NJHA
NEW JERSEY HOSPITAL ASSOCIATION

Legal Challenges to the Affordable Care Act

Introduction and Overview

More than 20 separate legal challenges to the Patient Protection and Affordable Care Act ("ACA") have been filed in federal district courts across the country. The two challenges that have received the most media attention were filed by states; however, additional suits have been filed by state and federal legislators, universities, private citizens and others. Only four cases so far have advanced to a decision on the merits; two judges have rejected arguments that one or more provisions of ACA are unconstitutional, while two others have ruled against the constitutionality of the law, in whole or in part. However, in the two rulings finding that one or more provisions of ACA is unconstitutional, neither judge enjoined its continuing implementation by the federal government and the states. The remaining cases are buried in a thicket of procedural motions and preliminary decisions about whether plaintiffs are "injured" by ACA and therefore have standing to sue, and about whether the cases are "ripe" for judicial adjudication now, since many of the challenged provisions of the law do not take effect until 2014 or later. The first substantive case should reach an intermediate federal appeals court in May, although there is a move afoot by the Attorney General for Virginia to have the United States Supreme Court bypass the circuit court of appeals and take the case directly from the Virginia district court on an expedited basis[1]. A complete and current summary of all of the pending cases, which includes papers filed by the parties and court decisions to date, is available at http://www.justice.gov/healthcare/. This memo will provide an overview of the legal challenges by providing summaries of the four cases in which substantive decisions have been issued and review the main claims asserted in these and the other cases.

The Individual Mandate

Federal judges in Michigan and Virginia, in decisions released in October and November 2010, upheld the individual mandate contained in section 1501 as a legitimate exercise of congressional power under both the Commerce Clause and the Necessary and Proper Clause of the Constitution. In December 2010, a different federal judge in Virginia struck down the individual mandate, while a federal judge in Florida struck down the individual mandate, and then the entire law. Both of these judges found that the mandate went beyond Congress's power under the Commerce Clause and could not be saved by invocation of the Necessary and Proper Clause.

[1] In another challenge to ACA, the Supreme Court has already denied such a petition for direct review from a district court decision unfavorable to the law's challengers.

The Commerce Clause of the Constitution gives Congress the power to "regulate commerce . . . among the Several states." In enacting section 1501, Congress included findings that the individual insurance requirement is based on an exercise of power under the Commerce Clause. Specifically, Congress determined that the individual mandate "is an essential part of [the] larger regulation of economic activity, and that its absence "would undercut Federal regulation of the health insurance market." Congress found that without the mandate, other reforms in ACA, such as the ban on denying coverage based on pre-existing conditions, would increase the existing incentives for individuals to wait to purchase health insurance until they needed care, which in turn would shift even greater costs onto third parties. Conversely, Congress found that by significantly reducing the number of the uninsured, the mandate, together with other provisions of the law, would lower health insurance premiums. Congress concluded that the mandate was essential to creating effective health insurance markets in which improved health insurance products that do not exclude coverage of pre-existing conditions can be sold.

Since the early 1940s, the Supreme Court has held that, in addition to regulating the movement of goods across states lines, Congress's power under the Clause also applies to local matters that "substantially affect interstate commerce." Under that more expansive reading, laws permitting the federal government to regulate an individual growing wheat for purely home consumption, and laws prohibiting racial discrimination in various contexts, have been upheld. In the wheat case, decided in 1942, the Court held that for the purpose of Congress invoking its Commerce Clause power, it was sufficient that the existence of home-grown wheat, in the aggregate, could "supply a need of the man who grew it which would otherwise be reflected by purchases in the open market," thus undermining the efficacy of the federal price stabilization scheme.

Sixty-three years later, in 2005, the Court similarly upheld Congress's authority to prohibit the possession of home-grown marijuana intended solely for personal use, finding that the Commerce Clause affords Congress broad power to regulate even purely local matters that have substantial economic effects. Congressional power to regulate commerce through the Commerce Clause also has been held to reach the power to regulate health insurance. Congress's power to legislate under the Commerce Clause is not, however, without limits. In more recent decisions from 1995 and 2000, the Rehnquist Court struck down two federal laws, one banning guns in close proximity to schools and another creating civil liability for gender-motivated violent crimes, finding in both cases that the underlying activity Congress was trying to address was basically criminal in nature and did not constitute economic enterprise. In none of these cases, however, has the Court needed to address the "activity/inactivity" distinction applied by the law's challengers to the individual mandate, since in every Commerce Clause case presented thus far, there has been some form of "activity."

