

Judge Rules Entire ACA Unconstitutional

On December 14, 2018, Texas Federal District Court Judge Reed O'Connor deemed the *Patient Protection and Affordable Care Act* (ACA) to be unconstitutional in its entirety, resulting in mass uncertainty for the millions of Americans who gained coverage through ACA provisions.¹ The lawsuit was commenced in February 2018 when Texas Attorney General Ken Paxton and a coalition of 20 Republican state attorneys general and governors sued the federal government on the foundation that they had been harmed by the increase in the number of individuals on state-supported insurance.² Although the judge has rendered his decision, the law remains in place for now because the court did not enjoin the ACA,³ likely because the ruling is expected to be appealed, and eventually reach the *Supreme Court of the United States* (SCOTUS).⁴

After the congressional Republicans' unsuccessful efforts to wholesale repeal and replace the ACA, the ACA's *Individual Mandate* penalty for those who did not maintain health insurance was at the forefront of the 2017 overhaul of the tax code.⁵ Through the enactment of the *Tax Cuts and Jobs Act* (TCJA) in December 2017, this penalty was reduced to \$0, effective beginning in 2019.⁶ Furthermore, in the previous 2012 SCOTUS case, *National Federation of Independent Business* (NFIB) v. *Sebelius*, Chief Justice Roberts concluded that the Individual Mandate penalty was a tax, with an essential feature being that it produced "at least some revenue for the Government."⁷ In this case, the Individual Mandate's penalty tax was valid under Congress' authority to tax and spend and the ACA was, therefore, deemed constitutional.⁸

However, under the same grounds as *NFIB v. Sebelius*, Judge O'Connor concluded that the Individual Mandate is no longer permissible under Congress's taxing power as a result of the TCJA reducing the Individual Mandate's tax to \$0 (i.e., it no longer produces revenue, which is an essential feature of a tax), rendering the ACA unconstitutional.⁹ Further, the court ruled that the Individual Mandate could not be severed from the ACA because the Mandate was "the keystone" of the law, essential to the regulation of the health insurance market, rendering the entirety of the ACA invalid.¹⁰ Contributing to the federal court decision was the *Department of Justice's* (DOJ) position, in which the agency agreed with the plaintiffs that the Individual Mandate is unconstitutional, and asserted that other provisions such

as the "guaranteed issue" (requiring health insurance companies to accept all applicants regardless of pre-existing conditions) are inseverable from the Mandate.¹¹ As a result, the DOJ did not defend the constitutionality of the Individual Mandate during the case.¹²

In an effort to avoid widespread confusion in the healthcare market, on December 17, 2018, 17 states filed a motion seeking clarity of the decision to help clarify whether the law becomes unconstitutional on January 1, 2018, and whether the ACA will stay in effect as the case moves through the courts.¹³ Representative Nancy Pelosi (D-CA), who is expected to become House Speaker in January 2019, stated that once the Democrats take control of the U.S. House of Representatives in January 2019, they will "swiftly intervene in the appeals process."¹⁴ Further, California Attorney General Xavier Becerra is leading a coalition of Democratic state officials in an attempt to defend the ACA,¹⁵ indicating their intent to appeal.¹⁶ Additionally, some states, such as Texas, are seeking to pass their own state healthcare law to replace the ACA through a "work around," should the ACA be struck down, to ensure that popular provisions, such as protecting those with pre-existing conditions, continue.¹⁷

Numerous healthcare provider associations have condemned Judge O'Connor's ruling. The *American Medical Association* (AMA) stated that this decision is "an unfortunate step backward for our health system."¹⁸ The AMA also predicted a regression to pre-ACA insurance coverage, where 20% of the U.S. population was uninsured and there were fewer patient protections.¹⁹ The *American Psychological Association* (APA) added that, especially with the Opioid Crisis, more healthcare services are needed, and there should be an expansion of access to healthcare coverage rather than a limitation of access for Americans.²⁰

Repealing the entirety of the ACA will undoubtedly affect the millions of people that received healthcare coverage upon the enactment of the ACA. This includes over 133 million individuals with pre-existing conditions (who were previously unable to obtain insurance);²¹ the 12 million individuals who gained coverage through *Medicaid Expansion*, who would lose their insurance coverage if the decision survives appeal;²² and, the 10 million individuals who received private insurance through the online marketplaces, who would also lose their insurance coverage, limiting the access of healthcare services to this population.²³ In total, the

