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Affordable Care Act Litigation: The Next Round





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On June 28, 2012, the Supreme Court upheld the constitutionality of the individual mandate in the Patient Protection and Affordable Care Act ("ACA"), while invalidating the ACA's conditioning of federal Medicaid funds on state acceptance of newly expanded Medicaid categories.[1] The Court's decision in *National Federation of Independent Businesses v. Sebelius* ("*NFIB*") settled what opponents considered their most fundamental attack on the ACA.[2] But a second wave of litigation challenging important aspects of the ACA is already underway, and new cases continue to be filed. The outcome of this next round of litigation may have profound effects on the ACA's implementation—and thus on important aspects of the health insurance and healthcare markets in the United States.

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[1] *See National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (June 28, 2012).

[2] On July 23, 2012, the petitioners in one of the cases that was denied certiorari in the wake of the *NFIB* decision filed a petition for rehearing in order to revive religious-freedom and equal-protection challenges to the individual mandate that had not been addressed either by the Supreme Court or the court of appeals. *See* Petition for Rehearing at 3-8, *Liberty Univ. v. Geithner*, No. 11-438 (U.S. July 23, 2012). On October 1, the Court directed the Solicitor General to respond to the rehearing petition by October 31, 2012.

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Tax Credits in Federally-Facilitated Health Insurance Exchanges

The most recent, and perhaps the most fundamental, new challenge to the ACA concerns the availability of subsidies to individuals who purchase health insurance through a health insurance exchange established by the federal government rather than by a state government.

Heath insurance exchanges—one of the centerpieces of the ACA's effort to expand the population of those with health care coverage—operate as virtual marketplaces where individuals and businesses can purchase private health insurance.[3] Individuals with incomes up to 400% of the federal poverty line who purchase insurance through an exchange are entitled to subsidies in the form of refundable ''premium assistance'' tax credits.[4] The ACA provides that all States shall establish an exchange by January 1, 2014, and provides grants to States to encourage them to do so.[5] But it also authorizes the federal government to create and operate exchanges in States that fail to meet that deadline.[6] On May 18, 2012, the IRS published a final rule specifying that the tax credits will be available to all qualifying individuals who purchase insurance through any exchange, whether state-run or federally-facilitated.[7]

On September 19, 2012, the Attorney General of Oklahoma challenged the final rule, contending that the ACA authorizes tax credits only for state-run, not federal-facilitated, exchanges.[8] Some estimates suggest that as many as half of the States will not create exchanges before the January 1, 2014 deadline.[9] Thus, if Oklahoma were to prevail, individuals in those States would not be eligible for exchange tax credits, and likely millions fewer individuals would gain health insurance coverage than if the rule were upheld.

The Oklahoma Attorney General's position rests principally on the authorizing language in the ACA, which refers to individuals ''enrolled in [a qualified health plan] through an Exchange established by the State.''[10] Defenders of the final rule, by contrast, argue that a federally-facilitated exchange qualifies as an exchange ''established by the State'' for these purposes.[11] They assert that the final rule is consistent with the ACA's structure, purpose, and legislative history.[12] And they argue that, to the extent the statutory text is ambiguous, the IRS's interpretation is entitled to deference under the *Chevron* doctrine.[13] Defenders of the federal government's position also assert that Oklahoma lacks standing to asserts its claim, and that its challenge is likely barred by the Tax Anti-Injunction Act.[14]

Contraceptive-Coverage Requirement

The most active litigation challenging the ACA targets its requirement that new, ''non-grandfathered,'' group insurance plans provide certain contraceptive services at no cost to beneficiaries.[15] The regulations implementing this provision, which became effective August 1, 2012, contain an exemption for certain religious employers who do not wish to provide contraceptive services to their employees.[16] The regulations also provide a one-year ''safe harbor'' from enforcement for religiously affiliated institutions that object to the coverage requirement but do not qualify for the exemption.[17] The U.S. Department of Health and Human Ser-

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[3] *See, e.g.*, *Creating a New Competitive Marketplace: Affordable Insurance Exchanges*, HEALTHCARE.GOV NEWSROOM (Sept. 26, 2012), *available at* http://www.healthcare.gov/news/factsheets/2011/05/exchanges05232011a.html.

[4] *See* 26 U.S.C. § 36B (2012).

[5] *See* ACA, Pub. L. No. 111-148, § 1301(b)(1), 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 18031(b)(1) (2012)).

