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The Black Sheep of the ACA Family

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My wife opened a DIY home décor studio last year. It changed my schedule. As her workload picks up each week when mine slows down and vice versa, weekends are no longer mutually available time and we have to be more creative in planning our social calendar.

As the early winter darkness settled in one Friday evening, my plan was to respond to a few emails before heading to the gym while my bride taught people how to make something she calls "chunky knit blankets." An annoying beep sounded and a "Breaking News" bulletin flashed on my screen: "Obamacare ruled unconstitutional." I knew exactly what this was about[1] but was unclear what it all meant. My exciting Friday-night plans of being alone in a gym were replaced with hours of reading and thinking about constitutional law.

THE COURT DECISION

On Dec. 14, 2018, a federal judge issued a decision in *Texas v. Azar*[2] declaring the individual mandate provision in the Affordable Care Act (ACA) to be unconstitutional. This was consistent with the 2012 U.S. Supreme Court ruling in *National Federation of Independent Business (NFIB) v. Sebelius*, which ruled that the requirement exceeded congressional power under the interstate commerce clause. However, the Supreme Court ruling in *NFIB v. Sebelius* allowed the mandate to be enforced under the taxing power of Congress. The elimination of the tax penalty in the December 2017 Tax Cuts and Jobs Act (TCJA) nullified the tax penalty but left the individual mandate in place. Hence, the Texas court ruled that the remaining mandate without taxation had no legal basis.

With a tax penalty in place, individuals had a choice between procuring insurance and paying a tax. Either would satisfy the legal requirement. Now there is a simply a requirement to obtain health insurance. There is not a punitive mechanism for not doing so, but the requirement is in place nonetheless. Had the Texas court simply struck the individual mandate, there would likely have been little controversy. Instead, the court ruled that the individual mandate cannot be severed[3] from the other ACA provisions and struck down the entire law.

The judge focused his decision on the intent of the 2010 Congress (passing the ACA), but he has received criticism for glossing over the intent of the 2017 Congress when the shared responsibility payment was voided in the federal tax overhaul in 2017. This is undoubtedly harder to assess, but many legal experts expect other courts will need to focus there.

> The task before the courts is judgment of congressional intent. Did Congress believe the individual mandate was an essential part of the law?

THE PLAYERS AND THEIR POSITIONS

The distinct players and their legal arguments are:

- **The state plaintiffs.** Twenty states, led by Texas, alleged that the individual mandate is unconstitutional and that all the other ACA provisions are inseverable.
- **The individual plaintiffs.** Neill Hurley and John Nantz, U.S. citizens and Texas residents, alleged that the individual mandate is unconstitutional and that all the other ACA provisions are inseverable. They argued that they were injured by forced compliance with an unconstitutional mandate.
- **The federal defendants.** The United States of America, the United States Department of Health and Human Services, and the United States Internal Revenue Service agreed that the individual mandate is unconstitutional, and that it is inseverable from the ACA's pre-existing-condition provisions and community rating requirements. They disputed that other ACA provisions (e.g., premium subsidies) are inseverable[4] from the mandate.
- **The intervenor defendants.** Sixteen states and the District of Columbia, led by California, disputed all of the plaintiffs' claims.
- **The judge.** United State District Judge Reed O'Connor agreed with the plaintiffs that the individual mandate is unconstitutional and that all the other ACA provisions are inseverable. While the plaintiff asked for an injunction, O'Connor issued a partial summary judgment and later stayed the ruling, allowing ACA markets to continue functioning as currently operating without interruption until the case is appealed.

- **Other courts.** For the ACA to be functionally overturned, the case will likely have to go through the 5th Circuit Court of Appeals and the Supreme Court over the course of several years.

THE COMPLICATED HISTORY OF THE INDIVIDUAL MANDATE

In 1993, Sen. John Chafee, a Rhode Island Republican, introduced the Health Equity and Access Reform Today Act. It was a defensive maneuver to offer a private alternative to contrast the government-centered plan being devised by the Clinton administration. The bill was never debated, voted upon or amended for future consideration. Among other things, the bill included an individual mandate provision, albeit without the comprehensive benefit requirements of the ACA.

