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Health Care—Insurance

Opponents of New Federal Health Care Law Wage Constitutional War Against It in Courts

Foes of the Obama administration's sweeping national health care insurance overhaul have launched multi-pronged constitutional attacks on the new statute in federal courts nationwide. In rulings on the merits thus far, two district courts have upheld the 2010 Patient Protection and Affordable Care Act's requirement that virtually all Americans buy a minimum amount of health insurance. One district court in Virginia, however, recently held that the ''individual mandate'' (or minimum coverage provision) exceeds Congress's Commerce Clause power.

Another major test is underway in the U.S. District Court for the Northern District of Florida, where 20 states have banded together to challenge the statute. That court Oct. 14 denied the government's motion to dismiss the states' Commerce Clause and Spending Clause claims. It heard argument on the parties' cross-motions for summary judgment Dec. 16.

The opponents' main argument is that the individual mandate targets ''inactivity''—the decision not to buy insurance—rather than ''activity'' affecting interstate commerce that is regulable under the Commerce Clause. They further contend that the statute's substantial revisions of Medicaid coerce and ''commandeer'' states' participation in a federal program in violation of the Spending Clause and the 10th Amendment. A third key argument is that the penalty imposed on those not buying insurance constitutes an unconstitutional unapportioned capitation or direct tax. Other challenges—ranging from freedom of religion to privacy to due process and beyond—have also been mounted.

Three Main Lines of Attack

Plaintiffs' principal constitutional challenges to the Patient Protection and Affordable Care Act are based on:

- Commerce Clause
- Spending Clause/10th Amendment
- Tax Power

The government counters that it clearly has commerce power to regulate the trillion-dollar health insurance market, and that the individual mandate is a critical element of the broader regulatory scheme to provide near-universal coverage and to bar insurers from denying coverage based on pre-existing conditions. It dismisses the states' ''coercion'' argument as whining about hard political choices that has never succeeded in court and is at odds with the fiscal facts. It contends that the penalty for flouting the individual mandate is not only a valid tax, but that its constitutional source buttresses Congress's power to enact the PPACA, and that the Anti-Injunction Act bars courts from hearing the tax claims.

Attorneys and scholars who spoke to BNA are sharply divided on the merits of the claims. The plaintiffs' allies decry the statute as an unprecedented federal encroachment on states' police power and individual liberty. The statute's supporters retort that the constitutional issues are not even close. The substance of both sides' arguments and of the courts' opinions so far indicates that the outcome of the litigation will significantly alter the health care insurance market (whether other businesses and activities will be affected is disputed), constitutional law, or both when the U.S. Supreme Court inevitably resolves it.

Key Cases to Watch

- *Florida v. Department of Health and Human Services* (N.D. Fla.)
- *Virginia v. Sebelius* (E.D. Va.)
- *Thomas More Law Center v. Obama* (E.D. Mich.) (*appeal pending*, 6th Cir., No. 10-2388)
- *Liberty University Inc. v. Geithner* (W.D. Va.) (*appeal pending*, 4th Cir., No. 10-2347)
- *Coons v. Geithner* (D. Ariz.)

Commerce Clause. Section 1501 of the PPACA requires all Americans, with certain exceptions, to maintain a minimum level of health care insurance, or pay a penalty. Plaintiffs have challenged this ''individual mandate'' as exceeding Congress's Commerce Clause power to regulate activities that substantially affect interstate commerce. As stated in the brief in support of 20 states' summary judgment motion in *Florida v. Dep't of Health and Human Servs.*, N.D. Fla., No. 3:10-cv-91-RV/EMT, *filed* 11/4/10:

> At its furthest reach, the commerce power permits federal regulation of *activities* having a substantial relation to interstate commerce. The commerce power does not allow Congress to compel inactive individuals to engage in economic activity against their will. Nor is there any basis in law to

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> treat an internal decision to abstain from activity as a form of ''activity'' subject to regulation under the Commerce Clause, or to deem all Americans ''active'' participants within a regulable market merely by dint of their existence.

