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Q & A
Litigation Challenging the ACA: Activity since NFIB

Produced by Jane Perkins
National Health Law Program
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Q: Thank you for the materials you provided to us summarizing *National Federation of Independent Business v. Sebelius*, the Affordable Care Act (ACA) case decided by the Supreme Court.[1] We have heard reports that plaintiffs are still challenging the ACA in court. Can you update us on ACA litigation?

A: Yes. Since the ACA was enacted in 2010, the National Health Law Program (NHeLP) has tracked 89 federal court challenges to all or parts of the ACA. The Supreme Court's *NFIB* decision did not bring the litigation to an end; indeed, over 70 cases have proceeded since the Court's announcement. It will not be a surprise if the Supreme Court agrees to take another ACA case.

Discussion

The ACA seeks to achieve comprehensive health reform by prohibiting discriminatory practices in private insurance markets (e.g., pre-existing condition exclusions), creating private insurance markets for the uninsured, expanding Medicaid to non-elderly and disabled adults with incomes below roughly 133% of the federal poverty level, and improving access to preventive care and chronic disease management programs.[2] On March 23, 2010, the day President Obama

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[1] *See* Jane Perkins, *Fact Sheet: The Supreme Court's ACA Decision and its Implications for Medicaid* (July 2012) (available from TASC or NHeLP); Jane Perkins, NHeLP, *ACA Litigation Case Schedule* (Mar. 2012) (closed docket of "round one" cases), *at* http://healthlaw.org/index.php?option=com_content&view=article&id=553. NHeLP has another docket of post NFIB cases that it routinely updates, *see* Jina Dhillon, NHeLP, *Health Reform Litigation* (last updated July 19, 2013), *at* http://healthlaw.org/index.php?option=com_content&view=article&id=698.

[2] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 (2010) (collectively, the Affordable Care Act or ACA).

signed the ACA, four lawsuits were filed challenging the constitutionality of the ACA. Within a few months, many more cases were filed. For the most part, these cases focused on the ACA's "individual mandate" provision requiring individuals to maintain insurance coverage or pay a penalty. A number of these cases were appealed, and the U.S. Supreme Court ultimately agreed to review *NFIB*, the case from the Eleventh Circuit Court of Appeals. In addition to challenging the constitutionality of the individual mandate, *NFIB* included a claim by state officials that the Medicaid expansion was an unduly coercive use of Congress's spending clause authority. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), upheld the individual mandate as a valid exercise of Congress's taxing authority but found the Medicaid expansion was unduly coercive on the states. As relief, the Court prohibited the U.S. Secretary of Health and Human Services from terminating federal funding to states that do not make the Medicaid expansion.

While *NFIB* was pending, most of the other ACA challenges were put on hold. Once the decision was announced, however, a second round of litigation was unleashed. More than 70 cases have proceeded in federal district courts across the country. As of July 31, 2013, 30 of these cases were pending in the courts of appeals, with some courts considering multiple challenges. For example, six ACA appeals are pending in the Sixth Circuit; six, in the D.C. Circuit; four in the Seventh; and four, in the Eighth. Appellate decisions are now being issued with some regularity.

While this second round of litigation involves a range of legal claims, the following are highlighted: challenges to premium assistance tax credits, challenges to contraceptive coverage requirements, and challenges based on state law supremacy. These claims are summarized below.

Challenges to premium tax credits.

The ACA seeks to make health insurance more affordable by providing premium assistance tax credits, on a sliding income scale, to uninsured individuals with incomes between 100-400 percent of the federal poverty level. *See* ACA §§ 1401, 1412. The premium assistance credits are only available to individuals who enroll in a health plan offered through an Exchange. *See* 26 U.S.C. § 36B. Exchanges are to be established and operated by the states, or, if the state refuses to establish such Exchange, by the federal government. *See* ACA §§ 1311, 1321(c). Nearly two-thirds of the states have decided that they will not operate the Exchange, thus ceding operation to the federal government.

Oklahoma is one such state. Oklahoma's Attorney General Pruitt has gone a step further in *Okla. ex rel. Pruitt v. Sebelius*,, arguing that premium assistance tax credits are only available to individuals in states that operate their own Exchanges and, thus, are not available to Oklahomans who will obtain coverage through a federally facilitated Exchange. *See* No. Civ-11-030-RAW (E.D. Okla.) (Am Compl. Sept. 19, 2012). More recently, individuals and companies that

oppose the ACA have filed these allegations in federal court in the District of Columbia. *See Halbig v. Sebelius*, No. 13-263 (D.D.C.) (Compl. May 2, 2013).