Kaiser Family Foundation (KFF) estimates that 52 million adults under the age of 65 (27% of the U.S. population) would be rejected for healthcare coverage by insurers, which will, ultimately, negatively affect healthcare access, which the ACA sought to remedy.²⁴

Other popular ACA provisions that would be rescinded should this ruling stand include the requirements that insurers cover those under age 26 on their parents' plans, and that certain employers offer coverage to their employees.²⁵ With a complete overhaul, healthcare costs would likely increase for individuals, leading to additional financial strain. For example, annual and lifetime limits on coverage would again be permitted and there would no longer be a cap placed on out-of-pocket costs.²⁶ Without these provisions, out-of-pocket expenditures will likely rise for individuals and further limit access to services due to cost.

However, even though many Americans would lose insurance and bear a greater financial burden as a result of deeming the ACA unconstitutional, there is likely a "long legal road to travel before that is an immediate threat."²⁷ As there have been more than 70 unsuccessful ACA-repeal attempts, many legal experts conclude that this decision will not hold upon appeal.²⁸ Notably, this could potentially be the third time since 2012 that SCOTUS contemplates a challenge to the ACA.²⁹ In the previous two decisions, SCOTUS ruled to uphold the ACA, further indicating that Judge O'Connor's decision might not be upheld.³⁰

The December 14th decision was revealed just hours before the end of 2019 Open Enrollment period through the marketplace insurance exchange on HealthCare.gov.³¹ In response, the *Centers for Medicare & Medicaid Services* (CMS) Administrator, Seema

Verma, made an announcement that open enrollment would continue as planned and that the case would not impact current insurance coverage or coverage in 2019 plans.³² However, the confusion caused by this decision could result in lower enrollment numbers for 2019, which are down from last year by approximately 12%.³³ However, this low enrollment is also partly due to the excise of the tax penalty of the Individual Mandate that sparked this lawsuit, as well as the increased number of individuals utilizing Medicaid Expansion in states that have recently expanded.³⁴ Additionally, it is hypothesized that this low enrollment could be as a result from unawareness of the enrollment period as funding for marketing and outreach was decreased by 90% last year.³⁵ Arguments have also been made that the thriving U.S. economy has contributed to low enrollment, as more people are employed and thus receiving insurance from their employer.³⁶

Should the *Texas v. United States* decision survive appeal, it would have major consequences for a large number of healthcare consumers. The decision would force people off of Medicaid in states that have expanded and restrict reasonable and affordable insurance options for those that currently obtain health insurance through the online marketplace. In addition, the decision would eliminate popular ACA provisions that both political parties support, such as covering those with pre-existing conditions. Although the decision has been rendered at the District Court level, the case will inevitably be appealed, eventually to SCOTUS. Until then, it appears that the ACA will remain in place and coverage will not be affected for individuals impacted by ACA provisions at this time.

- 1 "Texas, et al. v. United States of America, et al." Case No. 4:18-cv-00167-O (N.D. Tex. December 14, 2018), Memorandum Opinion and Order, p. 1-2; "Texas Judge Strikes Down Obama's Affordable Care Act as Unconstitutional" By Abby Goodnough and Robert Pear, The New York Times, December 14, 2018, <https://www.nytimes.com/2018/12/14/health/obamacare-unconstitutional-texas-judge.html> (Accessed 12/17/18); "Judge Strikes Down ACA Putting Law In Legal Peril – Again" By Julie Rovner, Kaiser Health News, December 14, 2018, <https://khn.org/news/texas-judge-puts-aca-in-legal-peril-again/> (Accessed 12/17/18).
- 2 Goodnough and Pear, December 14, 2018; "Democrats Vow Rapid Action After Obamacare Tossed by Judge" By Tom Korosec and Kartikay Mehrotra, Bloomberg, December 14, 2018, <https://www.bloomberg.com/news/articles/2018-12-15/obamacare-core-provisions-ruled-unconstitutional-by-judge> (Accessed 12/17/18).
- 3 "Federal Judge Strikes Down Entire ACA; Law Remains In Effect" By Katie Keith, Health Affairs, December 15, 2018, https://www.healthaffairs.org/doi/10.1377/hblog20181215.617096/full/?utm_source=Newsletter&utm_medium=email&utm_content=Federal+Judge+Strikes+Down+ACA%3B+Expanding+The+Serious+Illness+Care+Team%3B+Telehealth+Policy&utm_campaign=HAT (Accessed 12/17/18).
- 4 Goodnough and Pear, December 14, 2018
- 5 "Judge rule Obamacare unconstitutional, endangering coverage for 20 million" By Paul Demko and Adam Cancryn, Politico, December 14, 2018, <https://www.politico.com/story/2018/12/14/judge-rules-obamacare-unconstitutional-1066640> (Accessed 12/17/18).

