



Federal Appeals Court Finds Individual Health Insurance Mandate Unconstitutional While Upholding the Balance of Health Care Reform

By: Jack A. Janov

The Eleventh Circuit Court of Appeals in Atlanta recently invalidated¹ the personal health insurance provision² in The Patient Protection and Affordable Care Act³ ("ACA"). The court held that the insurance mandate exceeds the power of Congress under the Commerce Clause of the U.S. Constitution. This action was filed by 26 states and the National Federation of Independent Business.

This insurance mandate provision⁴ of the ACA requires most adults to purchase a minimum level of health insurance by 2014. But the Court also ruled that all remaining health care reform provisions of the ACA were valid, including the Medicaid expansion provision. This decision affirms a Florida District Court decision that invalidated the insurance mandate under the Commerce Clause, but reverses the District Court ruling that invalidated the entire ACA. This decision creates a split in the Courts of Appeal, as the Sixth Circuit upheld the constitutionality of the personal insurance mandate in June 2011.

In a 2-1 decision, the Eleventh Circuit found the personal insurance mandate violated the Commerce Clause because it mandates "Americans from cradle to grave to purchase an insurance product from a private company." The Court explained that the "mandate represents a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to purchase an expensive health insurance product every month for their entire lives." The majority opinion is authored by Chief Judge Joel Dubina, appointed by President George H.W. Bush, and by Judge Frank Hull, appointed by former President Bill Clinton. The 2-1 ruling marks the first time a democrat-appointed judge has invalidated the personal insurance mandate.

The primary constitutional issue faced by courts reviewing the validity of the personal insurance mandate is whether a person's decision not to buy health insurance constitutes an activity that Congress can regulate under the Commerce Clause. The majority opinion explains that the Defendant HHS's position on the validity of the individual mandate "amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point in their life [yet] affords no limiting principles [to] confine [this] power."



A dissent authored by Judge Marcus, who was appointed by President Clinton, would find the personal insurance mandate constitutional under the Commerce Clause, because it is “designed to regulate quintessentially economic conduct to ameliorate two national problems: cost shifting when the uninsured seek health care services, and the unavailability of health insurance” to those with negative medical histories and/or pre-existing conditions.

One potential health care industry issue resulting from this decision, if ultimately affirmed, is the impact of the removal of the personal insurance mandate upon the other provisions in the ACA. The Defendant HHS has argued, and many in the health care insurance industry have opined, that two provisions of the ACA in particular — the “guaranteed issue” and the removal of “pre-existing condition” exclusions — are interdependent on the personal insurance mandate. Without the near universal enrollee participation intended by the personal insurance mandate, a question may now arise as to whether guaranteed enrollment and removal of pre-existing condition exclusions can be financially tenable for the health insurance industry.

Back in June, the Sixth Circuit⁵ was the first appeals court to address the constitutionality of the personal insurance mandate of the ACA, where it was upheld under the Commerce Clause. The Sixth Circuit explained that the mandate satisfies the “substantial effects on interstate commerce” precedent established by the U.S. Supreme Court. In the Eleventh Circuit case decided last Friday, the Defendant Department of Health & Human Services has 90 days to file an appeal with the U.S. Supreme Court, or seek *en banc* review with the Eleventh Circuit. These two opposing rulings by the Eleventh and Sixth Circuits now provide strong contenders to be taken up by the Supreme Court.

There also are three other pending Court of Appeals decisions on the constitutionality of the personal insurance mandate: The Fourth Circuit in Richmond, Virginia, will soon issue a decision from two lower court cases,⁶ and the District of Columbia Circuit will soon hear oral arguments in September on another lower court decision.⁷ Ultimately, the constitutionality of the personal insurance mandate under the Commerce Clause of the U.S. Constitution will likely be decided by the U.S. Supreme Court.

Endnotes

- 1 *State of Florida, et. al. v. HHS*; 11th Circuit Court of Appeals, Docket No. 3:10-cv-00091-RV-EMT (8/12/11).
- 2 The “minimum essential coverage” provision. Section 1501 of PPACA.
- 3 The Patient Protection and Affordable Care Act. Also known as “PPACA,” “ACA,” or “Health Care Reform Act”).
- 4 Section 1501 of the ACA (with exceptions for religious objectors, illegal residents, persons incarcerated).
- 5 *Thomas More Law Center, et. al. v. Obama, et. al.* (Sixth Circuit, Case No. 10-2388) (Decision dated 6/29/11).
- 6 *Liberty University v. Geithner* (Western District, Virginia); *Virginia v. Sebelius* (Eastern District, Virginia).
- 7 *Mead et. al. v. Holder, Sebelius, HHS, et. al.*

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