HOBBS STRAUS DEAN & WALKER

806 SW Broadway, Suite 900
Portland, OR 97205

T 503.242.1745
F 503.242.1072

HOBBSSTRAUS.COM

MEMORANDUM

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TO: NATIONAL INDIAN HEALTH BOARD

FROM: Geoff Strommer Geoff Strommer (by TAE)
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: Health Care Litigation Update

I. Introduction

Lawsuits challenging the Affordable Care Act (ACA) and its implementation have continued to make their way through the courts despite the Supreme Court's decisions upholding the law. This past summer, the Supreme Court upheld the availability of premium tax credits on federally facilitated exchanges, avoiding a construction of the ACA that would have crippled its implementation. *King v. Burwell*, 135 S. Ct. 2480 (2015). Challenges to the employer mandate continue, including disputing its application to tribal governments, as well as suits involving contraceptive coverage, administrative delays in implementation of the law, and the Origination and Takings Clauses of the Constitution. Part II of this memorandum provides an update on litigation challenging the Affordable Care Act and its implementation under various theories.

A central part of the ACA is the authorization of Medicaid expansion. In both Alaska and Arizona state legislatures have sought to block governors' plans to expand Medicaid. Part III discusses the cases in both states.

Additionally, litigation specific to Indian health providers has continued, including contract support cost litigation, cases against IHS regarding the funding amounts under Indian Self-Determination and Education Assistance Act (ISDEAA) contracts, contract disputes with third parties, and funding for leases for Village Built Clinics in Alaska. Part IV of this memorandum provides an overview of recent and pending cases that are specific to Indian health providers.

II. Challenges to the Affordable Care Act

The Supreme Court Upholds the Individual Mandate and Premium Tax Credits

The United States Supreme Court has twice rejected challenges that would have crippled the Affordable Care Act. In 2012, the Supreme Court upheld the Affordable

Care Act's individual mandate in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) [hereinafter "*NFIB v. Sebelius*"]. The ACA's individual mandate requires individuals to have health insurance that meets certain minimum standards or pay a "shared responsibility payment." The Court ruled that this shared responsibility payment was in fact a tax penalty and upheld the ACA's individual mandate as a valid exercise of Congress's tax power. This ruling was critical to the ACA's survival because the tax penalty ensures that individuals may not merely wait until they are sick to purchase health insurance. Having healthy individuals pay into insurance plans is critical to those plans' abilities to pay the cost of health care coverage for sick individuals.

In *NFIB*, however, the Court also held that the ACA's expansion of Medicaid was unconstitutional. The Court found that Medicaid expansion exceeded Congress's spending power by threatening to terminate existing Medicaid funding if states chose not to expand their Medicaid programs. The case, therefore, made Medicaid expansion optional for states.

The Supreme Court decided its most recent ACA case in June 2015 when it decided *King v. Burwell*. 135 S. Ct. 2480 (2015). The Court held that premium tax credits are available on federally facilitated health insurance exchanges as well as state-based exchanges. To ensure that low-income individuals can afford to comply with the ACA's individual mandate, the law provides for premium assistance in the form of tax credits. The ACA allows states to implement their own exchanges, but if they choose not to, then the federal government operates a federally facilitated exchange in that state. The Internal Revenue Service (IRS) has made premium tax credits available to individuals who purchased insurance on either a federally facilitated or state-based exchange.

In *King*, the Court rejected the argument that the plain language of the ACA provided tax credits for persons enrolled in health coverage "through an Exchange established by the State under [section] 1311" of the ACA. 26 U.S.C. § 36B(b)(2)(A). The majority held that in light of the structure and purpose of the ACA, this phrase was intended to include insurance purchased through federally facilitated exchanges when states declined to create their own health insurance exchanges. The Court's decision was important to ensuring the affordability of health insurance to low-income individuals.

Employer Mandate Litigation

The Supreme Court's decision in *King v. Burwell* has had a significant impact on cases that were pending in district court challenging the employer mandate, particularly as it applies to states. The ACA requires "applicable large employers," which are employers with 50 or more full-time employees, to offer employees and their dependents health coverage that meets certain minimum requirements. 26 U.S.C. § 4980H. Employers are assessed a penalty if they fail to provide such coverage and an employee or dependent then qualifies for a premium tax credit by purchasing insurance through an exchange.