The concept was resurrected in the 2008 Democratic presidential primary by candidates John Edwards and Hillary Clinton. The third and final candidate, Barack Obama, opposed the mandate and wanted to be sure the electorate truly understood the concept. He reminded the electorate: "It's not a *mandate* on government to provide health insurance. It's a *mandate* on individuals to purchase it"(emphasis added).[5]

John Chafee's son Lincoln served as a Republican senator from 1999 to 2007, endorsed Obama for president in 2008 and served as national co-chair for his re-election campaign in 2012. Of course, Obama changed his position on the individual mandate after becoming president.

THE CBO, THE ACA AND THE ACADEMY

While Obama initially opposed the individual mandate, he was faced with promoting contentious legislation and the prospect of the Congressional Budget Office (CBO) taking "the position that without an individual responsibility requirement, half of the uninsured will be left uncovered."[6] The inclusion of the individual mandate in the ACA allowed the CBO to score the bill with attractive enrollment and politically required "deficit neutrality," but its vulnerability made it an easy target of ACA detractors. It suffered not only due to its unpopularity, but also because of challenges to its constitutionality.

These legal challenges quickly arose. Actuarial input was relied upon to appreciate the mandate's necessity. In 2011, the American Academy of Actuaries (the Academy) stated that the mandate is such "a vital component of the year-old health reform law that, if removed, alternatives would be needed."[7]

In 2012, the Academy effectively viewed severability consistent with the federal defendants' position. "However the Court rules on the constitutionality of the individual-mandate provision ... the guaranteed-issue and community-rating provisions should stand or fall together with it" based on the actuarial perspective that "in order for the community-rating and guaranteed-issue provisions in the Act to operate as intended, they must be paired with an effective mechanism to ensure broad participation in the health-insurance market, such as an individual mandate."[8]

CONGRESSIONAL INTENT (ESSENTIALITY AND SEVERABILITY)

The task before the courts is judgment of congressional intent. Did Congress believe the individual mandate was an essential part of the law? Would the law have passed without the individual mandate provision? These are important questions, as the court should sever the parts of the law that would have passed without the individual mandate.

The federal defendants had argued that guarantee issue and community rating were inseverable from the mandate, consistent with the general understanding of the essentiality belief of the 2010 Congress and the Academy's 2012 recommendation. In a brief submitted after the District Court ruling, the federal defendants agree that other ACA provisions, which could properly function without an individual mandate, should fall as well, as "the question of congressional intent as to those provisions is complicated by the circumstances surrounding their enactment."[9]

What did the 2017 Congress intend by striking the shared responsibility payment but leaving the individual mandate in place, subsequent to the Supreme Court ruling in 2012 that the mandate was constitutional only due to the taxing power of Congress?

Legal opinions vary somewhat, but reasonable conclusions of a future court may be:

1. The individual mandate was viewed to be essential[10] by the 2010 Congress.

2. The individual mandate was not viewed as essential by the 2017 Congress.

3. The intent of the 2017 Congress is more relevant, as it can freely change laws passed by the 2010 Congress.

THE LEGAL DILEMMA

Courts must presume congressional intent. While members of Congress likely cast their votes without full consideration of an alternative mechanism, this is undoubtedly a subjective exercise. For example, if Provision X in Legislation Y is ruled unconstitutional and Legislation Z = Y – X (feeling compelled to put some math in here), Congress would not cast an "insurance vote" on Z on the prospect that X may later be ruled unconstitutional. While judicial interpretation necessarily provides some flexibility, there is one judgment that courts most avoid. Courts are not allowed to presume that Congress intended to pass an unconstitutional law.[11] A court could find a law facially constitutional and as-applied unconstitutional.[12]

The challenge before the courts is interpreting constitutional intent with respect to a remaining unconstitutional element in current law. While the Supreme Court has not limited itself to binary options on ACA matters, the courts appear to have two unworkable interpretations: Either Congress left an unconstitutional law in place or Congress left an unconstitutional element in an otherwise constitutional law.[13]

THE LESSON FOR ACTUARIES

If congressional intent is the crucial interpretation and congressional intent is based on a congressional view of essentiality, how is a congressional view of essentiality formed? As the matters at hand are actuarial in nature, did the view of actuaries naturally become the view of members of Congress? If the view of actuaries has changed with experience, are the results of court cases based on actuarial opinions of yesterday? These are questions I did not ponder a year ago.

