

11th Circuit Deals Potentially Devastating Blow to President Obama's Health Care Reform Law

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Court Rules "Individual Mandate" Unconstitutional

Since it was signed into law on March 23, 2010, citizens, activist groups, political figures, and states across the country have filed lawsuits challenging parts of the **Health Care Reform Law**. Most eyes have been on the multi-state case filed in Florida, joined by twenty-six (26) states across the country. On August 12, 2011, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in that case, **ruling that the Health Care Reform Law's individual mandate is unconstitutional**.

In effect, the Court dismantled the Obama Administration's argument that health care is somehow different from other economic decisions, stating that the Administration's argument was "...devoid of constitutional substance, incapable of judicial administration – and, consequently, illusory." It also moves the question of whether it is legal to require Americans to purchase health insurance a step closer to the U.S. Supreme Court.

Background

The **Patient Protection and Affordable Care Act of 2010**, as *amended* by the **Health Care and Education Reconciliation Act of 2010**, ("PPACA"), was signed into law by President Obama on March 23, 2010. One of the many provisions in the sweeping health care reform involved an individual mandate on Americans to purchase insurance:

- Effective January 1, 2014, Americans will be required to buy health care insurance or face a penalty (the "mandate" or "individual mandate").
- Soon after PPACA's enactment, 26 states, lead by Florida, challenged its constitutionality.
- To date, the Sixth Circuit and the Eleventh Circuits have issued competing opinions, and an opinion is expected any day from the Fourth Circuit.

The Controversial Individual Mandate

Arguments opposing the individual mandate include the following:

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- The requirement for all citizens to obtain health insurance does not depend on them receiving health care services in the first place because, under the mandate, individuals must carry insurance each and every month, regardless of whether they have actually entered the market for health services.
 - The mandate is not an authorized exercise of Congress' power under the Commerce Clause because it does not regulate the commercial activity of obtaining health care; rather, it regulates the status of being uninsured.

Arguments supporting the individual mandate include the following:

- Without the mandate insurers would not have a big new pool of premiums flowing in to help offset the costs insurers will incur from having to cover people without imposing pre-existing condition limitations.
- Without the mandate, people would be able to wait until they are sick to buy insurance, pushing up premiums.

The Eleventh Circuit Holding (August 12, 2011)

On August 12, 2011, in the case of ***Florida v. U.S. Department of Health & Human Services***, the Eleventh Circuit concluded that the individual mandate (but not the rest of PPACA) was an unconstitutional exercise of congressional power. **The *Florida* decision is of high importance due to the composition of the plaintiffs, which include the governors and attorneys general from twenty-six (26) states that have filed a lawsuit to stop the heart of PPACA from taking effect.**

A three-judge panel of the Court, comprised of two Bill Clinton appointees (Judge Frank Hall and Circuit Judge Stanley Marcus) and one George H.W. Bush appointee (Chief Judge Joel Dubina), split in favor of the states. The majority (Hall and Dubina) concluded that "Congress exceeded its enumerated commerce power" when it "mandate[d] 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." The Eleventh Circuit decision comes in the wake of the Sixth Circuit's contrary decision in late June, which upheld the constitutionality of the individual mandate.

Here are a few highlights from the Eleventh Circuit majority's opinion:

- The individual mandate "regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so)."
- "It is overinclusive in *when* it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future."
- "The government's position 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 of their life. This theory affords no limiting principles in which to confine Congress's enumerated power."
- Even "in the face of a Great Depression, a World War, a Cold War, recessions, oil shocks, inflation, and unemployment, Congress never sought to require the purchase of wheat or war bonds, force a higher savings rate or greater consumption of American goods, or require every American to purchase a more fuel-efficient vehicle."

The Eleventh Circuit upheld the remaining portions of PPACA, (e.g., the Medicaid expansion).

Without the mandate, however, the rest of PPACA could unravel.

The Sixth Circuit Holding (June 29, 2011)

On June 29, 2011, in the case of *Thomas More Law Center et al. v. Barack Hussein Obama et al.*, a three (3) judge panel declared the individual mandate constitutional.

- The administration argued that the provision is a form of commerce regulation because a person's decision against obtaining health insurance imposes a cost on others who inevitably end up subsidizing medical care for the uninsured.
- The majority effectively accepted that reasoning, stating "no one is inactive when deciding how to pay for health care."
- A petition for certiorari has already been filed asking the Supreme Court to review the Sixth Circuit's decision.

PPACA Does Not Contain a "Severability" Clause

PPACA does not contain a severability clause.

- The Eleventh Circuit explained that in most cases the Supreme Court opts to sever the constitutionally defective provisions from the remainder of a statute even in the absence of a severability clause.
- The Supreme Court has explained, however, that a provision is not severable if there is evidence Congress would not have enacted the rest of the law without having included the constitutionally defective provisions.

Supreme Court Review of PPACA

Given the split between the Eleventh and the Sixth Circuits (and a pending decision from the Fourth Circuit), the Supreme Court will likely agree to decide whether the individual mandate is constitutional.

- If the Supreme Court accepts *certiorari*, the case will probably be argued either in late March or April 2012, yielding a decision near the end of its term in June 2012.
- If the Supreme Court agrees with the Eleventh Circuit, it will have to deal with the difficult issue of whether the individual mandate can be severed from the rest of PPACA's provisions.

For previous Bracewell & Giuliani client alerts covering different aspects of PPACA, click [here](#).

The twenty six (26) states include Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

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