The Oklahoma Attorney General as well as the State of Indiana and 29 Indiana school districts have challenged the employer mandate as it applies to states in *Oklahoma ex rel. Pruitt v. Burwell*, No. 6:11-cv-00030 (E.D. Okla. filed Jan. 21, 2011) and *Indiana v. IRS*, No. 1:13-cv-1612 (S.D. Ind. filed Oct. 8, 2013). Federally facilitated exchanges were operated in both states, which declined to create their own state-based exchanges. Both states made arguments similar to that in *King*, asserting that premium tax credits were not available in their states because the ACA did not permit them to be provided for insurance purchased on a federally facilitated exchange. The states reasoned, employers in their states could not be subject to tax penalties for failing to offer ACA-compliant health coverage because their employees could never go on a federally facilitated exchange and receive a tax credit, and therefore the employer mandate tax penalty could never be triggered. Both cases also argued that the ACA violates the Tenth Amendment to the extent that it applies the employer mandate to states and their political subdivisions.

In *Pruitt*, Oklahoma won at the district court level and the United States appealed to the Tenth Circuit Court of Appeals; that appeal was stayed pending the outcome of *King v. Burwell* in the U.S. Supreme Court. Following the outcome of *King*, the parties in *Pruitt* agreed that the district court judgment should be reversed, as *King* settled the issue of whether premium tax credits could be issued on federally facilitated exchanges. On July 28, 2015, the Tenth Circuit issued an order reversing the district court's decision. Procedural Termination, *Oklahoma ex rel. Pruitt v. Burwell*, No. 14-7080 (10th Cir. July 28, 2015). In *Indiana*, the plaintiffs have conceded that *King* disposed of their challenge to the IRS regulations allowing premium tax credits on federally facilitated exchanges. However, they continue to press their Tenth Amendment claims. Joint Notice Regarding Further Proceedings, *Indiana v. IRS*, No. 1:13-cv-1612 (S.D. Ind. July 21, 2015).

Another pending employer mandate case relates specifically to tribal governments. The Northern Arapaho Tribe filed suit in federal district court in the District of Wyoming, challenging IRS regulations extending the employer mandate to tribal governmental employers. *Northern Arapaho Tribe v. Burwell*, No. 14-cv-247 (D. Wyo. filed Dec. 8, 2014). Although the ACA does not specifically apply the employer mandate to tribal governments, the IRS regulations include governmental entities and define them to include tribal governmental employers. 26 C.F.R. §§ 54.4980H-1(a)(23), 301.6056-1(b)(7). The Northern Arapaho Tribe argued that the regulations were invalid because they contravene the language of the statute, which does not apply the employer mandate to tribes. The Tribe also argued that Congress never intended the employer mandate to apply to tribal governmental employers, as evidenced by the fact that Congress exempted individual Indians from the individual mandate. The Tribe further asserted that the employer mandate would make insurance more expensive for tribal member employees because an offer of insurance from an employer would make them ineligible for the tax credits and cost-sharing benefits that they would otherwise be entitled to when purchasing insurance through an exchange.

On July 2, 2015, the district court dismissed the Northern Arapaho Tribe's case. *Northern Arapaho Tribe*, no. 14-cv-247, 2015 WL 4639324 (D. Wyo.). Among other bases for dismissal, the court found that the ACA unambiguously expressed Congress's intent that the employer mandate apply to tribes. The court reasoned that if Congress wished to exempt tribes from the employer mandate, it needed to have done so explicitly. The Tribe appealed to the Tenth Circuit Court of Appeals on August 28, 2015.