Since 2010, several observers have referred to the individual mandate as an essential leg of a three-legged stool.[14] Unfortunately, public discussion of this nature has been misguided. First, the individual mandate could be considered a short leg of a very unbalanced stool. Second, three legs are not needed.[15] A strong enough mandate (e.g., annual $15,000 penalty) that is strictly enforced could incent near universal coverage. Likewise, premium subsidies that account for nearly all gross premiums could do the same. The combination of premium subsidies and an individual mandate work in tandem to incent coverage, but the implication of a required balancing of three legs of equal strength has acted to confuse proper understanding of ACA incentives. Hopefully, actuaries have articulated ACA mechanics more accurately than other commentators.

Actuaries should be clear that our viewpoints are estimates and avoid absolute statements. For example, it would be irresponsible to suggest that an individual mandate (or lack thereof) has no enrollment or premium impact; it is likewise irresponsible to definitively state that an insurance market cannot survive without a mandate. We can quibble about percentages, but the individual mandate penalty repeal in 2019 is not going to collapse the market. While most observers recognize this today, the ACA was ruled unconstitutional because a court believed a prior Congress believed that to be the case. As O'Connor specified in his ruling, "Congress stated explicitly that the Individual Mandate 'is essential to creating effective health insurance markets that *do not require underwriting and eliminate its associated administrative costs*' ..." (emphasis added).[16]

This has been an eye-opening series of events. While actuaries are known for our expertise in building and managing financial systems, we don't often consider that our technical opinions

are adopted by others for considerations such as determining congressional intent.

I believe the ACA experience provides three lessons for actuaries:

1. Don't speak in absolutes.

2. Incentives work; seek to understand them.

3. Consumers almost always understand their personal interests better than other stakeholders and accordingly make decisions in that regard. Markets that rely on consumers acting in the interest of the market will struggle.

FINAL THOUGHTS

I have had many discussions about this case inside and outside our profession. While most people expect the Texas ruling to be overturned, many find the decision unsettling. Personally, I believe a Supreme Court review would bring appropriate closure. Laws of this consequence should not have elements of constitutional uncertainty. We should expect contentious laws of significant magnitude that flirt with constitutional boundaries to be fully examined.[17] Chief Justice John Roberts wrote his own opinion in 2012. It allowed the ACA markets to continue uninterrupted and was described by most observers as "novel." It was praised by some and ridiculed by others.

Commentary on O'Connor's ruling has been less balanced. While acknowledging "a certain satisfaction in seeing the Chief Justice hoist on his own logic,"[18] *The Wall Street Journal* criticized the ruling as an attempt to achieve policy goals through the courts rather than Congress. O'Connor's work regarding the individual mandate is now finished. Roberts may have prematurely closed his book in 2012. If this case rises to the Supreme Court, he will need to consider his prior opinion, the current reliance on the ACA in society and the intention of the 2017 Congress. Of course, we will then have actual history of ACA market performance without a shared responsibility payment. It will be interesting to compare the court discussion of beliefs regarding essentiality with the evidence of actual experience in real time, and notorious[19] if the two are not aligned. ■

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ENDNOTES

1 I recruited the special counsel for civil litigation at the Texas attorney general's office, the plaintiff in this case, to speak at the Society of Actuaries Health Meeting in June 2018 for a panel called Hot off the Press: The Latest ACA Developments, Session 24, June 25, Austin, Texas. *https://www.soa.org/prof-dev/events/2018/health-meeting/agenda-day-2/*.

