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Trials&TRIBULATIONS

Universal health care coverage – is it constitutional?

Much has been written concerning the political implications of the Patient Protection and Affordable Care Act, Pub. L. No 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010 (PPACA), Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).

Regardless of one's political views concerning the appropriateness of a congressional mandate requiring universal health coverage, the legal challenges to PPACA pose an obstacle to the effectiveness of the statute. Ultimately, the legal challenges will likely be resolved by the U.S. Supreme Court.

PPACA embraces far more than health care reform. The 2,700-page bill is laden with provisions and riders patently extraneous to health care — according to one count, over 400 in all.

Yet, the primary issue in most of the litigation challenging PPACA is Section 1501 of the act, commonly known as the Minimum Essential Coverage Provision, which requires that every U.S. citizen, other than those falling within specified exceptions, maintain a minimum level of health insurance coverage beginning in 2014. Those who fail to comply must pay a "penalty," which is incorporated into an individual's tax return.

The congressional findings associated with passage of PPACA remarked that the national market in health insurance and health care services amounted to \$2.5 trillion in 2009 and consumed 17.6 percent of the annual gross domestic product.

According to the secretary of Health and Human Services, the uninsured consume \$100 billion in health care services annually, and \$43 billion of that amount is uncompensated (and therefore not paid to health care providers). Moreover, 62 percent of all personal bankruptcies are caused in part by medical expenses.

Accordingly, an integral part of the statutory scheme set forth by PPACA requires that all U.S. citizens, other than those meeting certain exceptions, maintain a minimum level of health insurance coverage.

Various plaintiffs, including certain state governments, have challenged the constitutionality of this requirement. Although var-

ious arguments have been advanced on behalf of the plaintiffs in these lawsuits, the most common challenge is that Congress exceeded its authority under Article I's Commerce Clause by enacting the legislation.

According to the plaintiffs' arguments, Congress may only pass laws that substantially affect interstate commerce. Federal district courts around the country have issued varying decisions about the constitutionality of this key provision of PPACA. Some judges have upheld the provision while others have declared the requirement unconstitutional, primarily relying upon the Commerce Clause and concluding that Congress exceeded its authority to regulate interstate commerce.

While the U.S. Supreme Court will ultimately resolve the issue, last month the litigation took one step closer to reaching this country's highest court when, for the first time, the issue was argued before a federal Court of Appeals.

On May 10, the Fourth Circuit Court of Appeals became the first appellate court to consider the Commerce Clause challenges to the Minimum Essential Coverage Provision. It took up the issue in two separate cases that had reached contrary conclusions — *Commonwealth of Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp.2d 768 (E.D. Va. 2010) and *Liberty University Inc. v. Geithner*, 753 F. Supp.2d 611 (W.D. Va. 2010).

In *Cuccinelli*, District Judge Henry Hudson, an appointee of President George W. Bush, held that the Minimum Essential Coverage Provision violated Congress' authority under the Commerce Clause and, therefore, was unconstitutional.

In *Liberty University*, District Judge Norman Moon, an appointee of President Clinton, held that the Minimum Essential Coverage Provision was within congressional authority under the Commerce Clause, therefore determining that the provision was constitutional.

Both district courts noted that the Supreme Court has identified three general categories of interstate commerce regulation in which Congress is authorized to act: (1) channels of interstate commerce;

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(2) instrumentalities of interstate commerce and the persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. It is the third category that was the focus of the plaintiffs' challenges in both cases.

Both the *Cuccinelli* and *Liberty University* courts noted that the Supreme Court has advised that the Commerce Clause permits the regulation of economic activity that substantially affects interstate commerce. In both cases, the plaintiffs argued that the failure to purchase health insurance, the conduct regulated by the provision at issue, is a decision not to engage in interstate commerce and consequently it is not a form of activity that may be regulated by Congress.

In contrast, the defendants contended that the decision to forego health insurance coverage was economic and did substantially affect the interstate health care market because the uninsured are able to obtain emergency room care for little or no money, shifting the costs for that uncompensated care to health care providers, the insured population in the form of higher premiums, and the government.

Although reaching contrary conclusions on the constitutionality of the provision, both the *Cuccinelli* and *Liberty University* courts appeared to agree that four Supreme Court decisions concerning the Commerce Clause provided the most relevant precedents.

Supporting the plaintiffs' position are the Supreme Court decisions of *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), where the Supreme Court found that the challenged statutes legislated non-commercial activities, resulting in holdings that the regulated activities were beyond the reach of federal power under the Commerce Clause.

In *Lopez*, the statute at issue was the Gun-Free School Zone Act of 1990, criminalizing possession of a gun within a statutorily-

defined school zone. The Supreme Court determined that possessing a gun in a school zone was not economic activity and any link between the regulated activity and its effects on interstate commerce were too attenuated.

Similarly, in *Morrison*, the court invalidated a federal civil remedy for the victims of gender-motivated crimes of violence based on its conclusion that the regulated conduct was non-economic and of a criminal nature.

On the other hand, the Supreme Court decisions of *Gonzales v. Raich*, 545 U.S. 1 (2005) and *Wickard v. Filburn*, 317 U.S. 111 (1942) supported the defendants' position. In *Raich* and *Wickard*, the Supreme Court upheld the laws being challenged as valid exercises of Congress' power under the Commerce Clause.

Wickard dealt with a penalty imposed by federal law on the wheat production of a commercial farm that exceeded marketing quotas established by statute. The penalty was part of a general statutory scheme to control the volume of wheat being sold in interstate commerce in order to avoid wheat surpluses and shortages, which caused wheat prices to fluctuate.

