

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN**

ASSOCIATION OF AMERICAN)	
PHYSICIANS & SURGEONS, INC., AND)	
ROBERT T. MCQUEENEY, M.D.,)	Civil Action
)	
Plaintiffs,)	
)	No. 1:13-CV-1214
v.)	
)	
DANIEL I. WERFEL, ACTING)	
COMMISSIONER OF THE INTERNAL)	
REVENUE SERVICE, IN HIS OFFICIAL)	
CAPACITY,)	
)	
Defendant.)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Association of American Physicians & Surgeons, Inc. (“AAPS”) and Robert T. McQueeney, M.D. (“McQueeney”), seek declaratory and injunctive relief against Daniel I. Werfel, Acting Commissioner of the Internal Revenue Service, in his official capacity (“Defendant”), as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action to stop the unconstitutional implementation by Defendant of the Patient Protection and Affordable Care Act (“ACA”) in violation of separation of powers and the Tenth Amendment.

2. ACA expressly requires that the mandate for large employers to purchase health insurance for employees (“Employer Mandate”) begin at the same time as the mandate for individuals to have health insurance (“Individual

Mandate”), on January 1, 2014. This simultaneous requirement of the Employer Mandate is to protect millions of employed individuals from having to spend their personal health care dollars on insurance premiums under the Individual Mandate.

3. Defendant violated the separation of powers in the U.S. Constitution by changing this legislative requirement and thereby shifting the burden of the ACA insurance mandate from employers to individuals. This change by Defendant of the requirements of ACA was without congressional approval or authorization.

4. By requiring individuals to purchase health insurance without the protection of the Employer Mandate, Defendant compels many individuals to spend their own health care dollars on insurance premiums instead of as direct cash payments to physicians for medical care.

5. Plaintiffs seek declaratory and injunctive relief to prevent Defendant from shifting the ACA-mandated insurance burden from employers to individuals.

THE PARTIES

6. Plaintiff AAPS was founded in 1943 and is a membership organization of thousands of practicing physicians, including many who have “cash practices” that do not accept payment from health insurance plans. AAPS is incorporated under the laws of Indiana and headquartered in Tucson, Arizona. AAPS membership includes physicians practicing in northeastern Wisconsin, including McQueeney. Members of AAPS, including McQueeney, have been harmed and continue to be harmed by the unconstitutional implementation of ACA.

7. Plaintiff Robert T. McQueeney, M.D., is a psychiatrist who resides in

Marinette County, Wisconsin, and who maintains a part-time private medical practice there. He has practiced in Marinette County for about 20 years, and is a member of AAPS.

8. Defendant Daniel I. Werfel is the Acting Commissioner of the Internal Revenue Service (“IRS”), an executive agency of the U.S. government.

JURISDICTION

9. This action arises under the laws of the United States. Accordingly, this Court has subject matter jurisdiction here under 28 U.S.C. § 1331 and § 1361, and jurisdiction to render the requested declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

VENUE

10. Venue is proper in this district under 28 U.S.C. § 1391(e) because Plaintiff McQueeney and other AAPS members reside here.

STANDING

11. Members of Plaintiff AAPS, including McQueeney, are injured by Defendant’s implementation of ACA, and Plaintiffs’ requested declaratory and injunctive relief will prevent ongoing and imminent future injury. Many AAPS members, including McQueeney, have private practices that depend substantially on “cash-paying” patients who purchase medical care with their own personal funds.

12. More than 50% of McQueeney’s patients pay out-of-pocket directly for his services. These payments are from the patients’ personal resources, using their own health care dollars. Some of these patients work fulltime for large

employers. McQueeney does not accept payment from most insurance plans. Other members of AAPS likewise have practices dependent on cash-paying patients.

13. Defendant's shifting of the mandate for health insurance premiums from employers to only individuals causes the elimination of many cash-paying patients from the medical practices of McQueeney and other AAPS members. Defendant's shifting of the ACA insurance burden entirely onto individuals diverts their discretionary health care dollars towards insurance premiums, away from direct payments to physicians. This significantly reduces the customer base for AAPS members who have "cash practices" accepting direct payments from patients.

14. Defendant's imposition of the Individual Mandate in 2014 without the Employer Mandate forces individuals to spend more of their personal health care dollars on health insurance premiums, and less as direct payments to physicians.

15. Defendant's imposition of the Individual Mandate in 2014 without the Employer Mandate causes AAPS members (including McQueeney) to lose cash-paying patients and revenue.

16. The protection of "cash practices," which depends in large part on individuals being able to pay out-of-pocket for medical services, is central to AAPS's purpose. AAPS has long advocated direct payment for medical services rather than use of "third-party payers" such as health insurance companies.

17. Defendant's delay of the Employer Mandate has also caused increases in individual health insurance premiums for some members of Plaintiff AAPS.

18. Addressing Defendant's ongoing violations of the Constitution does

not require participation in this lawsuit by individual AAPS members.