Religious Challenges to Contraceptive Coverage

Other than *NFIB v. Sebelius* and *King v. Burwell*, the Supreme Court has only issued one other decision on the merits in an ACA case. In *Burwell v. Hobby Lobby Stores, Inc.*, the court addressed a religious freedom challenge to contraceptive coverage regulations, known as the "contraceptive mandate." 134 S. Ct. 2751 (2014). The ACA requires applicable large employers to offer insurance coverage that includes preventive care and screening for women at no cost. 42 U.S.C. §§ 300gg-13(a)(4). The Department of Health and Human Services (HHS) has interpreted this requirement to require that large employers provide contraceptive coverage without any cost sharing requirements. Coverage of Preventive Services Under the [ACA], 77 Fed. Reg. 8725 (Feb. 15, 2012). The regulations provide a religious accommodation under which non-profit religious organizations may certify their objection and avoid having to pay for such coverage for their employees. When a non-profit religious organization objects to contraceptive coverage, the insurance company rather than the employer must pay the cost of the coverage. However, no such exemptions were available for for-profit employers.

In June 2014, the Supreme Court in *Hobby Lobby* held that regulations requiring employers to provide free access to contraception violated the Religious Freedom Restoration Act (RFRA) when applied to closely held corporations whose owners had religious objections to such coverage. 134 S. Ct. 2751 (2014). Since *Hobby Lobby*, challenges to the contraceptive mandate have continued, and there have been a total of over 100 suits challenging the mandate since the ACA's passage.[1]

On September 17, 2015, the Eighth Circuit Court of Appeals in St. Louis ruled that the ACA *does* violate the rights of religiously affiliated employers by requiring them to provide contraceptive coverage, despite the fact there is no charge for the coverage. *Sharpe Holdings, Inc. v. Burwell*, No. 14-1507 (8th Cir. Sep. 18, 2015) (slip op.). The Court ruled that requiring the employers to "self-certify" on a form that contraception was against their religious beliefs was itself a burden on the employers' free exercise rights under *Hobby Lobby*, stating that the court could not second guess the reasonableness of correctness of the employers' religious beliefs. *Id.* at 17. The decision departs from the holdings of other Circuit Courts of Appeals, thus creating a "circuit

[1] National Women's Law Center, *Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit* (Sep. 4, 2015), http://www.nwlc.org/status-lawsuits-challenging-affordable-care-acts-birth-control-coverage-benefit.

split," and increasing the likelihood that the Supreme Court will take up one of these cases in the coming terms.

Challenges to the Obama Administration's Delays in ACA Implementation

Additional ACA challenges have included litigation contesting the Obama Administration's delays in implementing certain ACA provisions. In November 2013, the Administration announced that it would delay enforcement of the ACA's minimum standards for insurance coverage. This prevented the cancellation of insurance plans, allowing individuals to keep their current plans so long as states did not take action to bar the renewal of these plans. The State of West Virginia filed suit, and argued that in addition to violating the ACA, this "administrative fix" was an unlawful delegation of federal power to the states in violation of articles I and II of the Constitution and violated the Tenth Amendment by making states responsible for determining whether federal law should be enforced. *West Virginia ex rel. Morrisey v. Department of Health & Human Servs.*, No. 1:14-cv-01287 (D.D.C. filed July 29, 2014). On September 3, 2015, the court heard oral arguments on the Department of Health and Human Services' motion to dismiss for lack of jurisdiction.

Another challenge to the Administration's implementation of the ACA came from the United States House of Representatives. *United States House of Representatives v. Burwell*, No. 14-cv-01967 (D.D.C. filed November 21, 2014). First, the House of Representatives argued that the Administration spent billions of dollars that Congress had not appropriated in order to make direct payments to health insurance issuers to offset the expense of the cost-sharing reductions in the ACA. Although the ACA authorizes such payment, the House of Representatives argued that Congress never passed legislation appropriating funds for this purpose. Second, the House of Representatives argued that the Administration had effectively amended the ACA by delaying the implementation of the employer mandate and by issuing regulations that only imposed penalties when large employers failed to offer coverage to a certain percentage of employees and their dependents even though the ACA requires that all employees and their dependents be offered coverage.

