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Key Portion of Health Reform Bill Struck Down by Virginia Federal Judge

By **Jed Morrison**

The "Commerce Clause," Article I, Section 8, Clause 3 of the United States Constitution, provides that: "[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." For over 200 years, this simple clause has been at the center of litigation defining the often delicate balance of power between the states and the federal government.

According to U.S. District Judge for the Eastern District of Virginia, Henry Hudson, to "regulate commerce" does not include the power to require U.S. citizens to purchase health insurance. In a memorandum opinion issued today, Judge Hudson struck down the core provision of the Obama health reform legislation mandating individuals to purchase health insurance or face fines. In overturning the "Minimum Essential Coverage" provision of the law, Judge Hudson noted:

"While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether Congress has the power to regulate—and tax—a citizen's decision not to participate in Interstate Commerce.... [My research has]yielded no reported decisions from any federal appellate courts extending the Commerce Clause or General Welfare Clause to encompass regulation of a person's decision not to purchase a product, not withstanding its effect on interstate commerce or role in a global regulatory scheme."

Hudson is the first federal judge to overturn the law. Two other federal judges upheld its constitutionality. The Virginia case challenging the Patient Protection and Affordable Care Act of 2010 (PPACA) was filed in March by Virginia Attorney Gen. Ken Cuccinelli II (R), who argued the law violated the Commerce Clause and the General Welfare clause, and conflicted with a new Virginia state statute that makes it illegal to require individuals to have health insurance.

Notably, the judge's ruling does not enjoin operation of the law (the insurance mandate does not become fully effective until 2014), and only strikes down section 1501 without affecting other sections of the law.

The decision likely will be appealed by the Department of Justice to the United States Court of Appeals for the Fourth Circuit, which sits just a few blocks away from Judge Hudson in Richmond. That court already is considering an appeal from a Lynchburg, Virginia, federal court upholding the law. Expedited proceedings in the Fourth Circuit are likely, and the case may end up at the U.S. Supreme Court.

All other provisions of the law were left untouched by the ruling. Reimbursement changes, closer fraud and abuse scrutiny, and

implementation of shared savings programs through accountable care organizations (ACOs) are not dependent upon the invalidated insurance coverage provisions. Those provisions of the law will proceed untouched.

For more information contact **Jed Morrison** at jmorrison@jw.com or 210.978.7780.

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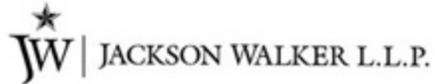
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