The Florida court, in its Oct. 14 nonmerits order denying the government's motion to dismiss (79 U.S.L.W. 1467), found that the plaintiffs had stated a ''plausible'' Commerce Clause claim. ''At this stage in the litigation, this is not even a close call,'' because the ''power that the individual mandate seeks to harness is simply without prior precedent,'' Judge Roger Vinson said. ''Of course, to say that something is 'novel' and 'unprecedented' does not necessarily mean that it is 'unconstitutional,' '' he added.

Two Courts Say Go. But the first two courts to reach the merits of the Commerce Clause claim rejected it. The U.S. District Court for the Eastern District of Michigan Oct. 7 upheld the individual mandate in *Thomas More Law Center v. Obama*, 79 U.S.L.W. 1467 (E.D. Mich. 2010). Judge George C. Steeh acknowledged that the statute ''arguably presents an issue of first impression'' because ''in every Commerce Clause case presented thus far, there has been some sort of activity.'' But he said that the health care market is ''unique'' in its ''cost-shifting'' phenomenon: ''Far from 'inactivity,' by choosing to forgo 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, collectively shifting billions of dollars, $43 billion in 2008, onto other market participants,'' including health care providers, the insured population in the form of higher premiums, governments, and taxpayers.

The court found that cost-shifting is ''exactly'' what the statute sought to address, that the plaintiffs are ''inseparable and integral members of the health care services market'' whose choices about how to pay for such services affect interstate commerce, and that ''this market reality forms the rational basis for Congressional action designed to reduce the number of uninsureds.''

The court relied upon *Wickard v. Filburn*, 317 U.S. 111 (1942), which upheld a penalty on wheat grown for home consumption despite the plaintiff farmer's protest that he did not intend to put it on the market, and *Gonzales v. Raich*, 545 U.S. 1, 73 U.S.L.W. 4407 (2005), which upheld Congress's authority to ban possession, under the Controlled Substances Act, of home-grown marijuana intended solely for personal use. Those cases ''rejected claims that individuals who choose not to engage in commerce thereby place themselves beyond the reach of the Commerce Clause,'' the court said. ''While plaintiffs describe the Commerce Clause power as reaching economic *activity*, the government characterization of the Commerce Clause reaching economic *decisions* is more accurate,'' it said.

Because Section 1201 of the statute bars insurers from denying coverage based on a ''pre-existing condition,'' individuals would have an incentive—absent the individual mandate and penalty—to wait to buy insurance until they become ill, the court said. ''As a result, the most costly individuals would be in the insurance system and the least costly would be outside it,'' thus aggravating cost-shifting and leading ''to even higher premiums,'' it said. The individual mandate is thus essential to the broad regulatory scheme, it found. The ruling is on appeal to the Sixth Circuit (No. 10-2388).

In a similar vein, the U.S. District Court for the Western District of Virginia, in *Liberty Univ. Inc. v. Geithner*, W.D. Va., No. 6:10-cv-00015-nkm, 11/30/10, found that *Wickard* and *Raich* entail that ''decisions to pay for health care without insurance are economic activities.'' ''Plaintiffs do not consider themselves to be engaging in commerce, but as in *Wickard*, economic activity subject to regulation under the Commerce Clause need not involve transacting business in the marketplace,'' Judge Norman K. Moon said.

''Because of the nature of supply and demand, Plaintiffs' choices directly affect the price of insurance in the market, which Congress set out in the Act to control,'' and that is all that is necessary under *Wickard*, Moon said. He found *Raich* to be to the same effect.

One Court Says Stop. But the third district court to rule on the merits went the other way. In *Virginia v. Sebelius*, 79 U.S.L.W. 1747 (E.D. Va. Dec. 13, 2010), Judge Henry E. Hudson found that the individual mandate exceeds Congress's commerce power. That regulatory power is ''triggered by some type of self-initiated action'' by the regulated person or entity, according to Hudson. ''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,'' he said.