On September 9, 2015, the court dismissed the House of Representatives' claims regarding implementation of the employer mandate but ruled that it had standing to pursue its appropriations-related claims. *U.S. House of Reps. v. Burwell*, No. 14-cv-1967, 2015 WL 5294762 (D.D.C. Sep. 9, 2015). The court reasoned that while the House did not have standing to require the Administration to comply with the ACA in its implementation of the employer mandate, it did have standing to pursue constitutional claims that the Administration usurped congressional power by expending non-appropriated funds, providing a concrete and particularized injury that was traceable to the federal defendants and remediable by the court. On September 15, the White House announced that it would appeal the ruling allowing the appropriations claims to proceed by seeking an interlocutory appeal to the D.C. Circuit Court of Appeals. The District Court will need to decide whether to grant the right of appeal—and stay the case while

that appeal proceeds—or reject it and proceed on the merits of the appropriations related claims.

Origination and Takings Clause Challenges

Circuit courts have twice denied challenges to the ACA based on the Constitution's Origination Clause. In *Sissel v. Department of Health and Human Services*, the plaintiff argued that the ACA's individual mandate violated the Constitution's Origination Clause. 760 F.3d 1 (D.C. Cir. 2014). The Origination Clause requires that bills for raising revenue originate in the House of Representatives, while the ACA originated in the Senate. The Court of Appeals for the District of Columbia rejected the challenge, reasoning that the ACA's primary purpose was not revenue generation but rather to increase health insurance coverage and decrease the costs of that coverage. On August 7, 2015, the court of appeals denied rehearing en banc, and the plaintiffs have since filed a petition for certiorari with the United States Supreme Court.

In *Hotze v. Burwell*, the plaintiffs also lodged an Origination Clause attack while additionally arguing that the ACA's employer mandate was an unconstitutional taking that violated the Fifth Amendment's Takings Clause. 784 F.3d 984 (5th Cir. 2015). The Fifth Circuit Court of Appeals dismissed the case for lack of standing and because it was barred by the Anti-Injunction Act, which prohibits suits to restrain the assessment or collection of a tax. The Fifth Circuit denied rehearing on August 17, 2015.

III. Challenges to Medicaid Expansion

On August 24, 2015, the Alaska Legislative Council filed suit in state court to challenge the Governor's decision to expand Medicaid. *Alaska Legislative Council v. Walker*, No. 3AN-15-09208CI (Alaska Super. Ct. filed Aug. 24, 2015). The Legislative Council argued that it alone, and not the Governor, had the authority to authorize additional groups of people to be eligible for Medicaid. Governor Walker has argued that although *NFIB v. Sebelius* struck down the federal government's ability to make current Medicaid funding contingent on expansion, the ACA nonetheless requires states to expand their Medicaid programs. On August 28, 2015, the court denied a temporary restraining order in the case, and the Alaska Supreme Court affirmed this denial of a temporary restraining order on August 31, 2015. Order, Sup. Ct. No. S-16059 (Alaska, Aug. 31, 2015) *available at* http://courtrecords.alaska.gov/webdocs/media/docs/ak-leg-council/order-s16059.pdf.

In Arizona, lawmakers have also attempted to challenge Arizona's plan for funding Medicaid expansion. *Biggs v. Brewer*, No. CV 2013-011699 (Ariz. Super. Ct. (Maricopa) filed Sept. 12, 2013). The thirty-six legislators and three citizens who filed suit argued that passage of a "hospital assessment" that would fund Arizona's share of Medicaid expansion was a tax and therefore required a two-thirds vote under state law rather than the simple majority with which it was passed. On August 26, 2015, the trial court granted the defendants' motions for summary judgment. Under Advisement Ruling,

Biggs v. Brewer, No. CV 2013-011699 (Ariz. Super. Ct. (Maricopa), Aug. 26, 2015) *available at* https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/9/2/m6981949.pdf. The court found that the hospital assessment was not a tax under state law and did not require a two-thirds majority. The Goldwater Institute, which has been instrumental in litigating the case, has indicated that the decision will be appealed to the Arizona Court of Appeals.

IV. Indian Health Care Litigation

There are a number of important recent or pending cases specifically involving Indian health care issues.

