

## HEALTH AND HOSPITAL

**Texas v. United States in the Fifth Circuit — Is Obamacare Constitutional or Not?**

By James G. Fouassier



JAMES G. FOUASSIER

Last January I reported on the important case of *Texas v. United States*, 4:18 – CV – 00167-O, in which Judge Reed O'Connor of the Northern District of Texas found that because Congress had eliminated the “shared responsibility payment” associated with the Individual Mandate (which requires that almost everyone who does not have health insurance become insured in a plan that meets all of the conditions of the Patient Protection and Affordable Care Act, or “ACA”), the ACA is “invalid” in its entirety. The court found that since the payment requirement was eliminated by Congress in 2017 the In-

dividual Mandate (“the Mandate”) was unconstitutional, and since it is essential to and cannot be severed from the ACA then the illegality of the Mandate renders the entire act invalid.

The U.S. Department of Justice had informed the Fifth Circuit that on the appeal it would take the position that the decision should be affirmed, and that it would file a brief in the case. This was a significant change from the DOJ’s previous position. (The DOJ is charged with defending the constitutionality of federal laws; rarely has it taken a formal position against the legality of acts of Congress.) Sixteen states along with the U.S. House of Representatives filed briefs in opposition to the

decision and in support of the ACA.

The Fifth Circuit issued its opinion on Dec. 18, 2019 on the appeal (19-10011). The two-to-one decision finds that once Congress eliminated the revenue component of the shared responsibility “tax” the Mandate no longer could be read as a “tax” notwithstanding that it remains “on the books.” Since “there is no other constitutional provision that justifies this exercise of congressional power” the Mandate is unconstitutional.

Recall that in 2012 SCOTUS sustained the constitutionality of the Individual Mandate by the surprising finding that the shared responsibility payment, variously labeled the “penalty” or the “fine” for failure to obtain health insurance, instead was a “tax.” *National Federation of Independent Businessmen v.*

*Sibelius*, 567 US 519 (“*NFIB*”). It could not be a “penalty” or a “fine” and survive, the court ruled; the Commerce Clause allows Congress to regulate commerce, not compel it, and the effect of a “penalty” is precisely to compel conduct. The power of Congress to tax, however, is much broader and applies to a variety of situations and activities (or, as here, non-activities). Hence, requiring the payment of a “tax” on an individual’s decision not to purchase insurance is a constitutional exercise of Congress’ taxing power.

The finding that the shared responsibility payment is a tax was quite a stretch. Chief Justice Roberts surmised that the Individual Mandate could be read not as a command

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## FUTURE LAWYER’S FORUM

**Starting the Last Semester of Law School**

By Olivia Lattanza



OLIVIA LATTANZA

After five semesters of attending law school and learning countless rules and laws, it is hard to believe that I will be starting my final semester this January. Prior to starting my first semester, several people told me that the three years of law school would go by in the blink of an eye. I certainly found this to be true. In fact, I feel that each semester flew by quicker than the previous semester. In the next five months before graduation, I will definitely savor my final moments as a student.

In particular, studying and reviewing class material at the school library before class is an important part of my daily routine. I have

always felt a special connection to libraries ever since I worked in one of my college’s libraries. For students, this is the best place to quietly study or to work on group assignments. However, I view the library from a different perspective after witnessing the work that goes into efficiently running a library. It was interesting to learn first-

hand how librarians maintain an organized study environment for students. For example, I was taught how to properly place recently returned books to their shelves, how to issue library cards, and how to renew and loan books. I gained a new appreciation and recognition for the work that librarians do for students because of this working experience.

For that reason, the library is also one of my favorite spots at my law school. In the upcoming months, I will certainly take advantage of the resources available at the Gould Law Library at Touro Law Center.

Another aspect of student life that I will miss is the actual classroom setting. Aside from the actual learning that takes place in class, the classroom environment can be one of the most exciting places. For instance, I can recall memorable lectures that connected the law that we were learning to current events. Also, I will not forget specific discussions that had the entire class laughing together. It is these unexpected moments that make law school classes an exciting place. In addition, this setting is a source of developing new and lasting friendships. For me, I al-

ways plan to arrive 30 minutes early to chat with my classmates because these conversations are always entertaining.

Overall, the goal for my last semester is to appreciate every aspect of law school. Whether that means spending more time in the library or arriving at class extra early to have great conversations with my friends, I will certainly enjoy my last moments as a student.

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## REAL PROPERTY

**RE Brokers Paying Lawyers is a No-No**

By Andrew Lieb



ANDREW LIEB

For a long time, real estate brokers on Long Island drafted leases for their clients, the landlords. As time passed, these brokers became educated about the illegality of this act and decided to stop committing a felony, per Judiciary Law §§ 484, 495(3) and 485-a, or being subject to having their license revoked, per *DOS v. Manfredi*, 126 DOS 10. However, real estate brokers often couldn’t help themselves. They needed to connive another scheme to have the leases drafted for them, rather than simply referring their clients to attorneys as the law required. So, many real estate brokers have found unethical attorneys to draft their leases while the brokers pay such attorneys directly while controlling the representation. Simply, these attorneys are answerable to the broker, not the client. Let’s discuss how these unethical attorneys should be checking their mailbox for a letter from grievance.

Attention is first drawn to Rule 1.8(f) of the Rules of Professional Conduct, which states that “[a] lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer’s representation of

the client, from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship; and (3) the client’s confidential information is protected as required by Rule 1.6.”

Setting aside the fact that these unsavory attorneys are in no way, shape or form obtaining informed consent from the client, let alone having any contact with such client (they take their marching orders from the real estate broker, not the client), assuming that they do obtain such requisite informed consent, attention is next drawn to the “Comment General Principles” 13 to Rule 1.7 “Interest of Person Paying for Lawyer’s Services” from the New York State Bar Association. Such Comment states that “[a] lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty or independent judgment to the client. See Rule 1.8(f).

If acceptance of the payment from any other source presents a significant risk that

the lawyer’s exercise of professional judgment on behalf of a client will be adversely affected by the lawyer’s own interest in accommodating the person paying the lawyer’s fee or by the lawyer’s responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.” Rule 1.7 concerns “Conflict of Interest: Current Clients” and is therefore inapplicable to the situation presented, except to the extent that the comment illuminates the issue with attorneys being hired, paid and directed by real estate brokers to draft leases because the comment sets forth the significant risk that the “lawyer’s duty of loyalty or independent judgment” are compromised.

So, what is the solution? Real estate brokers will swear that their clients won’t pay lawyers, albeit, why would their clients pay lawyers when the industry offers free services, albeit illegal and certainly non-compliant with the requirements set forth in the Housing Stability and Tenant Protection Act, amongst many other laws making requirements for leases. Real

estate brokers should just refer attorneys, but they can also keep the services free by looking to Real Property Law §442, which permits a real estate broker to rebate part of their commission to their client. As such, industry practice is that the tenant generally pays a residential real estate broker and such real estate broker can therefore, in compliance with Real Property Law §442, rebate part of the commission to the landlord coupled with a referral to two or three attorneys and then, the landlord can utilize the rebate to pay their attorney.

Problem solved; plain, simple and done. Alternatively, counsel should be mindful of Matter of Joran, 299 A.D.2d 34, where a broker paid a fee to an attorney for representation and the ultimate result was disbarment. It seems arm’s length representation and rebating fees is a better option.

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