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Update on Constitutional Challenges to Individual Coverage Mandate Under the Federal Health Care Reform Law

Healthcare Law Newsletter

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September 09, 2011

Two federal Courts of Appeals had reached opposite conclusions in constitutional challenges to the individual coverage mandate effective in 2014 under the Patient Protection and Affordable Care Act (PPACA). The 11th Circuit Court of Appeals has found the individual coverage mandate to be unconstitutional; the Sixth Circuit has found it to be constitutional. Constitutional challenges to the individual mandate will ultimately be heard by the U.S. Supreme Court, possibly as early as the term beginning in October 2011.

The Individual Mandate and Tax Penalty

Beginning in 2014, PPACA imposes penalties on virtually everyone who does not maintain health insurance coverage. The penalty in 2014 will be the greater of $95, or 1 percent of household income in excess of the tax filing threshold. In 2015, the penalty will increase to the greater of $325, or 2 percent of household income in excess of the tax filing threshold. In 2016, the applicable penalty triggers will be $695, or 2.5 percent of household income in excess of the tax filing threshold. Thereafter, the flat dollar penalty will be adjusted for inflation. The penalty for children younger than age 18 is half the adult penalty. The household penalty is capped at 300 percent of the annual flat dollar amount applicable to adults. 26 U.S.C. § 5000A.

Federalism and the 11th Circuit Decision

Most recently, and as was widely expected, the 11th Circuit found the individual mandate to be unconstitutional. *State of Florida v. U.S. Dept. of Health and Human Services*, No. 11-11021, 2011 U.S. App. LEXIS 16806 (11th Cir. August 12, 2011). In *Florida v. HHS*, Florida was joined 24 states, the National Federation of Individual Businesses and two individuals. The federal district court for the Northern District of Florida had found the individual mandate to be unconstitutional and struck down PPACA in its entirety. The 11th Circuit reversed the lower court on the severability issue.

In a 2-1 decision, the 11th Circuit focused on "broad restrictions" the Supreme Court has placed on congressional power under the Commerce Clause: First, the need to accommodate the Constitution's federalist structure and preserve the distinction between national and local concerns. Second, the inability to derive general police powers from the Commerce Clause. *State of Florida v. U.S. Dept. of Health and Human Services*, slip op. at 104. The 11th Circuit found that even if the aggregate impact of decisions not to purchase health coverage substantially affects interstate commerce, there was no meaningful way to distinguish health coverage from any other good or service. *Id.* at 124-126. The Court of Appeals found that the individual mandate is

overinclusive, as some uninsureds may never utilize health services or may pay in full and concluded that there simply was not a sufficient nexus between the individual mandate and the interstate commerce. Id. at 129-130. The 11th Circuit held that Congress cannot "mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die." *Id*. at 167.

The Action-Inaction Dichotomy and the Sixth Circuit Decision

In the first appellate ruling on a constitution challenge to PPACA, the Sixth Circuit upheld the healthcare reform law on June 29. *Thomas More Law Center v. Obama*, No. 10-2388, 2011 U.S. App. LEXIS 13625 (6th Cir. June 29, 2011). The three-judge panel issued three separate decisions: two found the individual mandate was within Congress' authority under the Commerce Clause law; the third held that Congress lacks authority to require most people to maintain healthcare coverage or pay a financial penalty.

The analysis in the *Thomas More Law Center* opinion differs markedly from the majority opinion in the *Florida v. HHS*. Both opinions review the Supreme Court decisions that have found Congress has authority under the Commerce Clause to regulate actions with only a very modest impact on interstate commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (wheat grown on family farm for family consumption); *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (marijuana grown for self-medication).

Many of the challenges to the individual mandate have asserted that a decision not to purchase health coverage is not an activity and that Congress' authority under the Commerce Clause does not reach inaction. The 11th Circuit distinguished the *Wickard* and *Gonzales* decisions as involving some economic activity – growing a product for home consumption – rather than complete inaction. In contrast, the Sixth Circuit noted that the Supreme Court has not adopted an activity/inactivity test in the Commerce Clause context and focused on the aggregate economic impact of the costs of uninsured health care.

The concurring opinion by Sixth Circuit Judge Sutton in *Thomas More Law Center* is of particular interest because he is a well-regarded, conservative jurist and the first Republican-appointed judge to uphold PPACA. Judge Sutton characterized those who do not purchase health coverage as self-insuring, either by saving money to pay for future health care costs or by saving nothing (and generating uncompensated care costs). He stated that both types of "self-insurers" substantially affect interstate commerce. *Thomas More Law Center v. Obama*, No. 10-2388, slip op. at 39 (6th Cir. June 29, 2011).

