The Daily Dish

The ACA and the Courts (again)

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Eakinomics: The ACA and the Courts (again)

The Affordable Care Act (ACA) is like Madonna – launched in controversy, constantly demanding attention and rebutting attacks, and certainly unwilling to cede center stage. So here we go again. Nearly a decade after passage, I have to write about the ACA, you have to read about the ACA, and we all are just passing time until (maybe) the Supreme Court (SCOTUS) puts us out of our misery (someday).

On Wednesday, the United States Court of Appeals for the Fifth Circuit issued a 2-1 decision that the individual mandate is unconstitutional. Recall that when SCOTUS originally upheld the mandate, it did so because violating the mandate (being uninsured) was penalized by paying a tax, and Congress had the power to tax. When the Tax Cuts and Jobs Act (TCJA) was enacted, it eliminated the tax penalty. A lawsuit was brought regarding the legality of the mandate since it was no longer enforced with a tax penalty.

The lawsuit raised some important legal and policy questions. Regarding the law, sometimes it is best to simply turn to the source (i.e. the 5th Circuit's decision):

> Those questions are: 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?
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> We answer those questions as follows: First, there is a live case or controversy because the intervenor-defendant states have standing to appeal and, even if they did not, there remains a live case or controversy between the plaintiffs and the federal defendants. Second, the plaintiffs have Article III standing to bring this challenge to the ACA; the individual mandate injures both the individual plaintiffs, by requiring them to buy insurance that they do not want, and the state plaintiffs, by increasing their costs of complying with the reporting requirements that accompany the individual mandate. Third, the 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. Fourth, on the severability question, we remand to the district court to provide additional analysis of the provisions of the ACA as they currently exist.

There we have it. The individual mandate is unconstitutional, and the rest of the ACA is in limbo awaiting the lower court ruling on how much is tied to the mandate, the appeal of that ruling, and the eventual kicking of that ruling to SCOTUS. Madonna's 64th release will probably arrive first.

In the interim, the ACA is once again a live policy issue, as Congress and the administration must contemplate how to respond if it is struck down. The ACA is once again a live campaign issue in 2020 – bad news for opponents who want to talk about health care on their terms, not the playing field of the ACA. And those

opponents are in a particularly awkward position: The tax penalty is gone, the mandate is gone, and the ACA taxes are gone (repealed in the spending bills this week). That means the only thing left is the ACA benefits – tax subsidies and Medicaid expansion – and the regulatory structure that supports them. The Trump Administration has heavily reshaped the latter, so the real residual is the benefits. It will be very difficult to argue for changing the benefits in any way without a full-blown vision for what replaces them – something that opponents have yet to be successful in articulating.

Until the next time…