

Health Care and Health Insurance ADVISORY

December 17, 2010

Federal Court in Virginia Finds Health Care Reform Bill's Individual Mandate Unconstitutional (*Cuccinelli (Virginia) v. Sebelius*, Civ. Action. No. 3:10CV188-HEH (E.D. Va. 2010))

INTRODUCTION

In a ruling entered on December 13, 2010, United States District Court Judge Henry E. Hudson held, in a challenge to the health reform law filed by the Commonwealth of Virginia, that Section 1501 (the "Individual Mandate") of the Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148 (2010), is unconstitutional. The Individual Mandate requires that every United States citizen (with certain exceptions) maintain a minimum level of health insurance coverage or incur a penalty assessed by the Internal Revenue Service. This advisory includes a brief summary of the decision, followed by a short discussion of how the decision may affect health care reform generally and the expected time frame for an appeal.

SUMMARY OF THE DECISION

In striking down the Individual Mandate, the court held as follows:

- The court found that the issue presented was "whether or not Congress has the power to regulate – and tax – a citizen's decision not to participate in interstate commerce." *Cuccinelli v. Sebelius*, Civil Action No. 3:10-cv-001188, Mem. Op. 3, December 13, 2010 (citing the court's Decision on the Motion to Dismiss). To prevail, Virginia needed to make a "plain showing that Congress has exceeded its constitutional bounds." Mem. Op. 10 (citations omitted).
- Judge Hudson rejected the government's argument that the sum of individual decisions regarding health insurance in the aggregate allows Congress to regulate intrastate activity under the Commerce Clause. In other words, he held that the decision not to purchase health insurance is **not** an "economic activity." Mem. Op. 24. The court reasoned that "[n]either the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market."

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- The court held that the Necessary and Proper Clause must be “tethered” to the Commerce Clause (or “the lawful exercise of an enumerated power” of the Constitution) to be effective. Mem. Op. 24. Since the Commerce Clause does not shield the Individual Mandate, the Necessary and Proper Clause cannot be relied upon to further an unconstitutional provision.
- The court further held that the Individual Mandate does not contain a **tax** for non-compliance, but rather includes a **penalty**. Mem. Op. 32-36. The Court noted that the final version of PPACA removed the word “tax” and inserted “penalty,” in a “conscious and deliberate act on the part of Congress.” Mem. Op. 34 (citations omitted). A penalty must be linked to an enumerated power other than the General Welfare Clause, unlike a tax. Mem. Op. 36. Since Judge Hudson had already decided the Individual Mandate failed under a Commerce Clause analysis, it failed under a tax analysis as well.
- The court noted that to uphold the Individual Mandate would have required extending constitutional law beyond the outer bounds of Supreme Court jurisprudence: “A thorough survey of pertinent constitutional case law has yielded no reported decisions from any federal appellate courts extending the Commerce Clause or General Welfare Clause to encompass regulation of a persons’s decision not to purchase a product....The unchecked expansion of congressional power to the limits suggested by the Minimum Essential Coverage Provision would invite unbridled exercise of federal police powers.” Mem. Op. 37.
- Instead of striking the entire law as Virginia requested, Judge Hudson engaged in a severability analysis. He noted, however, that a full severability analysis would require substantial additional testimony and expert opinion. Accordingly, he severed “only Section 1501 and *directly-dependent provisions* which make specific reference to Section 1501.” Mem. Op. 40 (emphasis added).
 - With the exceptions noted directly below, none of PPACA’s insurance reform provisions “make specific reference” to the Individual Mandate.
 - The provisions that do reference the Individual Mandate include: the Premium Tax Credits (Section 1401); Standard Documentation Procedures for Health Insurers (Section 2715); and Preserving Existing Coverage (Section 1251).
 - Specifically, the Rate Review, the Medical Loss Ratio, the Guaranteed-Issue, and the Guaranteed-Renewability provisions do not make “specific reference” to the Individual Mandate and remain intact for now.
- Notably, Judge Hudson rejected Virginia’s request for an injunction, finding a declaratory judgment that the provision was unconstitutional to be sufficient to prevent any harm, and that such an award of declaratory judgment “is sufficient to stay the hand of the Executive branch pending appellate review.” Mem. Op. 40-41.

DISCUSSION

Impact on Other Parts of PPACA: There are open questions regarding how this decision will affect provisions of the PPACA other than the Individual Mandate. In its briefing and argument, the government conceded that the Individual Mandate was the “lynchpin” of PPACA’s insurance reforms. The court disagreed with Virginia, however, that the entire act should fall with the decision on the Individual Mandate’s constitutionality. The court found that “without the benefit of extensive expert testimony and significant supplementation of the record, this Court cannot determine what, if any, portion of the bill would not be able to survive independently.” Mem. Op. 40. Accordingly, the court severed the Individual Mandate from PPACA and its “directly dependent provisions,” and left the remainder intact. However, a strong case can be made that PPACA’s insurance reforms are directly dependent on the Individual Mandate, even though there is no “specific reference” to Section 1501 in those provisions.¹ Judge Hudson’s conclusion that expert testimony and a supplemented record will be necessary may mean that, if the Supreme Court of the United States affirmed a holding that the Individual Mandate is unconstitutional, the case may be remanded to the district court with direction to conduct additional proceedings to determine severability of any related provisions.

Timing of Appeal: The Order granting summary judgment is a final judgment for which the government will be able to appeal to the United States Court of Appeals for the Fourth Circuit as a matter of right. The government will certainly do so, and will need to file a notice of appeal with the District Court within sixty days of the order granting summary judgment for Virginia. See Fed. Rule App. P. 4. The government will probably file the notice of appeal well before the February 11, 2011 deadline.

Once the notice is filed, and upon receipt of the appellate record or a certification that the record is complete by the district court, the Fourth Circuit Court of Appeals will issue a scheduling order, which will govern the briefing schedule and oral arguments. We expect that the briefing and arguments before the Fourth Circuit will happen in the next three to four months, and that the case will then be appealed to the Supreme Court for a decision in the 2011-2012 term. This case will move in a parallel, although slightly accelerated track to the litigation filed by 25 states in federal district court in Florida. Both cases will likely be before the Supreme Court for a consolidated single decision no later than the end of the 2011-2012 term in June 2012.

¹ In any event, the government conceded in its brief and in oral argument that if the individual mandate was found unconstitutional, insurance market reforms in section 1201 of PPACA would fail with it: “Under these principles [with respect to severability], some provisions of the Act plainly cannot survive. As defendants repeatedly have made clear...insurance industry reforms in Section 1201 such as guaranteed-issue and community-rating will stand or fall with the minimum coverage provision.” *Opposition to Plaintiff’s Motion for Summary Judgment* at 31-32. “[T]hese regulations of the interstate insurance market must be coupled with the minimum coverage provision in order to be effective.” *Id.* We believe that the government may be estopped now from contending otherwise.

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