- 6 "Tax Cuts and Job Act" Pub. L. No. 115-97, § 11081, 131 Stat. 2054, (December 12, 2017); Rovner, December 14, 2018; Keith, December 15, 2018.
- 7 Case No. 4:18-cv-00167-O (N.D. Tex. December 14, 2018), p. 5-8.
- 8 *Ibid*, p. 7.
- 9 *Ibid*, p. 1-2; Rovner, December 14, 2018.
- 10 Case No. 4:18-cv-00167-O (N.D. Tex. December 14, 2018), p. 40-41; Goodnough and Pear, December 14, 2018.
- 11 Keith, Health Affairs, December 15, 2018.
- 12 *Ibid*.
- 13 "Pro-ACA states fire back in court against ruling by Texas judge" By Jenny Deam, Cron, December 18, 2018, <https://www.chron.com/business/bizfeed/article/Pro-ACA-states-fire-back-in-court-against-ruling-13474724.php> (Accessed 12/19/18).
- 14 Rovner, December 14, 2018; "Democrats Vow Rapid Action After Obamacare Tossed by Judge" By Tom Korosec and Kartikay Mehrotra, Bloomberg, December 14, 2018, <https://www.bloomberg.com/news/articles/2018-12-15/obamacare-core-provisions-ruled-unconstitutional-by-judge> (Accessed 12/17/18).
- 15 "Federal judge rules health care overhaul unconstitutional" By Ricardo Alonso-Zaldivar, Boston.com, December 14, 2018, <https://www.boston.com/news/politics/2018/12/14/texas-judge-rules-health-care-overhaul-unconstitutional> (Accessed 12/17/18); "Judge's 'Obamacare' ruling poses new problems for GOP" By Ricardo Alonso-Zaldivar, Daily Hampshire Gazette, December 16, 2018, <https://www.gazettenet.com/Judge-s-ruling-on-Obamacare-poses-new-problems-for-GOP-22213166> (Accessed 12/17/18).

- 16 Keith, Health Affairs, December 15, 2018; Alonso-Zaldivar, December 16, 2018.
- 17 “Gov. Abbot says Texas will prioritize Obamacare replacement as health care lawsuit continues” By Lauren McGaughy, Dallas News, December 18, 2018
<https://www.dallasnews.com/news/texas-politics/2018/12/17/gov-abbott-says-texas-will-make-passing-state-health-care-law-priority-obamacare-lawsuit-continues> (Accessed 12/19/18).
- 18 Korosec and Mehrotra, December 14, 2018.
- 19 “AMA Statement on Affordable Care Act Ruling” By Barbara L. MacAneny, American Medical Association, December 14, 2018, <https://www.ama-assn.org/press-center/press-releases/ama-statement-affordable-care-act-ruling> (Accessed 12/17/18).
- 20 Korosec and Mehrotra, December 14, 2018.
- 21 Goodnough and Pear, December 14, 2018.
- 22 Rovner, December 14, 2018; Alonso-Zaldivar, December 14, 2018.
- 23 Rovner, December 14, 2018; Alonso-Zaldivar, December 14, 2018.
- 24 Goodnough and Pear, December 14, 2018.
- 25 *Ibid.*
- 26 *Ibid.*
- 27 *Ibid.*
- 28 Rovner, December 14, 2018.
- 29 *Ibid.*
- 30 *Ibid.*
- 31 *Ibid.*
- 32 *Ibid.*
- 33 “What the Obamacare Court Ruling Means for Open Enrollment” By Sarah Mervosh, The New York Times, December 16, 2018,
<https://www.nytimes.com/2018/12/16/us/obamacare-enrollment-deadline.html> (Accessed 12/17/18).
- 34 *Ibid.*
- 35 *Ibid.*
- 36 “Shorter Obamacare enrollment period: Sabotage or savior?” By Kimberly Leonard, Washington Examiner, December 11, 2018,
<https://www.washingtonexaminer.com/policy/healthcare/shorter-obamacare-enrollment-period-sabotage-or-savior> (Accessed 12/19/18).