The court said that Virginia—which filed its own suit rather than joining 20 other states in the Florida case—was not challenging the ''aggregate effect of the many moving parts of the [PPACA] on interstate commerce. Its lens is narrowly focused on the enforcement mechanism to which it is hinged''—the individual mandate.

The court agreed with the state that in both *Wickard* and *Raich*, the ''activity under review was the product of a self-directed affirmative move to cultivate and consume wheat or marijuana. This self-initia[t]ed change of position voluntarily placed the subject within the stream of commerce. Absent that step, governmental regulation could have been avoided.''

The commerce power is ''triggered by some type of self-initiated action by the regulated person or entity.''

JUDGE HENRY E. HUDSON
EASTERN DISTRICT OF VIRGINIA

According to the court, under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), which struck down the Gun-Free School Zones Act and the Violence Against Women Act, respectively, as exceeding Congress's commerce power, the Supreme Court ''tightened the reins'' on the commerce power to require that it ''square with the historically-accepted contours of Article I authority delineated'' in *Perez v. United States*, 402 U.S. 146 (1971). In turn, *Perez* ''stated that Congress has the power to regulate *activities* that substantially affect interstate commerce,'' the court said.

The secretary of health and human services' substantial effects reasoning, adopted by Judges Steeh and

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Moon, stretches too far, the court found. ''This broad definition of the economic activity subject to congressional regulation lacks logical limitations and is unsupported by Commerce Clause jurisprudence,'' it ruled.

The secretary also relied on the Necessary and Proper Clause of Article I, Section 8, clause 1 of the Constitution, which authorizes Congress to ''lay and collect Taxes . . . and provide for the . . . general Welfare.'' But the court said that under *United States v. Comstock*, 78 U.S.L.W. 4410 (U.S. 2010), this authority ''may only be constitutionally deployed when tethered to a lawful exercise of an enumerated power.'' Here, the enumerated commerce power was invalidly invoked, so the Necessary and Proper Clause was also unavailing, the court ruled. But it declined to enjoin enforcement of the statute or strike it down as a whole. Instead, it severed the individual mandate and other provisions specifically referring to it.

Law's Proponents: Not a Close Question. Scholars supporting the statute roundly rejected Judge Hudson's reasoning in Virginia's suit. Dean Erwin Chemerinsky, University of California, Irvine, School of Law, told BNA in a Dec. 11 e-mail that the individual mandate issue should not be a close question as a matter of constitutional law. ''Congress has the authority to adopt the 'individual mandate' either as an exercise of its Commerce Clause power or as an exercise of its taxing and spending power. As to the former, Congress can regulate economic activity which taken cumulatively has a substantial effect on interstate commerce. Buying (or even not buying) health insurance is economic activity and the trillion dollar health insurance industry obviously has a substantial effect on interstate commerce,'' he said. If Congress under the commerce power can regulate a woman growing marijuana for her own medicinal use, Chemerinsky said, referring to *Raich*, ''it surely can regulate a trillion dollar industry.

''The argument that Congress is regulating 'inaction' deserves no weight,'' Chemerinsky said. ''In Title II of the 1964 Civil Rights Act, Congress forced hotels and restaurants to stop discriminating based on race (ending their refusal to engage in economic transactions). Moreover, Congress has the authority to provide health care for all and under the Necessary and Proper Clause it can choose as a means the individual mandate.''

Agreeing with Chemerinsky, Timothy S. Jost, a professor at Washington and Lee University School of Law, Lexington, Va., who has been in contact with some amici but not written anything for or reviewed their briefs, told BNA Dec. 9 that Steeh and Moon got it right. The plaintiffs in *Wickard* and *Raich* both argued that they were not participating in the market, and the Supreme Court ''saw through that,'' telling them that their conduct affected the market, he said. Jost predicted that if this Commerce Clause issue gets to the Supreme Court, the United States will prevail by a vote of 8–1, ''unless the Justices change their position for political reasons,'' which is always possible, he said.