[6] *See id.* § 1321(c) (codified as amended at 42 U.S.C. § 18041(c)(1) (2012)).

[7] Dep't of the Treasury, Internal Revenue Service, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,378 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1 & 206), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-12421.pdf.

[8] *See* Complaint at 13-15, *Oklahoma v. Sebelius*, No. CIV-11-030-RAW (E.D. Okla. Sept. 19, 2012). The challenge was included in an amended version of the complaint. The challenge draws on ideas developed by a number of commentators. *See, e.g.*, Jonathan Adler & Michael Cannon, *Taxation without Representation*: *The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, HEALTH MATRIX: J. OF LAW-MEDICINE (forthcoming), (Jul. 16, 2012) *available at* http://ssrn.com/ abstract=2106789; Abbe Gluck, *The ''CBO Cannon'' and the Debate over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 10, 2012), *available at* http://balkin.blogspot.com/2012/07/cbo-canon-and-debate-over-tax-credits.html.

[9] Abby Goodnough, *Liking It or Not, States Prepare for Health Law*, N.Y. TIMES, Sept. 24, 2012, at A1, *available at http://www.nytimes.com/2012/09/24/us/like-it-or-not-states-prepare-for-health-law.html* (noting that the governors in seven states ''have said they will not create a state-run exchange,'' and that as many as thirty states ''are exploring their options''); *Establishing Health Insurance Exchanges: An Overview of State Efforts*, THE HENRY J. KAISER FAMILY FOUNDATION (Aug. 2012), *available at* http://www.kff.org/healthreform/upload/8213-2.pdf (''To date, seven states have declared that they will not create a state-based exchange. . . . Another 16 states have not yet committed to a health insurance exchange strategy, but are continuing planning efforts. . . . Nine states have not shown significant exchange planning activity.'').

[10] *See* Amended Complaint at 13-15, *Oklahoma v. Sebelius*, No. CIV-11-030-RAW (E.D. Okla. Sept. 19, 2012), *available at* https://ecf.oked.uscourts.gov/doc1/1451580137.

[11] *See, e.g.*, Timothy Stoltzfus Jost, *Congressional Testimony of Professor Timothy Jost on IRS Rule on Exchange Tax Credits*, HEALTH REFORM WATCH (Sept. 20, 2012), *available at* http://www.healthreformwatch.com/2012/09/20/congressional-testimony-of-professor-timothy-jost-on-irs-rule-on-exchange-tax-credits.

[12] *See* Timothy Stoltzfus Jost, *Yes, The Federal Exchanges Can Offer Premium Tax Credits*, THE HEALTH CARE BLOG (Sept. 12, 2011), *available at* http://thehealthcareblog.com/blog/2011/09/12/yes-the-federal-exchanges-can-offer-premium-tax-credits.

[13] *See, e.g.*, *id.*

[14] Nicole Huberfeld, *ACA Litigation-Oklahoma's ''Federalism Unit'' Piles On*, HEALTHLAWPROF BLOG (Sept. 20, 2012), *available at* http://lawprofessors.typepad.com/healthlawprof_blog/2012/09/aca-litigation-oklahomas-federalism-unit-piles-on.html.

[15] Coverage of preventive health services is required by § 2713 of the ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 300gg-13 (2012)).

[16] The exemption to the contraceptive-coverage requirement applies to institutions that (1) have as their purpose religious indoctrination, (2) primarily employ individuals who share the institution's religious beliefs, (3) primarily serve individuals who share the institution's religious beliefs, and (4) have a qualifying non-profit status under the U.S. Code. *See* Coverage of Preventive Services, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147).

[17] *See id.* On August 15, 2012, HHS issued an amended bulletin expanding the one-year safe harbor to cover qualifying

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vices (''HHS'') has committed to amend the regulations before the end of the safe-harbor period to further accommodate religiously affiliated institutions.[18] At least thirty-five lawsuits, however, have already been filed challenging the contraceptive-coverage requirement.[19]

Broadly, the plaintiffs claim that the contraceptive-coverage requirement violates the Religious Freedom Restoration Act (''RFRA''), which prohibits the federal government from ''substantially burden[ing] a person's exercise of religion.''[20] They also claim that the provision violates the First Amendment's Free Exercise Clause, which protects an individual's right to religious freedom.[21]

In several of the cases, the government has argued that the plaintiffs lack standing to challenge the contraceptive-coverage requirement. It also has argued that the plaintiffs' claims are not ripe for judicial review because HHS has demonstrated its intent to amend the regulations to further accommodate religiously-affiliated institutions.[22]