Contract Support Cost Litigation

On June 30, 2015, the United States Supreme Court granted the Menominee Indian Tribe of Wisconsin's petition for a writ of certiorari in a contract support cost case that our firm is litigating. *Menominee Indian Tribe of Wis. v. United States*, No. 14-510 (U.S. Supreme Court). The Tribe filed contract support cost claims in September 2005 for underpayments under the Indian Self-Determination and Education Assistance Act (ISDEAA) in the years 1995 through 2004. The Indian Health Service (IHS) denied the claims as untimely, saying they exceeded the Contract Dispute Act's six-year statute of limitations. The Tribe, however, argued that under Supreme Court precedent, its claims should have been equitably tolled by pending class action claims. The Tribe filed its opening brief before the Court on September 2, 2015, which is accessible at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2015_2016/14-510_pet.pdf.

ISDEAA Contract Funding Cases

Our firm also represented the Pyramid Lake Paiute Tribe in its suit against the Department of Health and Human Services (HHS) after the IHS terminated the Tribe's Emergency Medical Services (EMS) program. *Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-01771 (D.D.C. filed Nov. 8, 2013). The IHS had operated the program since 1993, but after the Tribe submitted its proposal to contract the program under the ISDEAA, the IHS terminated the program. IHS then declined the contract proposal, stating that the Tribe was proposing more funds than were available because the program had been terminated. On October 7, 2014, the district court ruled for the Tribe on its key funding arguments but did not order the IHS to enter the contract at the proposed funding level. *Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d 534 (D.D.C. 2014). The Tribe and the IHS subsequently reached a settlement agreement, and HHS filed an unopposed motion to dismiss the case on August 10, 2015.

Another recent case involving contract funding under the ISDEAA was brought by the Seneca Nation of Indians against HHS in August 2014. *Seneca Nation of Indians v. Department of Health & Human Servs*, No. 1:14-cv-01493 (D.D.C. filed Aug. 29,

2014). The Tribe is contesting the IHS' attempt to cut $3,774,392 from its annual funding base for fiscal years 2013-2015. Previously, the Tribe's annual funding was increased by this amount after the Tribe realized there had been a substantial undercount of its active user population. The Tribe then proposed an amendment to its FY 2010 and FY 2011 funding agreements to increase base funding by $3,774,392. Because the IHS did not issue a response within 90 days, as required by statute, the funding agreement was deemed approved, and the Tribe won a court case awarding the Tribe the increased amount. *See Seneca Nation of Indians v. Department of Health and Human Services*, 945 F.Supp.2d 135 (D.D.C. 2013).

While the Tribe was litigating the issue of the FY 2010 and FY 2011 amounts, it also requested an increase of $3,774,392 for FY 2012, but this increase was denied by IHS. The Tribe filed a claim with the Interior Board of Indian Appeals (IBIA) over the FY 2012 amount. *See Seneca Nation of Indians v. Nashville Area Chief Contracting Officer* (Docket No. IBIA 12-041). After the FY 2010 and FY 2011 litigation was resolved, IHS again rejected funding agreements that included the additional $3,774,392. for FY 2013, FY 2014, and FY 2015.

In August 2014, the Tribe filed suit in federal district court in the District of Columbia challenging the 2013–2015 denials and arguing that under the ISDEAA the IHS may not reduce the Tribe's annual funding level. The IBIA then stayed its proceeding pending resolution of the Tribe's suit over the 2013–15 amounts. However, HHS moved to dismiss the district court case in June 2015, arguing that it cannot be resolved prior to resolution of the stayed IBIA case. HHS asserts that the Tribe's arguments regarding the 2013–2015 amounts are contingent upon resolution of the funding level for the FY 2012 contract. The motion to dismiss is still pending.