STATUTORY BACKGROUND

19. ACA imposes mandates to purchase health insurance, beginning January 1, 2014, in the form of an Employer Mandate (26 U.S.C. § 4980H) and an Individual Mandate (*id.* § 5000A). *See* Pub. L. No. 111-148, 124 Stat. 119.

20. The Employer Mandate compels employers having greater than 50 fulltime-equivalent employees (“large employers”) to purchase ACA-compliant insurance for their fulltime employees.

21. The Individual Mandate penalizes non-exempt individuals who do not maintain “minimum essential” health insurance coverage under ACA. 26 U.S.C. § 5000A. Specifically, individuals who decline to purchase government-approved health insurance effective beginning January 1, 2014, will be assessed a “[s]hared responsibility payment” – a tax – by the federal government. *Id.* § 5000A(b).

22. This ACA tax begins January 1, 2014, payable to the IRS as part of the individual’s tax obligation and subject to the same penalties for late payment as other tax obligations are. 26 U.S.C. § 5000A(g)(1).

23. Although held by the U.S. Supreme Court to be a tax, the ACA tax is not considered to be a tax for the statutory purposes of the Anti-Injunction Act.

DEFENDANT’S UNCONSTITUTIONAL IMPLEMENTATION

24. Congress expressly required that the Employer Mandate (26 U.S.C. § 4980H) “shall apply to the months beginning after December 31, 2013.” Pub. L. No. 111-148, Title I, Subtitle F, Part II, § 1513(d), 124 Stat. 25. The significance

of that start date is that it is coterminous with the Individual Mandate, thereby protecting employees of large employers from having to pay substantial health insurance premiums in order to avoid the taxes imposed by the Individual Mandate.

25. But the IRS is implementing the Individual Mandate for 2014 without the protection of the Employer Mandate. *See* IRS Notice 2013-45, 2013-31 I.R.B. 116, “Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions),” at 3 (“no [Employer Mandate] will be assessed for 2014”).¹

IRREPARABLE HARM AND RIPENESS

26. Members of Plaintiff AAPS, including McQueeney, have medical practices that depend on direct payment by patients for care, rather than on payments by insurance companies or other third-party payers. Defendant’s implementation of ACA shifts the burden of paying health insurance premiums onto individuals in 2014, and thereby eliminates from the market many cash-paying patients who seek and would seek medical care by members of AAPS, including McQueeney.

27. Insurance plans that are government-approved under ACA do not typically cover expenses for much of the medical care provided by AAPS members.

28. Plaintiff AAPS’s members, including McQueeney, will soon suffer irreparable harm in losing cash-paying patients who are subjected to the Individual Mandate without the protection of those patients by the Employer Mandate.

¹ <http://www.irs.gov/pub/irs-drop/n-13-45.PDF> (viewed 10/25/13). The IRS refers to the Employer Mandate as the “employer shared responsibility.”

29. Plaintiff AAPS's members, including McQueeney, will soon suffer unrecoverable financial losses from this economic distortion caused by Defendant's unauthorized implementation of ACA. Plaintiff AAPS's members, including McQueeney, have no alternative means of recouping their damages associated with their loss of cash-paying patients.

30. This claim is purely legal and fit for judicial review now without the need for future developments. AAPS's members, including McQueeney, will suffer immediate and irreparable hardship if the Court defers review. This claim is ripe because it is sufficiently immediate for purposes of constitutional standing.

31. Defendant has no interest in deferring review and will suffer no hardship from immediate review. Defendant has a significant interest in a prompt decision on the constitutionality of his actions, rather than postponed adjudication.

DECLARATORY RELIEF

32. Plaintiffs seek declaratory relief against the continued implementation and enforcement of ACA, pursuant to 28 U.S.C. §§ 2201 and 2202.

COUNT I

(Violation of Separation of Powers and the Tenth Amendment)

33. Plaintiffs incorporate herein all of the foregoing allegations.

34. The U.S. Constitution requires a strict separation of powers between the three branches of government, such that the executive branch cannot change laws passed by Congress.

35. By imposing the Individual Mandate in 2014 without the protection

of the Employer Mandate, Defendant changes legislation passed by Congress in violation of the separation of powers in the Constitution, and the Tenth Amendment.

36. Plaintiffs seek injunctive relief to prohibit Defendant from implementing and enforcing ACA in its entirety or, in the alternative, from imposing the Individual Mandate without simultaneously enforcing the Employer Mandate.

37. Plaintiffs seek attorney's fees under the Equal Access to Justice Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

(i) Declare that Defendant's implementation of ACA violates separation of powers in the U.S. Constitution and the Tenth Amendment;

(ii) Issue an order prohibiting Defendant from enforcing the Individual Mandate of ACA;

(iii) Award Plaintiffs reasonable attorney's fees and costs; and

(iv) Award such other and further relief as the Court deems just.

Respectfully submitted,

/s/ Andrew L. Schlafly

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