Health Advocate

E-Newsletter of the National Health Law Program

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ACA Litigation Continues: A Primer of Major Cases

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Key Resources

Hobby Lobby initial brief, available here.

Nonprofit amicus brief, available here.

St. Louis Effort for AIDS order granting preliminary injunction, available here.

NHeLP and The AIDS Institute complaint, available here.

Halbig brief, available here

Coming in August's Health Advocate:

Alternative Benefits Plan and Exemptions

The Affordable Care Act (ACA) is comprehensive, market-based health reform legislation enacted on March 23, 2010. In 2012, the U.S. Supreme Court upheld the constitutionality of the ACA, but that did not end attacks against the law. Since the decision in *National Federation of Independent Business v. Sebelius*, objecting parties have filed more than 100 cases in federal courts nationwide. With a few exceptions, most of these cases seek to strike specific provisions of the ACA. This issue of the Health Advocate highlights cases filed in federal courts across the country since 2012.

Still Seeking to Strike Down the ACA

Two lines of cases currently pending in the appellate courts seek to repeal the ACA in its entirety. In one set of cases, the plaintiffs seek to undermine the entire framework of ACA implementation by challenging federal regulations that make premium subsidies available to qualifying individuals across the country. The ACA makes insurance affordable for many individuals by offering them premium tax credits, which they can use to purchase coverage through health benefit Exchanges (or Marketplaces). Under the ACA, states have the option to establish a state-run Exchange or a partnership Exchange with the federal government, or to refuse to create an Exchange, in which case the federal government will operate the Exchange.

Litigants in the District of Columbia, Indiana, Oklahoma, and Virginia focus on a seven-word phrase in an ACA subsection to argue that premium subsidies are available only "through an Exchange *established by the State*." See 26 U.S.C. § 36B(b)(2)(A) (emphasis added). They argue that individuals are not entitled to premium subsidies (and therefore would be unlikely to be able to afford health insurance) if they live in a state where the federal government is operating the Exchange. Thirty-four states have a federally facilitated Exchange, and approximately seventy-five percent of the people nationwide who qualify for premium subsidies live in those thirty-four states. If successful, these claims would essentially gut the ACA.

The leading case to date is *Halbig v. Sebelius*, and the district court there rejected the plaintiffs' arguments. The court relied upon established rules of statutory construction that require courts to read statutes as a whole, not as phrases in isolation. Doing so, the court placed the disputed seven-word phrase in context and found it clear that Congress intended the subsidy provisions to apply to all Exchanges. The plaintiffs have

appealed that decision to the D.C. Circuit. NHeLP and the AARP filed an amicus brief urging the circuit court to affirm that decision. The circuit court heard oral argument on March 25, and a decision is imminent. Given the ACA litigation track record, regardless of what the Halbig court decides, the cases pending in the other circuits will almost certainly proceed to the appellate level, and end up before the Supreme Court seeking review.

In the second set of cases, plaintiffs contend that the ACA is unconstitutional because it violates the Origination Clause of the Constitution, a provision that requires bills for raising revenue to originate in the U.S. House of Representatives. Federal district courts in D.C. and Texas have rejected the argument based on Supreme Court precedent applying the Origination Clause only to bills whose "primary purpose" is to collect revenue.

Seeking to Strike the Contraceptive Coverage Requirement

Dozens of other cases are challenging an ACA provision that requires most new health insurance plans to cover all U.S. Food and Drug Administration (FDA)-approved methods of contraception without cost-sharing. Implementing regulations exempt from this contraceptive coverage requirement group health plans of a "religious employer," which are generally churches and the exclusively religious activities of any religious order. The regulations also provide an accommodation for group health plans of other nonprofit organizations that hold themselves out as religious and have religious objections to covering contraception.

Notwithstanding this exemption and accommodation, plaintiffs have filed cases across the country challenging the contraceptive coverage requirement. The plaintiffs bring these cases as religious nonprofit entities who do not want to complete the self-certification form required for an accommodation and for-profit corporations and their owners asserting religious objections to providing their employees with health insurance that covers some or all forms of contraception. The litigants raise claims under the Religious Freedom Restoration Act of 1993 (RFRA) and the U.S. Constitution, but the RFRA claims are getting the most attention. The Supreme Court recently resolved two cases involving for-profit corporations, and issued injunctions pending appeal in two cases involving religious nonprofit entities.

