

# Affordable Care Act Likely to Survive Latest Challenge

December 19, 2018

On December 14, 2018, a judge on the U.S. District Court for the Northern District of Texas ruled that the entire Affordable Care Act (“ACA”) was unconstitutional. The decision is widely expected to be overturned on appeal. The ruling does not currently have any practical effect because it did not enjoin enforcement of the ACA and the Department of Health and Human Services (“HHS”) has stated that it will continue implementing the ACA.

## **Debevoise & Plimpton** THE RULING

In January 2018, Attorneys General and one Governor from 20 states (the “Plaintiff States”) sued to strike down the entire ACA on the basis that a recent development rendered it unconstitutional. In 2012, the U.S. Supreme Court upheld all but one of the ACA’s provisions, based in part on the determination that the individual mandate (a penalty certain people were required to pay if they did not purchase qualified health insurance) was an appropriate exercise of the federal government’s taxing power. As part of the 2017 tax reform law, Congress reduced the individual mandate penalty to zero in 2019. The Plaintiff States argued that because the Supreme Court upheld the individual mandate on the strength of the federal government’s taxing power, it must now be unconstitutional because it can no longer be characterized as a tax (because there is no longer any circumstance where individuals would be required to pay money to the government). The Plaintiff States further argued that since the mandate is inextricably linked to the other provisions of the ACA, the invalidity of the mandate necessarily leads to the invalidity of the entire ACA. The District Court accepted the arguments made by the Plaintiff States and held that the entire ACA was unconstitutional.

We expect the District Court’s opinion will be overturned on appeal for two principal reasons. First, the District Court’s determination that the individual mandate is unconstitutional because it is no longer a tax elevates form over substance. By reducing the mandate’s penalty to zero, Congress effectively eliminated the mandate altogether. As the mandate has been eliminated, any question about whether it is constitutional is moot. Second, the District Court relied on statements made by Congress in 2010 that

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the mandate was one of the ACA’s “essential” provisions. This reasoning overlooks the fact that in 2017—seven years later—Congress had come to a different view, eliminating the mandate while preserving the rest of the ACA. There is no evidence that Congress believed eliminating the mandate would result in the ACA ceasing to operate. Further, the District Court’s reasoning conflicts with the well-accepted principle that Congress, under most circumstances, is free to revise statutes as it sees fit (consistent with constitutional requirements). For these reasons and others, many commentators, including those who opposed the ACA on policy grounds, have opined that the District Court’s determination is in error.

### **THE DISTRICT COURT’S RULING HAS NO IMMEDIATE EFFECT**

For the moment, the ruling has no legal effect. The District Court did not issue an injunction, meaning HHS can continue implementing the ACA for now, as HHS has said it will. Moreover, the ACA’s constitutionality is being defended by a group of states that support it. These states have petitioned the District Court to stay the ruling pending resolution of appeal. A stay would confirm that the ACA remains fully in force until such time as a higher court issues a ruling on the case. There is a high likelihood that either the District Court or the Fifth Circuit will issue such a stay.

### **THE PROCESS GOING FORWARD**

The states that support the ACA will appeal the District Court’s decision to the Fifth Circuit. While the Fifth Circuit is typically a conservative circuit, it will likely view the District Court’s ruling as judicial overreach and will be troubled by the conclusion that Congress’s decision to amend just one part of the ACA will render the rest of it unconstitutional. A Fifth Circuit ruling will likely be issued sometime in the second half of 2019.

If the Fifth Circuit were to uphold the District Court, then it would almost certainly be overturned by the U.S. Supreme Court. A majority of the Supreme Court has already twice rejected challenges to ACA and it is unlikely that the result would be any different now.

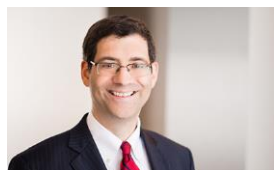
### **EFFECT ON HEALTH INSURANCE MARKETS**

As the District Court’s ruling is unlikely to survive on appeal, it should not have a meaningful effect on recent developments that suggest that the health insurance

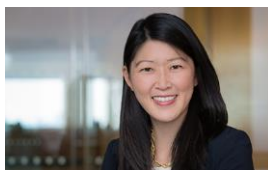
exchanges created by the ACA for the sale of individual and small group plans are stabilizing. The 2018 midterm elections removed the uncertainty created by the possibility that a Republican Congress might repeal the ACA. For 2019, insurance premiums have stabilized—if not gone down—in many states. Further, some commercial insurers that previously exited exchange markets because they had concerns about the long-term profitability of plans sold through the exchanges have now returned. Barring unforeseen developments, commercial insurers are likely to continue making the investments necessary to maximize the success and profitability of insurance plans sold on the ACA exchanges over the long term.

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Please do not hesitate to contact us with any questions.



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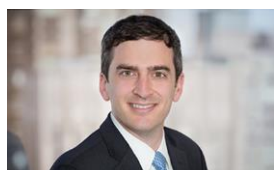
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