The plaintiffs' claims rest upon section 1321(c) of the ACA, which provides that premium assistance tax credits are available to individuals enrolled in an Exchange "established by the state under section 1311" of the ACA. The plaintiffs argue that these seven words unambiguously reflect congressional intent to bar individuals in states using federally operated Exchanges from obtaining premium assistance tax credits. By contrast, this is not how the IRS has implemented premium assistance tax credits. IRS regulations provide for tax credits to be available to individuals enrolling in health plans through Exchanges, whether the Exchange is operated by the state or for the state by the federal government. *See* 77 FR 30377 (May 23, 2012) (promulgated as 26 C.F.R. part 1); *see also* 45 C.F.R. § 155.20 (defining Exchange). Thus, the legal question for the courts in *Halbig* and *Pruitt* is whether the statutory language unambiguously applies only to state-established, state-run exchanges, as the plaintiffs' argue, or whether the federal agency's interpretation and implementation of the statute is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (stating that if the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). And while only a court can decide the question, the plaintiffs' reading does appear to "quarantine seven words," while ignoring how Exchanges and tax credits are referenced in other ACA provisions.[3] The plaintiffs' also ignore the ACA's stated purpose to achieve "quality, affordable health care for all Americans." ACA, Title I; *see also* ACA § 1501 (stating congressional findings regarding effects on national economy).

If ultimately successful, these challenges would arguably be the most damaging to the ACA's future.[4] The availability of premium assistance tax credits for uninsured individuals would be severely restricted, leaving affordable health insurance out of reach for millions. Numerous other ACA provisions could also be affected. For example, the plaintiffs take the position that the individual mandate cannot apply in federally facilitated Exchange states because, without the premium assistance tax credit, the cost of insurance premiums will exceed the eight percent affordability threshold established by the ACA. *See* ACA § 1501(e) (providing that the individual mandate does not apply to individuals for whom

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[3] *See* Presentation by Robert Weiner, Partner, Arnold & Porter, LLP, *Halbig v. Sebelius: 'All of ObamaCare Hangs on the Outcome*,' Cato Inst. Policy Forum (June 17, 2013) (policy forum presenting both sides of the argument and also featuring Michael Carvin**,** Partner, Jones Day; Michael F. Cannon, Director of Health Policy Studies, Cato Institute; and Simon Lazarus, Senior Counsel, Constitutional Accountability Center), at http://www.cato.org/events/halbig-v-sebelius-all-obamacare-hangs-outcome .

[4] The Defendants' motion to dismiss *Pruitt v. Sebelius* is pending. The complaint does raise questions about the plaintiffs' standing and ripeness. The Fourth Circuit has already refused to allow the Virginia Attorney General to challenge the ACA's individual mandate on behalf of the state citizens. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011).

insurance is unaffordable). The ACA also imposes a penalty assessment on large employers who do not provide health insurance to employees who receive a premium tax credit. *See* ACA § 1513 (enacting 26 U.S.C. § 4980H applicable to employers with at least 50 full time employees). The *Halbig* plaintiffs argue that the employer penalty cannot be assessed in states with a federally facilitated Exchange.[5] If these challenges succeed, any potential "fix" would require Congressional action.

Challenges to contraceptive coverage

The ACA added § 2713 to the Public Health Services Act. Section 2713 requires, with certain exceptions, that group health plans and health insurance issuers must provide health insurance coverage, without cost sharing, that includes preventive care and screenings as provided for in guidelines from the Health Resources and Services Administration (HRSA). *See* 42 U.S.C. § 300gg-13(a)(4). HRSA recommends coverage of all FDA-approved contraceptive methods; there are currently 20 such methods, ranging from oral contraception to surgical sterilization.[6] The federal agencies charged with implementing the ACA have adopted the HRSA contraceptive coverage recommendations, *see* 77 Fed. Reg. 8725 (Feb. 15, 2012) (adding 45 C.F.R. § 147.130).

The ACA laws exempt some group health plans and employers from the contraception coverage requirements. Religious organizations, such as churches, are exempted. The federal government has also finalized regulations that exempt additional religiously affiliated hospitals and other non-profits (while still requiring their insurers to cover the cost of employees' contraceptive coverage). *See* 78 FR 39870 (July 2, 2013).