In *Raich*, the court sustained Congress' authority to prohibit the local cultivation and possession of homegrown marijuana intended solely for personal use because the act as a whole regulated the production, distribution and consumption of marijuana "for which there is an established, and lucrative, interstate market," 545 U.S. at 26.

The court held that it was rational to conclude that growing marijuana at home, whatever the nature of that activity, exerted in the aggregate a substantial economic effect on interstate commerce because it affected the supply and demand in the national market for marijuana.

Notwithstanding the apparent agreement as to the applicable Supreme Court precedent, the district courts in *Cuccinelli* and *Liberty University* reached contrary conclu-

sions when applying that precedent to PPACA.

The court in *Liberty University* emphasized that its role was not to determine whether "the regulated activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a rational basis exists for so concluding," 753 F. Supp.2d at 630 (quotations omitted).

Noting that it is well-established that Congress holds the authority to regulate the business of insurance, the court concluded that "*Wickard* and *Raich* teach that Congress has broad power to regulate purely local matters that have substantial economic effects, even where the regulated individuals claim not to participate in interstate commerce," *Id.* at 632-33.

Acknowledging the novel and unique nature of the market for health care and the breadth of PPACA, the court in *Liberty University* concluded that "there is a rational basis for Congress to conclude that individuals' decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate health care market," *Id.* at 633.

The court rejected the notion that Congress was regulating inactivity:

"Far from 'inactivity,' by choosing to forego insurance, plaintiffs 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 Congress found, the total incidence of these economic decisions has a substantial impact on the national market for health care by collectively shifting billions of dollars on to other market participants and driving up the prices of insurance policies," *Id.* at 633.

In *Cuccinelli*, the court distinguished the economic activity in *Wickard* and *Raich* as involving individuals voluntarily deciding to grow wheat or cultivate marijuana, as opposed to the involuntary act of purchasing health insurance as required by PPACA. Concluding that *Wickard* and

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Raich represented the outer bounds of Congressional authority, the court determined that a decision not to purchase a product, such as health insurance, is not an economic activity.

The court explained that neither 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. Of course, the court recognized that “[t]he outcome of this case has significant public policy implications. And the final word will undoubtedly reside with a higher court,” 728 F. Supp.2d at 790. Of note, the Supreme Court rejected an attempt by the Commonwealth of Virginia in *Cuccinelli* to bypass the Court of Appeals and obtain a *writ of certiorari* for immediate review by the Supreme Court.

While it is anticipated that the Fourth Circuit Court of Appeals, considering both the *Cuccinelli* and *Liberty University* appeals, will be the first appellate court to address the issue, there is a possibility that a ruling on the Commerce Clause issue may have to wait a decision from another Circuit.

The Fourth Circuit Court of Appeals, after oral argument on May 10, issued an order requesting supplemental briefs to be filed by the parties addressing questions concerning the applicability of the Anti-Injunction Act and whether it barred pursuit of the litigation.

The Anti-Injunction Act, 26 U.S.C. §7421(a), is located in the Internal Revenue Code and provides, in pertinent part, that “no suit for the purpose of restraining

the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed,” 26 U.S.C. §7421(a).

The two primary objectives of the Anti-Injunction Act are to allow the federal government to assess and collect taxes allegedly due without judicial interference, and to compel taxpayers to raise their objections to collected taxes in suits for refunds.

In *Liberty University*, the court rejected the defendants’ argument that the Anti-Injunction Act barred the plaintiffs’ claims. The court concluded that the penalties imposed by PPACA were not akin to taxes for purposes of the Anti-Injunction Act.

Similarly, the court in *Cuccinelli* rejected applicability of the Anti-Injunction Act when it considered an earlier motion to dismiss filed by the defendants that was denied prior to the court’s ultimate grant of summary judgment in favor of the plaintiffs. By virtue of its request for supplemental briefs, it would appear that the Fourth Circuit may not be similarly convinced as to the non-applicability of the Anti-Injunction Act.

Regardless of the ultimate disposition in the present cases pending before the Fourth Circuit, if the split among the district courts in Virginia is any indication, it would not be surprising that when the Supreme Court ultimately considers this issue, the justices will likely disagree based upon ideology.

When the Supreme Court rejected the application for immediate review in the *Cuccinelli* case, there was no indication that Justice Elena Kagan had disqualified herself from that decision, causing at least one commentator to remark that it is likely she

will not recuse herself when the court ultimately considers PPACA.

Therefore, as with many decisions rendered by the Supreme Court on controversial issues, Justice Anthony Kennedy is likely to be the deciding vote when the court ultimately considers whether the Commerce Clause permits Congress to mandate universal health insurance coverage for U.S. citizens.

Justice Kennedy’s prior writings on the subject do not predict with any certainty how he will rule on the issue. In fact, he was part of the majority in the *Morrison* case (which supports those challenging PPACA) and he was part of the majority in the *Raich* case (which supports those defending the constitutionality of PPACA). In Justice Kennedy’s own words, as set forth in his concurring opinion joined by Justice Sandra Day O’Connor in the *Lopez* case:

“The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the founders knew to the single, national market still emergent in our own era counsels great restraint before the court determines that the clause is insufficient to support an exercise of the national power,” 514 U.S. at 568.

Only time will tell whether Justice Kennedy and his colleagues will exercise restraint when evaluating Congress’ authority to enact PPACA or whether they will conclude that Congress failed to exercise its own restraint in view of the Commerce Clause.

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