Nearly eight years later, and in the midst of a global pandemic, the United States Supreme Court has decided to reconsider the constitutionality of the Patient Protection and Affordable Care Act’s (ACA) individual mandate. On March 2, 2020, the Supreme Court decided to grant two petitions (now consolidated) for review which addressed the Court of Appeals for the Fifth Circuit’s (1) finding that the now zero-penalty individual mandate is not a tax and, thus, it is unconstitutional, and (2) remanding of the case back to the district court to further consider whether the individual mandate is severable from the ACA, or if the remainder of the ACA is also unconstitutional. It is expected that Justices will hear the oral argument this fall—with a decision likely to follow in 2021.

Herein, we provide our readers with a brief look at the individual mandate pre- and post- 2017 Tax Cuts and Jobs Act (TCJA) and the Fifth Circuit’s decision, which has the Supreme Court’s attention.

Background

1. The Individual Mandate Pre-TCJA

The ACA fundamentally changed U.S. regulation and financing of health care. A particularly crucial feature of the ACA is its “individual mandate”—requiring all U.S. citizens, residents and their dependents to maintain health insurance coverage, either via the private market, employer-provided coverage, or group markets.

In light of the various reforms that would otherwise negatively impact health insurance carriers—such as eliminating a carrier’s ability to charge more (or refuse to cover entirely) those individuals with pre-ex-
isting conditions—a monetary penalty is imposed upon those who fail to comply with the individual mandate. Arguably, in order for the individual mandate to effectively maintain this equilibrium, the noncompliance penalty must be sufficiently robust.

Not surprisingly, the individual mandate has been a particularly divisive feature of the ACA. In 2012, in National Federation of Independent Business v. Sebelius, the U.S. Supreme Court upheld the constitutionality of the individual mandate, stating:

“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”

Thus, until the enactment of TCJA in 2017, individuals were expected to be charged with paying a specific amount of money for failing to obtain and maintain health insurance coverage.

2. The Individual Mandate Post-TCJA

JCA—the massive, comprehensive tax reform law enacted in 2017—did not fail to include the individual mandate as one of the many provisions it targeted. Specifically, effective for tax years beginning in 2019, it effectively eliminated the impact of the individual mandate by setting the penalty amount at $0.

Interestingly, the TCJA’s amount adjustment did not technically repeal either the individual mandate, or the ACA in its entirety. Without a doubt, however, it upset the aforementioned equilibrium and, in more practical terms, put everyone back in the pre-ACA era where obtaining insurance is once again a voluntary choice for most individuals in most states.

The New Challenge

At the end of 2019, in Texas v. United States, the Fifth Circuit considered a challenge regarding the constitutionality of the individual mandate in light of the TCJA’s zero-penalty and determined that:

[T]he individual mandate is unconstitutional because it can no longer be read as a tax, and there is no other constitutional provision that justifies this exercise of congressional power.

The case was initiated by a group of states led by Texas and two self-employed individuals. Plaintiffs argued that the individual mandate was now unconstitutional since: (1) the initial Supreme Court decision hinged on the fact that the mandate was a tax; and (2) the TCJA’s zero-penalty amount precludes revenue generation which is a requirement for tax characterization. Furthermore, the plaintiffs maintained that since, “the individual mandate was essential to and inseverable from the rest of the ACA, the entire ACA must be enjoined.”

Significantly, before reaching the Court of Appeals for the Fifth circuit on appeal, the federal government in the trial court agreed with the plaintiffs that as a zero-penalty, the individual mandate is unconstitutional now. However, unlike the plaintiffs, the federal government maintained that only those provisions that couldn’t function without the individual mandate, such as the protections pertaining to pre-existing conditions, should be eliminated—not the entire ACA.

But on appeal at the Fifth Circuit, in what the court expressly described as a “significant change in litigation position,” the federal defendants agreed with the plaintiffs, arguing “that the entirety of the ACA is inseverable from the individual mandate.” The government’s other new position at the Fifth Circuit was that “the remedy in this case should be limited to enjoining enforcement of the ACA only to the extent it harms the plaintiffs.”

