that it can fairly be characterized as a tax in order to avoid having the legislation found unconstitutional.

Justice Ginsburg and the ACA

The ACA case of *California v. Texas* will go forward without Justice Ginsburg, although some may reflect on her words from past cases on the topic as the Court determines the future of the ACA. Notable cases are outlined below with quotes from Justice Ginsburg. Choosing a handful of quotes from what could be described as an intricately woven tapestry of thought could not fully demonstrate Justice Ginsburg's analysis. Links to decisions and oral arguments are provided for desired further reading.

First ACA case. As discussed above, the constitutional questions on the ACA first appeared before the U.S. Supreme Court in 2012, with the case of *National Federation of Independent Business v. Sebelius*. In an opinion written by Chief Justice John Roberts, the Court upheld (5-4) the individual mandate to buy health insurance as a constitutional exercise of Congress' taxing power.

Justice Ginsburg filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part:

> "I agree…that the minimum coverage provision is a proper exercise of Congress' taxing power… Unlike the Chief Justice, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.…"

She also added, "…The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's… In the Social Security Act, Congress installed a federal system to provide monthly benefits… Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers

and state governments. According to the Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive… [T]he minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system.…"

2015. On June 25, 2015, the High Court decided another ACA case, *King v. Burwell*. The U.S. Supreme Court affirmed (6-3) the Fourth Circuit and upheld an Internal Revenue Service (IRS) ruling to extend health plan premium tax credits to individuals enrolled in ACA coverage through a federal exchange. Chief Justice Roberts, writing for the majority, and joined by Justice Ginsburg and others, found that the ACA phrase "an Exchange established by the state" did not expressly limit tax credits to state exchanges, but was properly viewed as ambiguous and that several other provisions in the ACA would make little sense if tax credits were not available to federal exchange enrollees.

Although she did not write the majority opinion or a concurring opinion, during oral argument, Justice Ginsburg expressed concern that if the nationwide subsidies were struck down, there would be disastrous consequences for states that don't create their own.

2020. In one of her last analyses, Justice Ginsburg filed a dissent in the case of *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, decided on July 8, 2020. The High Court held (7-2) that government departments had the authority to provide exemptions from the regulatory contraceptive coverage requirements stemming from the ACA for employers with religious and conscientious objections. Justice Ginsburg wrote, "The blanket exemption for religious and moral objectors to contraception formulated by the IRS, EBSA, and CMS is inconsistent with the text of, and Congress' intent for, both the ACA and RFRA. Neither law authorizes it."

Against this backdrop, the Supreme Court will hear oral arguments in *California v. Texas* on November 10, 2020. The Court could find part or parts of the ACA unconstitutional, find the entire law unconstitutional, or find that the Fifth Circuit was wrong and that the individual mandate is constitutional.

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