District courts have dismissed three of the suits for lack of standing or ripeness.[23] In *O'Brien v. U.S. Department of Health and Human Services*,[24] the U.S. District Court for the Eastern District of Missouri dismissed the plaintiff's challenge on the merits, concluding that the requirement does not violate the RFRA or the First Amendment.[25] By contrast, on July 27, 2012, a district judge in Colorado granted a preliminary injunction temporarily barring application of the contraceptive-coverage requirement to a ''for-profit, secular employer.''[26] In so doing, the judge held that the plaintiffs' RFRA claim would likely succeed on the merits and was ''deserving of more deliberate investigation.''[27] Appeals have been filed in the four cases that were dismissed.[28] The other cases challenging the contraceptive-coverage requirement remain pending in district courts.[29]

Maintenance of Effort

A less publicized challenge to the ACA concerns the ACA's maintenance-of-effort provision, which requires States to maintain certain Medicaid eligibility standards that were in place on March 23, 2010, when the ACA was signed into law, or risk losing federal Medicaid funding.[30] On September 5, 2012, the Commissioner of the Maine Department of Health and Human Services filed a motion for injunctive relief in the U.S. Court of Appeals for the First Circuit seeking to enjoin enforcement of the maintenance-of-effort provision.[31] The State argues that the provision ''is part of the mandatory [Medicaid] expansion struck down'' by the Supreme Court in the *NFIB* decision.[32] Maine also contends that the provision is invalid because it ''surprise[s] participating States with postacceptance or retroactive conditions,'' which the Constitution prohibits.[33] On September 13, 2012, the First Circuit issued an order summarily dismissing the State's motion.[34] The State is expected to continue the litigation in federal district court.[35]

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non-profit institutions that object to some, but not all, contraceptive services. *See* Center for Consumer Information and Insurance Oversight, U.S. Dep't of Health & Human Servs., GUIDANCE ON TEMPORARY ENFORCEMENT SAFE HARBOR FOR CERTAIN EMPLOYERS 3-4 (Aug. 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

[18] Specifically, HHS plans require insurance companies to sell plans without contraceptive coverage to religiously affiliated institutions while providing these services directly to employees. Coverage of Preventive Services, 77 Fed. Reg. 8728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

[19] *See HHS Mandate Information Central*, BECKETFUND.ORG, http://www.becketfund.org/hhsinformationcentral/ (last visited Oct. 12, 2012) (listing and describing cases challenging the contraceptive-coverage requirement). The plaintiffs in the thirty-five cases include: (1) for-profit and non-profit organizations that object to the coverage requirement but do not qualify for the exemption, (2) individuals whose employers may stop providing health insurance if required to offer contraceptive coverage, and (3) States that may be required to provide health care for individuals whose employers cease to provide insurance because of the coverage requirement. *See id.* Another helpful website compiling information on these cases can be found at http://berkleycenter.georgetown.edu/essays/resources-and-background-on-contraception-and-conscience.

[20] 42 U.S.C. § 2000bb-1(a) (2012).

[21] Many of the plaintiffs further claim that the HHS regulations implementing the contraceptive coverage requirement violate the Administrative Procedure Act. *See*, *e.g.*, *Belmont Abbey Coll. v. Sebelius*, No. 11-1989, 2012 U.S. Dist. LEXIS 99391, at *2 (D.D.C. July 18, 2012).

[22] *See, e.g.*, *Wheaton Coll. v. Sebelius*, No. 12-1169, 2012 U.S. Dist. LEXIS 120187, at *2 (D.D.C. Aug. 24, 2012).

[23] *See id.* at *3; *Belmont Abbey Coll.*, 2012 U.S. Dist. LEXIS 99391, at *2-3; *Nebraska v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-3035, 2012 U.S. Dist. LEXIS 104419, at *78-79 (D. Neb. July 17, 2012).

[24] No. 4:12-CV-476-CEJ, 2012 U.S. Dist. LEXIS 140097 (E.D. Mo. Sept. 28, 2012).

[25] *See id.* at *12-42. The district court also dismissed the plaintiff's claim that the contraceptive-coverage requirement violates the Administrative Procedure Act. *See id.* at *41-47.