'Unique' Market. Jost cited two points made in the amicus brief on behalf of economic scholars supporting the United States in the Florida suit. First, the brief quotes former Massachusetts Gov. Mitt Romney (R), in signing that state's health care reform law, as stating:

> Some of my libertarian friends balk at what looks like an individual mandate. But remember, someone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers pay. A free ride on the government is not libertarian.

(citing Wall Street Journal, Apr. 11, 2006, p. A16). Second, the brief emphasizes the unique aspects of the health care insurance market as both justifying the PPACA's measures and obviating the likelihood of the expansion of federal power in other markets:

> The requirement to obtain a minimal level of health insurance is predicated on the unique characteristics of the health care market—the unavoidable need for medical care; the unpredictability of such need; the high cost of care; the inability of providers to refuse to provide care in emergency situations; and the very significant cost-shifting that underlies the way medical care is paid for in this country. Those characteristics do not obtain in other markets and, without them, the predicate for the kind of regulation adopted in Section 1501 does not exist.

The plaintiffs' ''inactivity'' argument is ''completely inconsistent'' with Commerce Clause law as ''universally understood at least since 1937,'' Simon Lazarus, public policy counsel, National Senior Citizens Law Center, Washington, D.C., told BNA Dec. 13. That argument is ''really an effort to change constitutional law in a very reactionary way,'' to revert back to the law as it stood early last century in a way that will allow the courts to shrink federal power and ''dumb down'' the Constitution, he asserted. Even some prominent conservatives such as Charles Fried, solicitor general in the Reagan administration, and Orin Kerr, of the George Washington University Law School, have disavowed the plaintiffs' position, he said.

Necessary and Proper. Disputing Judge Hudson's Necessary and Proper Clause analysis, Adam Winkler, a professor of constitutional law at UCLA School of Law, Los Angeles, told BNA in a Dec. 10 e-mail that the individual mandate ''is a necessary part of the comprehensive health care reform. Even if the choice to remain uninsured is not itself economic activity, the Supreme Court has said that the Necessary and Proper Clause permits Congress to reach beyond the confines of the Commerce Power when essential to a larger regulatory scheme.'' The PPACA's ''overhaul of the health insurance market is unsustainable without the individual mandate, just like the Controlled Substance Act would be undermined if people could lawfully grow their own marijuana for personal consumption,'' he said.

The PPACA's critics say that Congress has never before required private individuals to buy something from a private company, Winkler said. ''The Founders, however, enacted an individual mandate in the Militia Acts of 1792, which required free white men to outfit themselves with a military-style firearm at their own expense,'' he noted. ''Just like the Militia Clauses empowered Congress to impose an individual mandate on guns, the Commerce Clause empowers Congress to impose an individual mandate for health care insurance, which is obviously a significant part of the national economy.''

Winkler said that the principle behind the individual mandate goes back to *McCulloch v. Maryland*, 17 U.S. 316 (1819), in which Chief Justice John Marshall said that, so long as the objective of the federal law is within federal power, ''all means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional.'' Here, the ''end is regulating a huge piece of interstate commerce, so Congress can

PENDING OR DISMISSED HEALTH CARE REFORM LITIGATION

CASE NAME	CLAIMS RAISED									
	COMMERCE CLAUSE	SPENDING CLAUSE	10TH AMENDMENT	UNCONSTITUTIONAL TAX/TAX POWER	DUE PROCESS	RELIGIOUS LIBERTY (1ST AMENDMENT)	PRIVACY	INTIMATE ASSOCIATION	STANDING	OTHER
THOMAS MORE LAW CENTER v. OBAMA (E.D. Mich.)	●		●	●	●	●			●	●
LIBERTY UNIV. v. GEITHNER (W.D. Va.)	●		●	●		●			●	●
VIRGINIA v. SEBELIUS (E.D. Va.)	●		●	●						●
FLORIDA v. DEP'T of HHS (N.D. Fla.)	●	●	●	●	●				●	
U.S CITIZENS ASS'N v. SEBELIUS (N.D. Ohio)	●			●	●		●	●	●	
COONS v. GEITHNER (D. Ariz.)	●	●	●	●	●		●			●
BALDWIN v. SEBELIUS (S.D. Cal.)	●			●		●	●		●	●
N.J. PHYSICIANS INC. v. OBAMA (D.N.J.)	●				●				●	
BURLSWORTH v. HOLDER (E.D. Ark.)	●		●	●						
SOLLARS v. REID (N.D. Ind.)										●
MACKENZIE v. SHAHEEN (D.N.H.)			●		●					●
HEGHMANN v. SEBELIUS (S.D.N.Y.)							●			●
ARCHER v. U.S. SENATE (W.D. Va.)				●						●
TAITZ v. OBAMA (D.D.C.)	●					●			●	●
FOUNTAIN HILLS TEA PARTY PATRIOTS v. SEBELIUS (D. Ariz.)				●						●
SHREEVE v. OBAMA (E.D. Tenn.)			●	●					●	