In the Michigan case, Judge George Steeh essentially rejected the "activity/inactivity" dichotomy, finding instead that the decision whether to purchase insurance or to attempt to pay for healthcare out of pocket was plainly economic, and that such decisions by individuals, viewed in the aggregate, had clear and direct impacts on healthcare providers, taxpayers and the insured population who ultimately pay for the care provided to those who go without insurance. In so ruling, the court found the healthcare market to be unique. According to Judge Steeh, no one can guarantee his or her health or ensure that he or she will never participate in the healthcare market. The question is simply how participants in the healthcare market pay for

medical expenses—through insurance, or through an attempt to pay out of pocket with a backstop of uncompensated care funded by third parties. It is this phenomenon of cost-shifting that makes the healthcare market unique. Far from inactivity, by choosing to forgo insurance, Judge Steeh found that individuals who ignore the mandate are making an economic decision to try to pay for healthcare services later, rather than now through the purchase of insurance, collectively shifting billings of dollars of their healthcare costs onto other market participants.

Judge Norman Moon, deciding the first Virginia case, reached a similar conclusion, holding that the ACA's challengers, in foregoing insurance, are "making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance."

As noted above, federal judges in Florida and Virginia more recently reached opposite conclusions to those of Judge Steeh and Judge Moon. On Jan. 31, 2011, in Florida, et al. v. Department of Health and Human Services, et al., Judge Roger Vinson of the District Court for the Northern District of Florida ruled that the so-called individual insurance mandate, section 1501 of ACA, is unconstitutional. On Dec. 13, 2010, in Virginia v. Sebelius, Judge Henry Hudson likewise ruled that Congress exceeded its powers in enacting section 1501. Whereas Judge Hudson limited his ruling to section 1501 and upheld the balance of ACA, Judge Vinson invalidated the entire law, noting the lack of a "severability" clause in ACA, by which a court can excise a problematic provision of a law while leaving the balance intact. In so doing, however, Judge Vinson also rejected the states' claim that the expansion of Medicaid eligibility under ACA, by imposing unprecedented cost and burdens on participating states, exceeded Congress's authority under the Spending Clause of the Constitution.

Judge Vinson framed the inquiry in the Florida case by finding that a threshold question is whether some type of "activity" is required as a predicate to Congress exercising its powers under the Commerce Clause, an inquiry that many had thought had been put to rest by the Supreme Court's late New Deal jurisprudence, discussed above. Nevertheless, he held that "activity" is indeed an "indispensable" part of Commerce Clause review, so that the individual mandate must rise or fall on whether an individual engages in "activity" by failing to buy health insurance, in violation of section 1501. Since the tax penalty under section 1501 is, by its terms, imposed on any individuals who do not buy health insurance, the mandate indeed regulates "inactivity." Imposing such a penalty on a person who "fails" to act as required by Section 1501, was, in Judge Vinson's view, an impermissible expansion of congressional power beyond the boundaries prescribed by the Commerce Clause. The government's counter argument—that in the unique healthcare market, those who "opt out" of obtaining health insurance, with attendant cost-shifting to third parties when they become ill and need medical care are very much engaged in economic "activity"—was deemed unpersuasive by Judge Vinson, who determined that such an argument would leave Congress with virtually unfettered power over individual action or inaction.

Judge Hudson's December decision in the second Virginia case similarly found that the refusal to purchase health insurance was not by itself economic activity. Relying on recent Supreme Court decisions in the school gun and violence against women cases, he went on to rule that Congress cannot regulate such "inactivity" merely because such decisions might, in the aggregate, indeed have an effect on interstate commerce. If Congress can regulate such

inactivity," Judge Hudson warned, there would be no limit to its powers, contravening the bedrock principle that the Constitution granted the federal government only limited authority.