[26] *See Newland v. Sebelius*, No. 1:12-cv-1123-JLK2012, U.S. Dist. LEXIS 104835, at *7, 28 (D. Colo. July 27, 2012); *see also id.* at *28 (noting that the preliminary injunction ''does not enjoin enforcement of the preventative coverage mandate against any other party'').

[27] *Id.* at *27 (internal quotation marks omitted).

[28] *See O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. filed Oct. 4, 2012); *Nebraska v. U.S. Dep't of Health & Human Servs.*, No. 12-3238 (8th Cir. filed Sept. 25, 2012); *Belmont Abbey Coll. v. Sebelius*, No. 12-5291 (D.C. Cir. filed Sept. 14, 2012); *Wheaton Coll. v. Sebelius*, No. 12-12-5273 (D.C. Cir. filed Aug. 30, 2012).

[29] *See HHS Mandate Information Central*, BECKETFUND.ORG, http://www.becketfund.org/hhsinformationcentral/ (last visited Oct. 12, 2012).

[30] The ACA's MOE requires states to maintain the Medicaid eligibility standards that were in effect on March 23, 2010, until the end of 2013 for adults and until October 2019 for children. *See* ACA, Pub. L. No. 111-148, § 2001(b), 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. §§ 1396a(a)(74), 1396a(gg) (2012)).

[31] *See* Petitioner's Motion for Injunctive Relief, *Mayhew v. Sebelius*, No. 12-2059 (1st Cir. Sept. 5, 2012)). The State filed its petition for injunctive relief in the First Circuit before seeking relief in federal district court pursuant to Rules 8(2) and 18(2) of the Federal Rules of Appellate Procedure. *See id.* at 1.

[32] *See id.* at 18.

[33] *See id.* at 17 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012)).

[34] *See Mayhew v. Sebelius*, No. 12-2059 (1st Cir. Sept. 13, 2012) (order denying preliminary injunction).

[35] *See* Katherine Jett Hayes, *Update: Legal Challenges to the Affordable Care Act's Medicaid Maintenance of Effort Provisions*, HEALTHREFORMGPS (Sept. 26, 2012), *available at* http://healthreformgps.org/resources/update-legal-challenges-to-the-affordable-care-acts-medicaid-maintenance-of-effort-provisions.

Origination Clause

Another angle of constitutional attack on the individual mandate that one plaintiff has adopted in the wake of the Supreme Court's *NFIB* decision is the contention that the ACA violates the Origination Clause, which requires revenue measures to originate in the House of Representatives rather than in the Senate.[36] Plaintiff Matt Sissel contends that because the Supreme Court determined that the individual mandate was an exercise of Congress's power to lay and collect taxes, the ACA should have originated in the House but actually began its legislative journey in the Senate. His case had been stayed pending the Supreme Court's decision, and on Sept. 11, 2012, Sissel sought to amend his complaint to add his Origination Clause claim.[37] As the proposed amended complaint acknowledges, the ACA was originally considered in the Senate as an amendment to a bill that did originate in the House, but Sissel contends that because the House bill neither contained nor addressed health insurance, that bill's House origins should not save the mandate from Origination Clause invalidation.[38] The district court has yet to rule.

Independent Payment Advisory Board

In another of the constitutional challenges to the ACA, the plaintiffs have included a claim challenging the constitutionality of the Independent Payment Advisory Board (''IPAB''), a special commission established in the ACA and tasked with recommending proposals to contain Medicare spending.[39] The IPAB's annual proposals automatically go into effect unless Congress affirmatively acts to supersede them with legislation that would achieve the same spending reductions.[40] The ACA prohibits administrative and judicial review of the implementation of IPAB's proposals.[41]

The plaintiffs in *Coons v. Geithner*, filed in 2010 in the District of Arizona, challenge the IPAB as an unconstitutional delegation of legislative power to an unelected agency, and argue that the provision barring judicial review of IPAB proposals violates the separation of powers doctrine.[42]

On August 31, 2012, the district court dismissed the plaintiffs' IPAB challenge.[43] The court noted that ''[t]o survive an anti-delegation challenge, Congress need only 'clearly delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.' ''[44] The court then concluded that Congress had ''met that test'' in establishing the IPAB.[45] It is unclear whether the plaintiffs will appeal the court's ruling.