Judge Sutton rejected the action/inaction dichotomy both as outside the scope of prior Supreme Court decisions and as unlikely to produce a workable test. "[T]he notion that self-insuring amounts to inaction and buying insurance amounts to action is not self-evident. If done responsibly, the former requires more action (affirmatively saving money on a regular basis and managing the assets over time) than the latter (writing a check once or twice a year or never writing one at all if the employer withholds the premiums)." *Id.* at 45. He concluded by noting that

the Thomas More Law Center had brought a facial challenge and that an as-applied challenge to the individual mandate as implemented in specific circumstance might well produce a different determination on constitutionality. *Id*. at 52.

Severability

The 11th Circuit viewed the individual mandate as a protection for insurers, rather than as a protection for consumers who want to purchase health care coverage at a reasonable price:

> At best, the individual mandate is designed *not* to enable the execution of the Act's regulations, but to counteract the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed reforms. That may be a relevant political consideration, but does not convert an unconstitutional regulation (of an individual's decision to forego purchasing an expensive product) into a constitutional means to ameliorate adverse cost consequences on private insurance companies engendered by Congress's broader reform of their health insurance products.

Florida v. HHS, slip op. at 165. The 11th Circuit ignored the adverse cost consequences on health coverage purchasers arising from adverse selection under the provisions of PPACA that prohibit insurers from refusing to issue coverage, or pricing insurance, on the basis of health status.

The individual mandate is intended to prevent adverse selection -- under which individuals only buy coverage when they anticipate incurring health care costs -- from driving premiums through the roof. As premiums rise, the healthy will tend to drop coverage more readily than those with high medical costs, driving premiums still higher. Thus, the individual mandate, if effective, would make coverage more affordable for both willing and unwilling purchasers.

Some commentators have expressed doubts whether the individual mandate penalty, at least in the initial years when the penalty is small, will be effective at deterring adverse selection. Other commentators have suggested that even if the individual mandate is struck down, mechanisms such as limited open enrollment periods could be viable alternatives to the individual mandate.

Other Constitutional Challenges on Appeal

Appeals on the constitutionality of the individual mandate are pending in other courts of the Fourth Circuit and the Court of Appeals for the District of Columbia. The Fourth Circuit will be reviewing the decision by the federal district court for the Eastern District of Virginia finding the individual mandate to be unconstitutional, but severing the individual mandate from other provisions of PPACA. *Virginia v. Sebelius*, 702 F.Supp.2d 598 (E.D. Va. 2010), argued, No. 11-1057 (4th Cir. May 10, 2011). The Fourth Circuit will also be reviewing a district court decision from the Western District of Virginia that upheld the constitutionality of the individual mandate. Liberty University v. Geithner, 753 F.Supp.2d 611 (W.D. Va. 2010), argued, No. 10-2347 (4th Cir. May 10, 2011). Following oral argument, Court of Appeals requested additional briefing in both appeals on whether the Anti-Injunction Act, 26 U.S.C. § 7421(a), which prohibits injunctions against the collection of taxes, was applicable to the PPACA litigation. In rare unanimity, the Justice

Department, the state of Virginia and Liberty University all agreed – albeit with somewhat different reasoning – that the Anti-Injunction Act does not apply.

An opinion upholding the individual mandate was issued by the district court for the District of Columbia in *Mead (Seven-Sky) v. Holder*, 2011 U.S. Dist. LEXIS 18592 (D.D.C. Feb. 22, 2011), *appeal docketed*, No. 11-5047 (D.C. Cir. Mar. 1, 2011). Oral argument before the D.C. Circuit is scheduled for September 2011.

The remaining 20-plus constitutional challenges to the individual mandate are still pending at the district court level or have been dismissed on standing or other procedural grounds. Appeals from dismissals based on standing issues have been decided in the Ninth Circuit (*Baldwin v. Sebelius*, No. 10-56374, 2011 U.S. App. Lexis 16617 (9th Cir. August 12, 2011)) and are pending before the Third Circuit (*New Jersey Physicians Inc. v. Obama*, 2010 U.S. Dist. LEXIS 129445 (D. N.J. Dec. 8, 2010), appeal docketed, No. 10-01489 (3rd Cir. 2011)) and the Eighth Circuit (*Kinder v. Geithner*, No. 11-1973 (8th Cir. argued June 22, 2011)).

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