If you are feeling a little sea sick when you think about health care reform, there may be good reason for it. Though at the moment, the boat though rocky, seems to be staying afloat.

You will recall, Judge Reed O'Connor of the US District Court, Northern District of Texas overturned the entire Affordable Care Act but is keeping it in force during dependency of appeals. The Justice Department, in a bit of an about face, is taking the position that it no longer supports any part of the Affordable Care Act. Last summer, the Justice Department took the position that it would defend the Affordable Care Act.

In recent days, Mitch McConnell, Senate majority leader, has indicated in no uncertain terms health care reform at large will not be taken up until after the 2020 election. Presumably, he knows that it wouldn't stand a chance in the Democratic controlled House.

The Trump administration backed association health plan changes enacted last summer (see prior memo ***here***) have been dealt a significant blow as well. Several states challenged the authority for these regulations and the District Court of the District of Columbia has just ruled that certain significant parts of the association regulations are in fact invalid and must be vacated.

First, the Court found that the administrative agencies exceeded their authority in its new broad definition of bona fide association. Of particular concern to the court is the lack of any significant commonality of interest standard as is required by the ERISA statute. You will recall that the new association rules provide that the association can exist specifically for the purpose of providing health coverage. Whereas the ERISA law, requires that the association exist independent of the provision of health care.

Further, the Court takes exception with the new rules permitting self-employed individuals to participate in the association. By its very nature, ERISA is intended to protect employees. The very first word in ERISA, in fact, is employee.

The Court has sent the regulations back to the Department of Labor (DOL) for further consideration. Specifically, the DOL will need to review how it wishes to proceed. In the meantime, it is important for us to be very careful about placing any client with an association formed under the new rules as these might be invalidated.

The DOL has issued some FAQ guidance providing that associations formed under the new rules must continue to honor claims until further guidance is provided. But it would be

imprudent to place additional business with these newly formed associations until these matters are sorted out. Associations formed in accordance with standards established prior to 2018 are fine.