Self-Referral Practices at Physician-Owned Hospitals

Another less publicized challenge to the ACA concerns the availability of Medicare funding for patient referrals made by physicians to physician-owned hospitals. The Medicare Act prohibits reimbursement for services provided to a patient at a medical facility in which the patient's referring physician, or a member of the physician's immediate family, has a financial interest.[46] Historically, this prohibition has not applied to patient referrals made by physicians with an ownership interest in the whole hospital, as opposed to an interest in a subdivision or department of the hospital.[47] This exception is generally referred to as the ''whole hospital exception.''[48]

Subject to certain exemptions, Section 6001 of the ACA limits the availability of the ''whole hospital exception'' to physician-owned hospitals that (1) had a Medicare provider agreement in place before December 31, 2010, and (2) do not expand their facilities after March 23, 2010, without HHS authorization.[49]

On June 3, 2010, Physician Hospitals of America and the Texas Spine & Joint Hospital filed a lawsuit claiming that Section 6001 violates their rights to due process and equal protection under the Fifth Amendment.[50] The plaintiffs also claim that Section 6001 is void for vagueness and that it effects an unconstitutional and retroactive taking of their real and personal property.[51] Shortly after the complaint was filed, the government moved to dismiss based on lack of exhaustion of administrative remedies. The district court denied the motion, but subsequently granted the government's motion for summary judgment on the merits.[52] On August 16, 2012, the Fifth Circuit concluded that the district court lacked jurisdiction because the plaintiffs had not exhausted their administrative remedies and thus affirmed dismissal of the suit.[53] It remains uncertain whether the plaintiffs will seek review by the Supreme Court.[54]

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[36] ''All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.'' U.S. CONST. art. I, § 7, cl. 1.

[37] *See* Proposed Amended Complaint at 11-12, *Sissel v. U.S. Dep't of Health & Human Servs.*, No. 1:10-cv-01263-BAH (D.D.C. Sept. 11, 2012).

[38] *See Id.*

[39] The IPAB was created by § 3403(b) of the ACA. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 1395kkk(a) (2012)).

[40] *See* 42 U.S.C. § 1395kkk(d).

[41] *See id.* § 1395kkk(e)(5).

[42] *See* Amended Complaint at 29-32, *Coons v. Geithner*, No. CV-10-1714-PHX-GMS (D. Ariz. May 10, 2011), *available at* https://ecf.azd.uscourts.gov/doc1/02517456153.

[43] *See Coons v. Geithner*, No. CV-10-1714-PHX-GMS, 2012 U.S. Dist. LEXIS 124196, at *5-6 (D. Ariz. Aug. 31, 2012). Although the court dismissed the plaintiffs' IPAB challenge, it allowed the plaintiffs to file additional briefing on other claims concerning privacy, medical autonomy, and preemption. *See id.* at *8.

[44] *Id.* (quoting *Mistretta v. United States.*, 488 U.S. 361, 372-73 (1989)).

[45] *Id.*

[46] *See* 42 U.S.C. § 1395nn (2012).

[47] *See* Reconciliation Act of 1993, Pub. L. No. 103-66, § 13562, 107 Stat. 312 (1993) (codified as amended at 42 U.S.C. § 1395nn(d)(3)).

[48] *See, e.g.*, *Physician Hosps. of Am. v. Sebelius*, No. 11-40631, 2012 U.S. App. LEXIS 17246, at *3 (5th Cir. Aug. 16, 2012).

[49] Prohibited expansions include increasing the number of operating rooms, procedure rooms, and beds for which the hospital was licensed as of Mar. 23, 2010. *See* Changes to Whole Hospital and Rural Provider Exceptions, 75 Fed. Reg. 72,240 (Nov. 24, 2010) (to be codified at 42 C.F.R. pt. 362).

[50] *See* Complaint, *Physician Hosps. of Am. v. Sebelius*, No. 6:10-cv-277 (E.D. Tex. June 3, 2010), *available at https://ecf.txed.uscourts.gov/doc1/17513995883*.

[51] *See id.*

[52] *Physician Hosps. of Am. v. Sebelius*, 770 F. Supp.2d 828 (E.D. Tex. 2011) (denying motion to dismiss); *Physician Hosps. of Am. v. Sebelius*, 781 F. Supp.2d 431 (E.D. Tex. 2011) (granting motion for summary judgment).

[53] *See Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649 (5th Cir. 2012).

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[54] Dayna Worchel, *U.S. Appeals Court Rules Against Tyler Hospital*, TylerPaper.com (Aug. 21, 2012, 5:46 PM), *available at* http://www.tylerpaper.com/article/20120821/NEWS08/308219995/0/PRIVACY.