2 *Texas v. United States of America*, case no. 4:18-cv-00167-O, Memorandum Opinion and Order, Dec. 14, 2018, *https://affordablecareactlitigation.files.wordpress.com/2018/12/Texas-v.-US-partial-summary-judgment-decision.pdf*.

3 The determination of "severability" is a subjective legal matter that relies upon interpretation of congressional intent. It is discussed later in this article.

4 Three months after the court ruled in plaintiffs' favor, the federal defendants dropped this dispute. U.S. Department of Justice to Lyle W. Cayce, Clerk of the U.S. Court of Appeals for the Fifth Circuit. March 25, 2019. *https://theincidentaleconomist.com/wordpress/wp-content/uploads/2019/03/letter-from-DOJ.pdf*.

5 BuzzFeed: Obama on the Mandate in 2008. YouTube, Dec. 25, 2011. *https://youtu.be/FknJLMc84bo*.

6 Lizza, Ryan. The Mandate Memo: How Obama Changed his Mind. *The New Yorker*, March 26, 2012, *https://www.newyorker.com/news/news-desk/the-mandate-memo-how-obama-changed-his-mind*.

7 American Academy of Actuaries. 2011. Actuaries: Removing Individual Coverage Mandate Would Require Alternatives. News release, March 28. *https://www.actuary.org/files/03.28.11+News+Release+Mandate_0.pdf*.

8 *National Federation of Independent Business v. Kathleen Sebelius, Secretary of Health and Human Services; State of Florida v. Department of Health and Human Services*, case nos. 11-393 and 11-400, Brief for the American Academy of Actuaries, Jan. 2012, *http://dev.actuary.org/files/publications/Academy_amicus_(11-393).pdf*.

9 Baker, Sam. The Trump Administration's Case for Killing the ACA. *Axios*, May 2, 2019, *https://www.axios.com/affordable-care-act-repeal-strike-down-trump-administration-12ca52f7-4258-40aa-bcfd-b98d956c2e9d.html*.

10 Weinstein, Rich (@phillyrich1). 2016. "But NOW that a TX Judge has ruled the ACA completely unconstitutional because the mandate is unconstitutional and cannot be severed from the ACA, well, never mind what we all said before, 'The law still works without it.'" Twitter, Dec. 16, 2018. *https://twitter.com/phillyrich1/status/1074323151193063425*.

11 Adler, Jonathan H., and Abbe R. Gluck. What the Lawless ObamaCare Ruling Means. *New York Times,* Dec. 15, 2018, *https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html*.

12 Somin, Ilya. Judge Sutton on Facial vs. As-Applied Challenges to the Individual Mandate. *The Volokh Conspiracy*, June 29, 2011, *http://volokh.com/2011/06/29/judge-sutton-on-facial-vs-as-applied-challenges-to-the-individual-mandate/*.

13 Congress did not repeal the individual mandate, but rather left the individual mandate in place without a taxing mechanism.

14 Loosely speaking, the shared responsibility payments and premium subsidies are needed to balance guarantee issue and community rating requirements.

15 Other government programs, such as Medicare Advantage and Managed Medicaid, functionally operate without a risk-based premium rating or an individual mandate.

16 Supra note 2.

17 Fann, Greg. Government Accountability. *Axene Health Partners* (accessed April 8, 2019), *https://axenehp.com/government-accountability/*.

18 Texas ObamaCare Blunder: A Judge's Ruling Will be Overturned and Could Backfire on Republicans. *Wall Street Journal*, Dec. 16, 2018. *https://www.wsj.com/articles/texas-obamacare-blunder-11544996418*.

19 Not intended to be a reference to the eldest justice on the bench. Kelley, Lauren. How Ruth Bader Ginsburg Became the "Notorious RBG": Irin Carmon and Shana Knizhnik Discuss Their New Book and Justice Ginsburg's Trailblazing Career. *Rolling Stone*, Oct. 27, 2015, *https://www.rollingstone.com/culture/culture-features/how-ruth-bader-ginsburg-became-the-notorious-rbg-50388/*.