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choose any means available short of infringing on individual rights,'' Winkler submitted. He cited *Comstock* as a recent case in which the Supreme Court ''broadly read the Necessary and Proper Clause to allow Congress to detain sex offenders after completion of their sentences. Even Chief Justice Roberts agreed that Congress was empowered by the Necessary and Proper Clause to reach beyond its enumerated powers to accomplish a legitimate goal.''

Opponents: Inactivity Never Regulated. The plaintiffs in the Florida case, however, like Judge Hudson, invoke *Comstock* in their service. They argue that the individual mandate is not, in the words of *Comstock*, a ''means that is rationally related to the implementation of a constitutionally enumerated power.'' ''Rather, it is an unprecedented attempt to impose a desired policy 'end'—universal coverage—through a statutory command ungrounded in any enumerated power, and which invades the sovereignty of the States and the People's reserved rights in a constitutionally 'improper' manner,'' according to the Florida plaintiffs' summary judgment brief.

Agreeing that ''inactivity'' has never been subject to regulation under the Commerce Clause, Cory Andrews, senior litigation counsel, Washington Legal Foundation, Washington, D.C., who filed an amicus brief supporting Virginia in its case, pointed out that the plaintiffs in *Wickard* and *Raich* were punished for the activities of growing wheat and marijuana, not for inactivity.

In the Michigan case, Judge Steeh acknowledged that ''in every Commerce Clause case presented thus far, there has been some sort of activity,'' Andrews noted. And in *Liberty Univ.*, Judge Moon ''implicitly concedes the same point when he attempts to convert the mental process of decision-making, *hesto presto*, into an activity,'' Andrews asserted. He concluded that the ''bizarre reasoning by which the government (and two district judges) attempt to convert inactivity into activity is really akin to alchemy.''

The PPACA's individual mandate also runs afoul of the principle that ''Congress's Commerce Clause authority is not unlimited because general police powers are reserved exclusively to the states,'' Andrews said.

''[N]either the government nor the two district judges upholding the individual mandate offer *any limiting principle* to the 'economic decision theory,' '' Andrews said. It could even extend to a blue collar worker's decision not to obtain a GED, which ''undoubtedly has an impact on the overall economy, no matter how small. But does anyone seriously think such decisions are within the legitimate reach of Congress?

''It simply cannot be the case that the Commerce Clause means both that whether you participate in commerce or whether you choose not to participate in commerce, Congress can regulate you,'' Andrews declared. ''If that were the intention, the architects of the Constitution would simply have provided 'Congress can regulate you.' They didn't.''

Limited, Enumerated Powers. Agreeing with Andrews, Nick Dranias, director, Center for Constitutional Government, Goldwater Institute, Phoenix, told BNA in a Dec. 13 e-mail that Judge Hudson in Virginia's suit ''got it right in ruling that such unlimited power cannot be squared with the Constitution's framework of limited and enumerated powers for the federal government.''

Even if federal regulation of the health care insurance market is ''necessary'' as found by Congress, it is not '' 'proper' to the extent that it deploys an administrative agency—the Independent Payment Advisory Board (IPAB)—to regulate the health care insurance market by wielding vast executive and legislative powers without any meaningful legislative or judicial check or balance,'' Dranias said. Nor is the PPACA ''proper'' in relying upon the individual mandate or in invoking implied powers ''to override state Health Care Freedom Acts, which exercise state sovereignty in a manner that protects individual liberty, because doing so would prevent states from fulfilling their appointed role in our system of dual sovereignty,'' he contended.

