

What's Next After the Texas vs. Azar Ruling?

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On Friday, December 14th, Judge Reed O'Connor, a Texas Federal District Court Judge, ruled on the case *Texas vs. Azar*. As background, *Texas vs. Azar* was filed by 20 Republican state attorneys general and governors. The plaintiffs challenge the constitutionality of the individual mandate in the Affordable Care Act (ACA) and argue that since the individual mandate has been repealed, or more technically zeroed out, the rest of the ACA must be struck down. They argue that the individual mandate cannot be severed from the ACA given its key structural role in the law. The Department of Justice agreed with some, but not all parts, of this argument, and sixteen states and DC are defending the ACA.

Judge O'Connor ruled that not only are all the parts of the ACA that are directly connected with Title I of the ACA unconstitutional, but the **entire** ACA is unconstitutional.

The remarkable sweep of the ruling puts the ACA back on the table in a BIG way. The sense on the Hill was that staff was preparing for a ruling in favor of Texas and that only Title I of the ACA would be struck down. Title I is the set of provisions that create the private market coverage system. However, the ruling declares the ENTIRE law unconstitutional. This changes the calculation for health care on the Hill in much of 2019.

The playbook for re-litigating Title I in Congress was pretty straightforward. The Democratic House would vote to join the appeal of the lawsuit, they would have hearings and a floor resolution on pre-existing conditions, then move on to drug pricing. But now, Democrats have all 10 titles of the law to re-litigate. Let's talk about a few provisions that were declared unconstitutional Friday.

- The entire Medicaid expansion, most importantly the additional FMAP.
- ACOs
- All the Medicare payment provisions
- MIECHV
- The Physician Payment Sunshine Act
- The Prevention Fund
- The process that created biosimilars at FDA
- All the revenue measures

It is important to note that we are a long way from this decision having a real world impact. There will be an appeal to the 5th Circuit and a trip to the Supreme Court seems more likely now than if the decision had ruled in favor of Azar. This is a long process that will likely take us into 2020 for a final decision.

In the immediate future, we can expect that Democrats in the House will now have hearings and hold show votes on any provision of the entire act. The question remains, can the Republican Senate sit and watch and act as though nothing is happening in the House?

Now let's be clear: this is all theater as the court process plays out. But it is time consuming theater. **What yesterday's ruling does is alter timelines for the must pass bills for next year.** It expands the amount of time that staffers critical to must pass bills have to spend on issues unrelated to those must pass bills. It pushes other subjects of interest off of calendars. That's the real world impact of the decision.

The playbook was at the ready for Title I to be declared unconstitutional. Maybe Democrats will stick to the playbook. But if Democrats think health care is a wedge issue and that the gap between the parties can be grown, they were just handed a significant expansion of the playing field. It will be surprising if Democrats do not take advantage of it.

And if you have other issues you'd like addressed, you are now working around this new reality.

Authors