HEALTHCARE VALUATION

THE FINANCIAL APPRAISAL OF ENTERPRISES, ASSETS, AND SERVICES

Robert James Cimesi, MHA, ASA, FRICS, MCBA, AVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS
Foreword by Shannon P. Pratt

“...the definitive treatise for the complexities of valuation in the healthcare industry.”
- Chris M. Mellen, President - Delphi Valuation Advisors, Inc.



The Adviser's Guide to Health Care


Robert James Cimesi, MHA, ASA, FRICS, MCBA, CVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS
Todd A. Zigrang, MBA, MHA, FACHE, ASA – President, HEALTH CAPITAL CONSULTANTS

Keep Up With the Changes in Health Care Services and Consulting Practices
Includes Foreword by Leading National Health Care Attorney

TWO-VOLUME SET ➤

- Consulting Services
- An Era of Reform - The Four Pillars

To purchase, visit AICPAStore.com/AGHC




ACOs: Balancing Quality and Costs in Healthcare

Robert James Cimesi, MHA, ASA, FRICS, MCBA, AVA, CM&AA – CEO, HEALTH CAPITAL CONSULTANTS
Foreword by Peter A. Pavarini, Esq. – Squire Sanders LLP

“A must read and resource for any healthcare industry executive”
—Roger W. Logan, MS, CPA/ABV, ASA, Senior Vice President of Phoenix Children's Hospital

Learn more at CRCPress.com



(800)FYI - VALU

*Providing Solutions
in the Era of
Healthcare Reform*

Founded in 1993, HCC is a
nationally recognized healthcare
economic financial consulting firm

- [HCC Home](#)
- [Firm Profile](#)
- [HCC Services](#)
- [HCC Experts](#)
- [Clients & Projects](#)
- [HCC News](#)
- [Upcoming Events](#)
- [Contact Us](#)
- [Email Us](#)

HCC Services

- [Valuation Consulting](#)
- [Commercial Reasonableness Opinions](#)
- [Commercial Payer Reimbursement Benchmarking](#)
- [Litigation Support & Expert Witness](#)
- [Financial Feasibility Analysis & Modeling](#)
- [Intermediary Services](#)
- [Certificate of Need](#)
- [ACO Value Metrics & Capital Formation](#)
- [Strategic Consulting](#)
- [Industry Research Services](#)



Todd A. Zigrang, MBA, MHA, CVA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of *"The Adviser's Guide to Healthcare – 2nd Edition"* [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant's Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies*; *Business Appraisal Practice*; and, *NACVA QuickRead*. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); American Health Lawyers Associate (AHLA); the American Bar Association (ABA); the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



John R. Chwarzinski, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski's areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis. Mr. Chwarzinski is the co-author of peer-reviewed and industry articles published in *Business Valuation Review* and *NACVA QuickRead*, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo. Mr. Chwarzinski holds a Master's Degree in Economics from the University of Missouri – St. Louis, as well as, a Master's Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.



Jessica L. Bailey-Wheaton, Esq., is Vice President and General Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey-Wheaton is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the *Journal of Health Law & Policy*.



Daniel J. Chen, MSF, CVA, is a Senior Financial Analyst at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he develops fair market value and commercial reasonableness opinions related to healthcare enterprises, assets, and services. In addition, Mr. Chen prepares, reviews and analyzes forecasted and pro forma financial statements to determine the most probable future net economic benefit related to healthcare enterprises, assets, and services, and applies utilization demand and reimbursement trends to project professional medical revenue streams, as well as ancillary services and technical component (ASTC) revenue streams. Mr. Chen has a Master of Science in Finance from Washington University St. Louis.