Spending Clause. The Spending Clause is the second key arrow in the PPACA opponents' quiver. The Florida plaintiffs argue that the PPACA's expansion of the Medicaid program is coercive to such an extent that it ''violates all five restrictions on congressional spending power'' set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987). They contend that states are left with a ''Hobson's choice'' because they cannot afford the increased costs, but withdrawing from Medicaid would preclude their adequate coverage of the poor.

They also argue that the revised Medicaid terms are ambiguous, change the fundamental purpose of Medicaid, violate state sovereignty and federalism, and coerce states unlawfully.

In his Oct. 14 order, Judge Vinson wobbled but declined to dismiss this Spending Clause claim. He said the claim ''is based principally on a single sentence near the end of *Dole*, where the Supreme Court speculated that 'in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' '' That statement in turn, Vinson noted, is drawn from *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), which ''likewise speculated that there may be a point at which Congressional pressure turns into impermissible coercion.'' *Steward Machine*, however, did not elucidate that point, cautioning instead that ''any spending measure (in that case, in the form of a tax rebate) 'conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties,' '' Vinson observed.

No case has ever actually applied the coercion theory to invalidate Spending Clause legislation, and ''its entire underpinning is shaky,'' Vinson noted. Most federal appeals court have dismissed states' coercion claims as merely involving a ''hard political choice,'' he said. The Fourth Circuit apparently is the one circuit where the theory ''is not viewed with such suspicion,'' he said, quoting *West Virginia v. Dep't of HHS*, 289 F.3d 281 (4th Cir. 2002). But finding that the Eleventh Circuit has not foreclosed such claims, and that *Dole* and *Steward Machine* apparently leave room for them, Vinson ruled that the plaintiffs had stated a ''plausible'' claim.

Cites, Links to Pending and Dismissed Cases

Decisions, orders, or complaints in pending or dismissed cases under the Patient Protection and Affordable Care Act include:

Thomas More Law Center v. Obama, E.D. Mich., No. 10-CV-11156, 10/7/10. (http://pub.bna.com/lw/1011156.pdf)

Liberty University Inc. v. Geithner, W.D. Va., No. 6:10-cv-00015-nkm, 11/30/10. (http://pub.bna.com/lw/1015.pdf)

Virginia v. Sebelius, E.D. Va., No. 3:10CV188-HEH, 12/13/10. (http://pub.bna.com/lw/10188p.pdf)

Florida v. Department of Health and Human Services, N.D. Fla., No. 3:10-cv-91-RV/EMT, *order granting in part and denying in part defendant's motion to dismiss* 10/14/10. (http://pub.bna.com/lw/109179.pdf)

U.S. Citizens Association v. Sebelius, N.D. Ohio, No. 5:10 CV 1065, 11/22/10. (http://pub.bna.com/lw/11065.pdf)

Coons v. Geithner, D. Ariz., No. 2:10-cv-01714-GMS, *complaint filed* 8/12/10. (http://pub.bna.com/lw/101714.pdf)

Baldwin v. Sebelius, S.D. Cal., No. 10CV1033 DMS (WMC), 8/27/10. (http://pub.bna.com/lw/10133.pdf)

New Jersey Physicians Inc. v. Obama, D.N.J., No. 10-1489 (SDW) (MCA), 12/8/10. (http://pub.bna.com/lw/11489.pdf)

Burlsworth v. Holder, E.D. Ark., No. 4:10-CV-0258 SWW, 9/8/10. (http://pub.bna.com/lw/10258.pdf)

Sollars v. Reid, N.D. Ind., No. 1:09-cv-00361-TLS-RBC, 4/2/10. (http://pub.bna.com/lw/090361.pdf)

