

December 16, 2010

Court Finds Individual Mandate of PPACA Unconstitutional

On December 13, 2010, the U.S. District Court for the Eastern District of Virginia issued a memorandum opinion in *Commonwealth of Virginia Ex. Rel. Cuccinelli v. Sebelius* (Case number 3:10-cv-00188-HEH), ruling that the individual mandate to maintain health insurance coverage under the Patient Protection and Affordable Care Act (PPACA) must be stricken from the law on constitutional grounds. Under section 1501 of PPACA, Congressional authority to enforce the individual mandate is predicated on findings that mandatory health coverage is “commercial and economic in nature” and “substantially affects interstate commerce.” The *Cuccinelli* ruling represents the first successful challenge to this Congressional authority, and the decision may have a significant impact on provisions in the law relating to employer-sponsored health plans.

Background

The *Cuccinelli* action was filed on PPACA’s enactment date, March 23, 2010, by Attorney General Kenneth Cuccinelli on behalf of the Commonwealth of Virginia. The federal government filed a motion to dismiss the suit, which was denied on August 2, 2010. *Cuccinelli* was one of several state actions filed immediately after PPACA was passed, challenging the new law on constitutional grounds. Under Florida’s lead, 21 states¹ have combined their constitutional challenges into a consolidated action that is currently under consideration by the U.S. District Court for the Northern District of Florida. The court has dismissed four of the six claims in that lawsuit, but will hear oral arguments on the remaining claims – including the constitutionality of the individual mandate – on December 16, 2010. The Commonwealth of Virginia did not join the Florida action because of unique state law concerns. Virginia argued that PPACA conflicted with a Virginia law and, thus, violated the 10th Amendment to the Constitution, but the court did not reach that issue.

While other federal courts, including the Western District of Virginia and the Eastern District of Michigan, have ruled favorably on the constitutionality of the individual mandate, approximately 19 cases challenging PPACA are making their way through various court systems. On December 8, 2010, the U.S. Supreme Court declined to review the first petition for writ of certiorari in a case challenging PPACA’s individual mandate filed by a California state assemblyman. (*Steven Baldwin, et al. v. Kathleen Sebelius, et al.*, No. 10-369, U.S. Sup.).

Cuccinelli Claims

In *Cuccinelli*, the Commonwealth of Virginia sought a declaratory judgment that the individual mandate to maintain minimum essential coverage under PPACA exceeded the power of Congress under the Commerce Clause and the Necessary and Proper Clause of the Constitution. The Commonwealth also sought to enjoin the federal government from enforcing the new law based on the assertion that a citizen’s decision not to purchase health insurance coverage was not economic activity subject to regulation by the Commerce Clause, and that the Necessary and Proper Clause cannot be employed as

¹ The other states involved in the Florida lawsuit are Arizona, Indiana, Mississippi, Nevada, North Dakota, Alabama, Colorado, Idaho, Louisiana, Michigan, Nebraska, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Georgia, and Alaska, along with the National Federation of Independent Business and two individuals.

a vehicle to enforce an unconstitutional exercise of the Commerce Clause. The Commonwealth further argued that the sanction for failure to maintain individual health insurance was mischaracterized as a “tax,” and that it was actually a penalty that was not associated with any Congressional authority under the Constitution.

The federal government’s primary defense rested on the claim that, in the aggregate, the actions of the uninsured in shifting healthcare costs to the rest of the system is economic activity that impacts interstate commerce, and the individual mandate is the linchpin which provides financial viability to the overall regulatory scheme. In addition, the federal government argued that the individual mandate is an appropriate exercise of Congressional power under the Necessary and Proper Clause, since Congress has rationally concluded that the provision is necessary to make the other provisions in PPACA effective. The government further asserted that the requirement to maintain a minimum level of health insurance coverage or pay a tax penalty was well within Congress’ traditional taxation authority in Article I of the Constitution.

The court agreed with the Commonwealth of Virginia on each issue. Citing recent U.S. Supreme Court decisions that have narrowed Congressional Commerce Clause powers, the court pointed out that activities subject to regulation under the Commerce Clause must be truly economic in nature and must have a demonstrable effect on interstate commerce. The court pointed to past decisions in which Congressional regulatory power under the Commerce Clause has been triggered by self-initiated actions such as cultivating and consuming illegal drugs.² The court pointed out that the Supreme Court has never extended the power of the Commerce Clause to “compel an individual to involuntarily enter the stream of commerce by purchasing a commodity on the private market,” and thus, PPACA’s individual mandate exceeds Congress’ Commerce Clause power. The court further held that the Necessary and Proper Clause may be deployed only when exercised in furtherance of a lawfully exercised, constitutionally enumerated power.

According to the court, since the individual mandate was not within the purview of Congress’ constitutional power under the Commerce Clause, the mandate could not be enacted under the Necessary and Proper Clause. The court also held that the monetary sanction for failure to comply with the individual mandate was a penalty, not a tax within Congress’ independent taxation power under Article 1, section 8 of the Constitution. Looking to the legislative history of the provision and the interplay of the terms “penalty” and “tax” in the statute, the court determined that the terms were not treated as synonymous by Congress, and that the purported “tax” was not a bona fide revenue-raising measure.

Impact on Employers and Employer-Sponsored Health Plans

Despite the integral role of the individual mandate in PPACA’s legislative scheme, the court held that the unconstitutionality of the individual mandate was not fatal to the entire health reform statute, and only section 1501 and “directly dependent” provisions that make specific reference to section 1501 should be stricken from the law. While this aspect of the decision appears to narrow its impact, the decision still has the potential to raise issues regarding the application of certain provisions of PPACA that affect employers. Although there are very few specific references to section 1501 in the legislation, the law references section 1501’s individual mandate to maintain minimum essential coverage or uses the term “minimum essential coverage” in several provisions that affect employers or their plans, including:

² *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942) and *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 2208 (2005).

- The new employer mandate to provide a benefits and coverage summary under section 2715 of the Public Health Services Act;
- The “modified pay or play” provisions that require employers either to provide affordable health coverage to employees or to pay certain penalties;
- The employer mandate to provide employees with free choice vouchers in order to purchase coverage under a state exchange;
- The “Cadillac plan” excise tax provisions under Code section 4980I, under which the tax will be assessed on a plan that provides minimum essential coverage if the cost of the plan exceeds certain threshold dollar limits; and
- Code section 162(m)(6), which will apply only to covered health insurance providers offering minimum essential coverage beginning in 2013.

The true impact of the *Cuccinelli* decision on each of these provisions is unclear, particularly given that the Administration is expected to appeal the ruling. The decision is not binding on other judges and does not specifically shield health plans from compliance with any portion of PPACA. However, the decision adds a new level of complexity and uncertainty to employer efforts to comply with PPACA’s health plan and other requirements, and future decisions in this and similar actions should be closely monitored.



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