On June 30, in *Burwell v. Hobby Lobby*, the Supreme Court held that the contraceptive coverage provision, as applied to three closely held corporations that object on religious grounds to providing insurance for certain contraceptives, violates RFRA (and therefore never reached the constitutional claim). RFRA prohibits the government from placing substantial burdens on a person's exercise of religion unless there is a compelling reason to do so. The Court relied on the Dictionary Act, which defines a handful of words under federal law, and decided that closely held corporations are persons within the meaning of RFRA. Then, the Court accepted as true the companies' and owners' contention that covering certain types of contraception, which the owners' incorrectly believe are abortifacients, violates their religious beliefs (scientific evidence, however, establishes that they are not in fact abortifacients). The Government did not disagree with that contention, but argued that the connection between the challenged rule and the religious objection was too attenuated to be substantial because the decision to use contraception is made by independent third-parties, i.e., the employees. The Court, however, concluded that the contraceptive coverage provision imposed a substantial burden because the owners sincerely believed it was substantial. The Court "assumed" there is a compelling government interest, but decided that the provision violated RFRA because it was not the least restrictive means of furthering those interests. According to the Court, the Department of Health and Human Services was already using a less restrictive means for some religious nonprofits with religious objections to contraceptive coverage—the "accommodation."

As a result of the Court's decision, women employed by closely held companies like Hobby Lobby, Mardel, and Conestoga Wood might be left with health insurance coverage that fails to meet their health care needs. The Court did not otherwise define closely held corporations, so it remains to be seen which types and how many corporations will be able to assert RFRA claims in the future. Although the Court wrote that it was not handing a shield to employers seeking to opt out of other laws, like those requiring health plans to cover immunizations or anti-depressants, it is not clear how or why the Court's legal reasoning would apply only to contraceptive services. But, it is significant that, because RFRA applies only to federal laws, not state laws, the Court's decision does not directly affect state contraceptive equity laws.

Although the *Hobby Lobby* Court concluded that the accommodation was a less restrictive means of furthering the government's interests in the context of for-profit challenges, it declined to say whether the accommodation would actually withstand a RFRA challenge. And indeed, non-profit plaintiffs are using RFRA to challenge the accommodation in federal courts throughout the country. The plaintiffs there claim that the very act of completing the self-certification form violates their religious beliefs by facilitating the subsequent provision of contraceptive coverage by a third party. In two of those cases, the Supreme Court has granted injunctive relief pending final dispositions of the appeals. Thus, for the time being, those nonprofit organizations do not have to complete the self-certification form, as required by federal rules. They must simply notify the government that they do not intend to provide contraceptive coverage.

Seeking to Enforce the ACA

In another set of cases, plaintiffs seek to enforce ACA provisions. Some lawsuits have asked courts to enjoin state laws that restrict the activities of individuals who are federally certified to inform and assist uninsured individuals to enroll in qualified health plans (QHPs) under the ACA. In a case brought by NHeLP and co-counsel Jay Agnoff of Mehri & Skalet, PLLC, *St. Louis Effort for Aids v. Huff*, a federally Certified Application Counselor, along with other entities and individuals who wanted to help uninsured Missourians enroll in health coverage, argued that the state navigator law violated the Supremacy Clause, the First Amendment, and the Due Process Clause. The court granted the plaintiffs' request for a preliminary injunction, finding that the ACA preempted provisions of the Missouri law. The challenged provisions, among other things, prohibit consumer assisters who are not also insurance agents or brokers from providing information about the benefits offered by different health plans. They also require consumer assisters to tell individuals who previously obtained insurance from an insurance agent or broker to consult with an insurance agent or broker. The Missouri Insurance Commissioner has appealed the case to the Eighth Circuit.

Finally, in a complaint filed with the Office for Civil Rights at the Department of Health & Human Services, NHeLP and the AIDS Institute requested that federal officials take all necessary steps, including a corrective action plan, targeted outreach and enrollment of people living with HIV and AIDS, and decertification of the named Florida QHPs to end discrimination targeting people living with HIV and AIDS. The complaint alleges that four Florida insurers are violating the ACA and federal civil rights laws by imposing overly restrictive medical management to commonly used HIV/AIDS medications, and by placing all HIV/AIDS medications in the highest cost-sharing tiers. As a result of these unlawful acts, insured individuals face expensive co-insurance and co-pays, prior authorization requirements, high up-front costs, and quantity limits.

Conclusion

Given the sheer volume of cases, decisions are being announced on an ongoing basis. Please periodically consult our website for the latest developments and analyses.

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state level.

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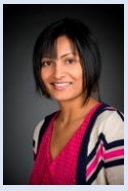

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