Third-Party Contract Dispute Cases

In April 2014, the Grand Traverse Band of Ottawa and Chippewa Indians sued Blue Cross and Blue Shield of Michigan (BCBSM) for violations of a contract under which BCBSM administers the Tribe's self-insured employee benefits plan. *Grand Traverse Band of Ottawa & Chippewa Indians v. Blue Cross & Blue Shield of Mich.*, No. 5:14-cv-11349 (E.D. Mich. filed April 1, 2014). The Tribe alleged that BCBSM has been paying more than it should have under the contract for Contract Health Services (CHS). The Tribe asserted that BCBSM should not have been paying more than Medicare-like Rates for CHS-eligible claims based on regulations that went into effect in July 2007 and, at a minimum, BCBSM was contractually obligated to apply an 8 percent discount to its rates to reflect the Medicare-like Rate. The Tribe also alleged that BCBSM was collecting an administrative fee from the money it used to pay claims in violation of the contract. The parties settled the issue of administrative fees while continuing to litigate the applicability of Medicare-like Rates. On July 17, 2015, BCBSM filed a third party complaint against Munson Medical Center, arguing that it breached its contract with BCBSM by failing to provide necessary information or charge rates. BCBSM argues that

Munson Medical Center is responsible to the extent that BCBSM is found liable to the Tribe. Both cases continue in the Eastern District of Michigan.

The Alaska Native Tribal Health Consortium (ANTHC) sued Premera Blue Cross (Premera) in 2012 for failure to pay the higher of ANTHC's reasonable billed charges or the highest amount Premera would pay to a non-governmental entity under section 206 of the Indian Health Care Improvement Act. *Alaska Native Tribal Health Consortium v. Premera Blue Cross*, No. 3:12-cv-0065 (D. Alaska filed Mar. 27, 2012). In September 2014, ANTHC moved for summary judgment, arguing that its billed charges should be deemed reasonable. Premera filed a cross motion for summary judgment, arguing that ANTHC's billed charges were not reasonable or, in the alternative, that Premera had paid ANTHC in accordance with the Alaska Usual and Customary Rate which is usually higher than ANTHC's billed charges. In July 2015, the court denied the motions for summary judgment, finding that questions remained over whether Premera had paid substantially less than ANTHC's billed charges. The parties are expected to have a settlement conference during the week of October 19–23, 2015.

Village Built Clinic Litigation

The Maniilaq Association (Maniilaq) is currently in litigation regarding IHS' denial of a lease for its Kivalina, Alaska Village Built Lease proposal. *Maniilaq Ass'n v. Burwell*, No. 1:15-cv-00152 (D.D.C. filed Jan. 30, 2015). Our firm represents Maniilaq in this matter. Maniilaq asserts that the lease is mandatory under section 105(*l*) of the ISDEAA. IHS, however, has contended that it is free to cap funding at the historical Village Built Clinic (VBC) lease amount received by Maniilaq rather than pay the amount determined under the compensation options and criteria in the section 105(*l*) regulations.

The case is an outgrowth of prior litigation regarding IHS' obligation to enter into and fully fund leases for VBCs. Previously, Maniilaq requested IHS enter into a mandatory lease for its VBC in Ambler, Alaska. IHS failed to respond within 45 days, as required by statute. IHS's eventual response stated that it did not enter into leases with ISDEAA contractors for VBC facilities; a lease under section 105(*l*) cannot be incorporated into an ISDEAA funding agreement; Maniilaq must apply for a lease through the IHS Lease Priority System; and that IHS would not be required to provide monetary compensation for such lease. Maniilaq sued IHS, and in November 2014, the court held that the offer containing the lease was deemed accepted by operation of law when IHS failed to respond within 45 days and that the lease may be incorporated into an ISDEAA funding agreement. *Maniilaq Association v. Burwell*, 72 F.Supp.3d 227 (D.D.C. 2014).

In the present litigation, Maniilaq's motion for summary judgment is pending before the court. Maniilaq has asked the court to resolve the issue of lease compensation. Oral argument on Maniilaq's motion has not yet been scheduled.

V. Conclusion

Challenges to the ACA and efforts to block Medicaid expansion have continued. These suits are likely to taper off somewhat as courts resolve various issues regarding implementation of the ACA. We will keep a close eye on these cases as they progress as well as continuing to track cases that involve issues specific to Indian health providers.

If you have any questions about the information discussed above, you may reach me at gstrommer@hobbsstraus.com or (503) 242-1745.