More than 60 lawsuits are challenging the contraceptive coverage requirements. Two primary groups are filing these cases: for-profit secular employers and religious or religiously affiliated organizations. The cases brought by religiously affiliated organizations have, for the most part, been dismissed or stayed because the Obama Administration announced an enforcement moratorium until August 1, 2013, pending issuance of regulations to provide additional religious accommodations. *See, e.g., Wheaton College v. Sebelius*, 703 F.3d 551 (D.C. Cir. 2012) (holding case in abeyance pending rules). As noted above, these regulations were issued on June 28, 2013, so these cases will now develop.[7]

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[5] The Fourth Circuit has upheld the constitutionality of the employer mandate. *See Liberty Univ., Inc. v. Lew*, _ F.3d _, 2013 WL 3470532 (4th Cir. July 11, 2013) (holding Congress had Tax and Commerce Clause authority to enact ACA provision requiring large employers to provide insurance or pay a penalty).

[6] Women's Preventive Services: Required Health Plan Coverage Guidelines*, available at* www.hrsa.gov/womensguidelines (last visited July 29, 2013).

[7] *Compare Liberty Univ.*, _ F.3d _, 2013 WL 3470532, at *19-20 (4th Cir. July 11, 2013) (on remand from S. Ct.) (refusing to consider contraceptive coverage challenge that was

By contrast, the cases brought by secular, for-profit employers have been moving through the courts. For the most part, these cases challenge the contraceptive coverage requirements as violating the companies'/employers' free exercise of religion rights under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (RFRA).

So far, two federal circuit courts have decided appeals of district court denials of preliminary injunctive relief. A split Third Circuit panel recently held that a for-profit, secular corporation cannot engage in religious exercise and, thus, did not reach the merits of the plaintiffs' First Amendment and RFRA claims. *See Conestoga Wood Specialties Corp. v. U.S. Dep't of Health & Human Servs*., _ F.3d _, 2013 WL 3845365 (3d Cir. July 26, 2013), *aff'g*,, _ F. Supp. 2d _, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013). The *Conestoga* majority reviewed the history and purpose of the First Amendment and the relevant case law and found no support for the argument that the provision secures religious liberty for a proprietary, secular corporation. *Id*. at *2-4. Because it concluded that Conestoga, as a secular corporation, cannot exercise religion, the court similarly held that the company could not assert a RFRA claim. *Id*. at *8. The court also rejected a "pass through" theory urged based upon the Ninth Circuit's recognition that a for-profit corporation could assert the free exercise claims of the owners. *Id*. at *6-8 (rejecting *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009)).The owners of Conestoga are Mennonites who object to two FDA-approved "emergency contraception" methods, Plan B and Ella, on grounds that they can act upon a "conceived but not yet attached human embryo." *Id*. at *2.

In the other case, Hobby Lobby and its owners object on religious grounds to providing coverage for four FDA-approved contraceptives that they view as preventing implantation of a fertilized egg. Sitting en banc, the Tenth Circuit Court of Appeals found the plaintiffs to be experiencing irreparable harm and likely to succeed on the merits of their RFRA claims. *See Hobby Lobby Stores, Inc. v. Sebelius*, _ F.3d _, 2013 WL 3216103 (10th Cir. June 27, 2013), *rev'g*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012). To reach its conclusion, the court found that Hobby Lobby is a person within the meaning of RFRA, that the contraceptive requirements place a substantial burden on Hobby Lobby's exercise of religion (because the company will be subject to daily financial penalties for failing to provide the coverage), and that the government failed to establish a compelling interest for the requirement, given that it was riddled with numerous specific exemptions such that the requirement does not apply to "tens of millions of people." 2013 WL 3216103, at *23.The Court remanded the case for a

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initially raised in post-remand briefs); *see also Id.* at *16-19 (holding ACA individual mandate did not violate free exercise rights under First Amendment or Religious Freedom Restoration Act by forcing plaintiffs, contrary to their religious beliefs, to facilitate or subsidize abortions).

determination of whether the remaining preliminary injunction factors are being violated.

