

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:10-CV-0499 (RJL)
)	
KATHLEEN G. SEBELIUS, Secretary of the United States Department of Health and Human Services, <u>et al.</u> ,)	
)	
Defendants.)	

SUPPLEMENTAL PLEADING

The Court authorized each party to file a “supplemental pleading” addressing whether “*National Federation of Independent Business v. Sebelius* [*NFIB*] [132 S. Ct. 2566 (2012)] and *Hall v. Sebelius* [667 F.3d 1293 (D.C. Cir. 2012)] require the dismissal of any count.” Minute Order, July 13, 2012. They do. Specifically, they require the dismissal of Count I, in its entirety, and Count III, in part. Defendants’ portion of the Joint Status Report, Doc. 53, July 12, 2012, 6-9, well explains the precedential effects of *NFIB* and *Hall*, but for efficiency’s sake, defendants summarize those effects below.

Count I of plaintiffs’ complaint laments the fact that entitlement to Social Security triggers statutory entitlement to Medicare Part A benefits. Second Am. and Supp. Compl. for Declaratory and Injunctive Relief, Doc. 26, Sept. 13, 2010, ¶¶ 90-93. *Hall* disposes of an identical claim: “The Statute offers no path to disclaim their legal entitlement to Medicare Part A benefits [,] [t]herefore, the agency was not required to offer plaintiffs a mechanism for disclaiming their legal entitlement.” 667 F.3d at 1296-97. Thus, *Hall* requires dismissal of plaintiffs’ claim on the merits. But it also requires dismissal for lack of jurisdiction: The D.C. Circuit’s decision in *Hall* squarely forecloses plaintiffs’ claim, rendering it insubstantial and, therefore, inadequate to trigger this Court’s jurisdiction. Status Report at 8-9.

Count II addresses the constitutionality of the employer responsibility provision of the Affordable Care Act, Second Am. and Supp. Compl. ¶¶ 94-96, which was not resolved by *NFIB*.

Count III challenges the individual responsibility provision of the Affordable Care Act as an unconstitutional exercise of power under Article I of the Constitution. Second Am. and Supp. Compl. ¶¶ 97-99. *NFIB* sinks this claim. It holds, in relevant part, that “Congress had the power to impose the exaction in § 5000A [*i.e.*, the individual responsibility provision] under the taxing power” *NFIB*, 132 S. Ct. at 2598. Plaintiffs also contend that the individual responsibility provision violates the Fifth Amendment. Second Am. and Supp. Compl. ¶ 68. *NFIB* did not resolve this aspect of plaintiffs’ challenge to the individual responsibility provision.

Count IV assails, both substantively and procedurally, administrative provisions of the Medicare program relating to the enrollment of doctors in the program and the use of identification numbers. Second Am. and Supp. Compl. ¶¶ 100-105; Defs.’ Mot. to Dismiss, Doc. No. 32, Nov. 22 2010, at 57-74. Neither *NFIB* nor *Hall* squarely addresses these claims. But *NFIB* upheld the Affordable Care Act – the Medicaid ruling limited the application of a provision of the Medicaid Act – and, as plaintiffs recognize, their substantive challenges under Count IV fail “if the ACA survives.” Status Report at 6.

Counts V and VI request accountings of the Medicare and Social Security Trust Funds, Second Am. and Supp. Compl. ¶¶ 106-117, and these unique claims were not addressed in *NFIB* or *Hall*.

Dated: July 27, 2012

Respectfully submitted,

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