Both Judge Vinson and Judge Hudson also rejected the federal government's argument that the individual mandate should be held under the "Necessary and Proper Clause" of the Constitution. That catch-all provision authorizes Congress to enact laws that, while not expressly authorized by the Constitution's specific enumerated powers, are "necessary and proper" to the exercise of those powers. In the seminal case, McCulloch v. Maryland, authored by Chief Justice John Marshall more than 200 years ago, the Court had ruled that the "necessary and proper clause" must be given a broad reading, permitting any laws that are "convenient" or "rationally related" to a power expressly conferred on Congress. Thus, while Congress's power to create a national bank was nowhere expressly provided in the Constitution, its decision to do so was upheld because creation of a national bank was rationally related to Congress's other powers, including the power to coin money and to tax and spend. Just last year, the Supreme Court reaffirmed the wide reach of the Necessary and Proper Clause, upholding a federal law authorizing civil commitment of federal prisoners who are sexual predators following completion of their criminal sentences, even though no provision expressly authorizes Congress to do so. The Court explained that as long as there is some initial link to an explicitly enumerated power in the Constitution, the Necessary and Proper Clause also authorizes actions many steps removed from that power--in this case, Congress's power to pass certain criminal laws.

In the ACA cases, the government asserted that the individual mandate is "rationally related" to Congress's conceded power to regulate health insurance, and therefore was a legitimate exercise of its "Necessary and Proper" powers. Judges Vinson and Hudson rejected this argument, finding that the Necessary and Proper Clause provides "only the means necessary to carry out specifically granted powers." Since they had already determined that the mandate fell outside of the permissible bounds of the Commerce Clause, the Necessary and Proper Clause could not on its own provide the vehicle to rescue it.

Large Employer Mandate

ACA requires large employers to either provide insurance coverage to their employees or pay a penalty if uninsured employees receive premium or cost-sharing assistance through the health insurance exchanges states are required to establish by 2014. In the Florida case, the states, as large employers, argued that this provision would violate their sovereign immunity under the Tenth Amendment to the Constitution. Judge Vinson rejected this challenge, citing a 2000 Supreme Court decision which held that where a law applies equally to states and private employers, it does not violate the sovereign immunity of the states. The large employer mandate also was challenged by the private Liberty University in the Michigan case, on the basis that the requirement that employers maintain minimum essential coverage for their employees or pay a penalty was, like the individual mandate, enacted in violation of the Commerce Clause. Judge Moon disagreed, noting that Congress has the power to regulate terms and conditions of private employment, and that the decision by employers of whether or not to offer their employees health insurance had a substantial impact on interstate commerce.

Health Insurance Exchanges

Judge Vinson likewise rejected the states' argument that ACA's requirement that state's establish health insurance exchanges (or have the federal government do so if they refuse) violated the Tenth Amendment by impermissibly legislating in an area—regulation of insurance--traditionally reserved to the states under their police powers. In so ruling, Judge Vinson cited Supreme Court precedents upholding similar examples of "cooperative federalism" whereby federal laws such as HIPAA, which likewise regulate insurance and even supplant weaker state laws governing the privacy and security of health insurance transactions, have been sustained.

Medicaid Expansion

ACA requires that states participating in the Medicaid program expand their programs, beginning Jan. 1, 2014, to cover most non-elderly persons with incomes up to 133 percent of the federal poverty level. In the Florida case, the states contended that this provision alters the fundamental nature of the federal-state relationship under Medicaid, transforming the Medicaid program from a voluntary one authorized by the Spending Clause of the Constitution into an impermissive mandatory one with catastrophic cost consequences. Essentially, the states argued that the expansion presents them with a "Hobson's Choice": remain in the Medicaid program and be financially ruined by their additional cost of paying part of the cost of coverage for the newly eligible beneficiaries, or decline participation in Medicaid and be financially ruined by the loss of financial support from the federal government under the Medicaid program as it existed prior to the expansion.

The Supreme Court has held that Congress, in the exercise of its Spending Clause power, may attach conditions to the receipt by the states of federal funds. To do so, Congress must be acting "in pursuit of the general welfare," the conditions must be clear, so that the states can effectively decline participation, the conditions imposed must be related to the federal interest in the underling funding program and the spending condition cannot be coercive. In rejecting the state challenge to the Medicaid expansion, Judge Vinson determined that a state's initial decision to participate in Medicaid was indeed voluntary, and that state dependence on continued federal matching funds, even with additional conditions imposed by ACA through the eligibility expansion, did not now turn that "voluntary" initial decision into a coercive one.

Conclusion

As noted above, absent extraordinary action by the United States Supreme Court, appeals from the rulings of the various federal judges involved in ACA litigation will be taken first to the courts of appeal for the circuit in which the district court is located. One or more of these cases will then proceed to the Supreme Court, probably sometime in 2012. NJHA will continue to monitor and report on these cases as they progress through the Federal judiciary.