The federal circuit courts are also split on whether to grant plaintiffs' requests for injunctions pending appeals of the denial of preliminary injunctive relief. Recently, for example, the Sixth Circuit court was "not persuaded, at this stage of the proceedings that a for-profit company has rights under the RFRA" and refused to enjoin the contraceptive coverage requirement pending appeal. *Eden Foods, Inc. v. Sebelius*, No 13-1677 (6th Cir. June 28, 2013); *Autocam v. Sebelius*, No. 12-2673, 2012 U.S. App. LEXIS 26736 (6th Cir. Dec. 28, 2012) (same); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs*., No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8 2013) (same); *see also Hobby Lobby Stores, Inc. v. Sebelius* 133 S. Ct. 641 (2012) (Sotomayor, Circuit Justice) (denying injunction pending appeal of the district court decision).

By contrast, the Seventh Circuit, in *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012), issued an injunction finding the "coerced coverage" of contraception placed a substantial burden on the employer's exercise of their rights under the RFRA. *See also Grote Indus. LLC v. Sebelius*, 708 F.3d 850 (7th Cir. Jan. 30, 2013) (same, in consolidated case); *Annex Med. Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025 (8th Cir. Feb. 1, 2013) (grant without rationale). *See also Gilardi v. HHS*, No. 13-5069 (D.C. Cir. Mar. 21, 2013) (denial without rationale), *same case* (D.C. Cir. Mar, 29, 2013) (grant, following emergency motion for rehearing *en banc*, without rationale).

As split decisions continue to develop, this issue will present the Supreme Court with another opportunity to review the ACA and, on this question, in light of *Citizens United v. Fed. Elec. Comm'n*., 558 U.S. 310 (2010) (holding that corporations have First Amendment free speech protection)).

The extent of federal preemption

Among the ACA challenges is a sleeper case, *Coons v. Geithner,* No. CV-10-1714-PHX-GMS, 2012 WL 6674394 (D. Ariz. Dec. 20, 2012). Filed in August 2010, the case challenged the individual mandate but also included claims that the ACA unconstitutionally impeded medical autonomy and individual privacy. A final claim in the case alleged that Arizona's Health Care Freedom Act (HCFA), Ariz. Const. XXVII, § 2, protects citizens from being required to purchase health insurance and that collection of the ACA's tax penalty from those choosing not to be insured would "supersede Arizona's authority to shield individual liberty from federal power thwarting the very aim of American federalism." *Id.* at *3. The district court dismissed the claims, disposing of the HCFA as follows:

> To permit the HCFA to operate would frustrate the purpose of the PPACA by allowing Arizona, and virtually all states, to exempt their citizens from its tax penalties, thus frustrating Congress's intent to encourage the purchase of minimal health insurance. Therefore the two laws are in direct

conflict and Arizona's constitutional provision is pre-empted.

Id. at *2. The decision has been appealed, and briefing is underway. *See* No. 13-15324 (9th Cir.).

The court's decision finding that the ACA preempted inconsistent state law is the first of its kind, but it may not be the last.[8] State legislatures across the country have been considering health care freedom acts that seek to stymie not only insurance purchasing requirements but also other ACA provisions, including, for example, provisions that establish "navigator" services to educate and assist individual with enrolling in a qualified health plan. *Compare* ACA §1311(i)(3)(B) (stating that navigators "will distribute fair and impartial information concerning enrollment in qualified health plans" and "facilitate selection" of a plan) *with* Mo. Stat. § 376.2002.1 (prohibiting navigators from providing advice related to the "benefits, terms, and features of a particular health plan"). Depending on the provisions contained in state health care freedom acts and their implementing regulations, additional courts could be called upon to decide whether there are preemption problems.

Conclusions and recommendations

Since the ACA was signed into law, it has been subject to numerous court challenges. Advocates should monitor case developments because they can affect implementation of parts or all of the ACA. Decisions in these cases, involving, for example, preemption, could also have repercussions on litigation practice in general. In particular, advocates should track developments in the cases involving coverage of no-cost preventive contraceptive services. The developing splits in court opinions make this issue one that the Supreme Court could well decide to take up during next year's term.

The National Health Law Program routinely updates an ACA litigation docket that tracks ongoing federal court cases and links the reader to important case pleadings and orders. The July 2013 iteration of the docket can be found in the ACA Implementation Tool Box on our website at: http://healthlaw.org/index.php?option=com_content&view=article&id=698.

NHeLP will also provide updates and alerts to advocates as opinions are announced.

[8] *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (holding Virginia Attorney General lacked standing to challenge the ACA individual mandate as inconsistent with the Virginia Health Care Freedom Act).