In reaching its ultimate decision, the Fifth Circuit confronted three issues: (1) standing, (2) constitutionality, and (3) severability. More specifically, the court stated:

“First, is there a live case or controversy before us even though the federal defendants have conceded many aspects of the dispute; and, relatedly, do the intervenor-defendant states and the U.S. House of Representatives have standing to appeal? Second, do the plaintiffs have standing? Third, if they do, is the
individual mandate unconstitutional? Fourth, if it is, how much of the rest of the Act is inseverable from the individual mandate?"  

a. Standing – Trending in the Supreme Court
The Supreme Court has recently been immersed in issues of standing, especially indicating a particular interest in the subject of whether harm in the form of a technical statutory violation alone results in sufficient injury to confer standing upon a federal court plaintiff. In this case, the Supreme Court will consider the Fifth Circuit’s affirmation of the lower court’s decision that the two individual plaintiffs—neither of whom suffered a financial penalty since the TCJA set the penalty amount at zero—still had standing, because they “demonstrated two types of ‘injury in fact’: (1) the financial injury of buying that insurance; and (2) the ‘increased regulatory burden’ that the individual mandate imposes.”

Additionally, the Fifth Circuit found that despite the federal defendants’ considerable agreement with the plaintiffs on the merits, the federal defendants had standing, as well. The court considered United States v. Windsor on point where a refusal of the government to provide relief preserves a “justiciable dispute.” As the Fifth Circuit noted:

The instant case is similar. Though the plaintiffs and the federal defendants are in almost complete agreement on the merits of the case, the government continues to enforce the entire Act. The federal government has made no indication that it will begin dismantling any part of the ACA in the absence of a final court order.

b. Constitutionality
Again, the court clarified that once the TCJA set the penalty amount to zero, the individual mandate no longer qualifies as a “tax” because it produces no revenue for the government. Revisiting the criteria used to first validate the mandate’s constitutionality in National Federation of Independent Business v. Sebelius, the Fifth Circuit concluded that “[t]he four central attributes that once saved the statute because it could be read as a tax no longer exist.”

c. Severability
The Fifth Circuit declined to answer the question as to “whether, or how much of, the rest of the ACA is severable from the constitutional defect.” Instead, the court remanded to the lower court for further consideration. Specifically, the Fifth Circuit required the district court:
[T]o explain with more precision what provisions of the post-2017 ACA are indeed inseverable from the individual mandate; and to consider the federal defendants’ newly-suggested relief of enjoining the enforcement only of those provisions that injure the plaintiffs or declaring the Act unconstitutional only as to the plaintiff states and the two individual plaintiffs.¹⁸“

What the Future Holds

The Supreme Court has already agreed to review the matter. And it is possible that the Supreme Court will avoid deciding the ultimate fate of the ACA by finding that the plaintiffs lack standing since the only “harm” they have suffered is choosing to comply with the regulatory burden of maintaining health insurance coverage. On the other hand, it’s very possible that the Supreme Court will follow the Fifth Circuit’s reasoning that the zero penalty is no longer a tax—making the individual mandate unconstitutional. And if the Supreme Court decides that the individual mandate is inextricable from the ACA as a whole, the entire ACA may crumble.

EDITOR’S NOTE: We would remind our readers here, that although TCJA zeroed out the penalty for individuals, it did not change the employer mandate or its corresponding penalties. And, significantly, the IRS recently clarified that since those affected employers (“applicable large employers” or “ALEs”) do not report their Employer Shared Responsibility (ESR) payment liability on a tax return, the IRS Chief Counsel’s Office has been advised that there is no statute of limitations for assessing such payment under IRC §6501(a). As we explain, Texas v. U.S. could potentially invalidate the entire ACA—including the ESR—but absent such decision, or other change in the law, the IRS continues to impose ESR assessments. Our upcoming article will be directed at ALEs and how they should best prepare for possible receipt of an IRS assessment notice—Letter 226J. Stay tuned!

If you have any questions or concerns about the Patient Protection and Affordable Care Act, or any other tax questions, contact Frost Law at 410-862-2834 or fill out our online form.

Footnotes
3. Note that this is also commonly referred to as “the shared responsibility payment.”
4. IRC §5000A(c).
6. IRC §5000A(c), as amended by the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, §11081, applicable for months beginning after December 31, 2018. Note that a penalty still applies for noncompliance through 2018 unless the individual is exempt.
8. Id. at 8.
9. Id. at 33.
10. Id.
11. Id. at 5.
12. See Frank v. Gaos, 586 U. S. ___ (2019) (Supreme Court remanded Google privacy settlement back to lower court for further scrutiny over whether consumers have standing in privacy actions presenting only statutory violations); Thole v. U. S. Bank N. A., 207 L. Ed. 2d 85 (U.S. 2020) (no standing for pension plan participant to challenge alleged plan misconduct that didn’t jeopardize his ability to receive benefits).
16. Id. at 23.
17. Id. at 27.
18. Id.

Lowered Interest Rate Upheld by Maryland’s High Court for all Wynne Refunds

As we previously discussed on April 22nd, 2019, the Wynnes challenged a Maryland law claiming the interest rate on Wynne appeals ...