MacKenzie v. Shaheen, D.N.H., No. 1:10cv167, 5/26/10. (http://pub.bna.com/lw/10167.pdf)

Heghmann v. Sebelius, S.D.N.Y., No. 09 Civ. 5880 (BSJ). (http://pub.bna.com/lw/095880.pdf)

Archer v. U.S. Senate, W.D. Va., No. 7:10-CV-00124, 4/12/10. (http://pub.bna.com/lw/10124.pdf)

Taitz v. Obama, D.D.C., No. 10-151, 4/14/10. (http://pub.bna.com/lw/10151.pdf)

Fountain Hills Tea Party Patriots LLC v. Sebelius, D. Ariz., No. CV-10-00893-PHX-ROS (DKD), 6/16/10. (http://pub.bna.com/lw/10893.pdf)

Shreeve v. Obama, E.D. Tenn, No. 1:10-cv-71, 11/4/10. (http://pub.bna.com/lw/1071.pdf)

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Most federal appeals courts have dismissed states' coercion claims as merely involving a "hard political choice."

JUDGE ROGER VINSON
NORTHERN DISTRICT OF FLORIDA

The United States' summary judgment brief cites "three independent flaws" in the plaintiffs' claim, "each of which is fatal":

> First, when viewed in the context of the full Act, the amendments will not harm state budgets; to the contrary, any increases in state Medicaid spending will be more than offset by new savings created by the [PPACA]. Second, the coercion theory provides no judicially administrable standards and essentially raises political questions that fall outside the province of the judiciary, as several courts have held. Third, even if this claim were justiciable, the ACA's Medicaid amendments do not cross the line separating "pressure" from "coercion," wherever it may be.

Grant Conditions: Fudged and Smudged? Disagreeing with the government, James F. Blumstein, a health law scholar and professor at Vanderbilt Law School, Nashville, Tenn., recently argued that a Spending Clause challenge is viable. In a Dec. 6 conference at the American Enterprise Institute in Washington, D.C., he said that under *Dole*, the federal government must state conditions unambiguously when a grant is made (the "clear statement" requirement), and the conditions must not cross the line from "pressure" to "coercion." In addition, the relationship between the federal and state governments in cooperative spending programs such as Medicaid is "controlled in broad strokes by contract principles," he said. "To protect state sovereign interests in deciding whether or not to participate in cooperative federalism programs, federal conditions (and state obligations) on federal programs must be unambiguously stated in advance," he said, citing *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 74 U.S.L.W. 4479 (2006).

Blumstein argued that the PPACA is a "modification" of an existing federal-state contract with respect to Medicaid, and thus subject to closer judicial scrutiny than the "formation" of a new contract. The "clear statement" requirement—and the rule of *Arlington*—may be fudged by changes in the PPACA that provide new subsidies for persons in the range of 100 to 400 percent of the federal poverty level, while at the same time providing nothing new for those below the 100 percent level (thus anticipating that the existing Medicaid program with respect to the poorest would remain unchanged), Blumstein said. These changes may not have been foreseeable by states when they initially signed up for Medicaid, and may amount to a "bait and switch" that smudges the lines of accountability between the state and federal governments, he submitted. And the changes have a greater financial impact on states than any program other than K-12 education, because Medicaid often amounts to 20 to 25 percent of their budgets, he maintained.

Given states' long-standing reliance on fund-sharing in the Medicaid program, certain features of the PPACA-expanded Medicaid program—states' reduced role in determining eligibility and scope of benefits, and the "all or nothing" choice they face—may amount to impermissible "coercion" under the Spending Clause, Blumstein said. Even though no court has invalidated a federal spending program on coercion grounds for 75 years, he argued that the expanded Medicaid program may constitute "choice-set coercion"—a "forcing of inappropriate choices"—of the kind that Justice Anthony M. Kennedy found existed in *Lee v. Weisman*, 505 U.S. 577 (1992), in the context of middle school children forced to choose between attending graduation and listening to a rabbi's prayers.

New Take on Coercion Theory. This is not the "psycho-coercion" ridiculed by Justice Antonin Scalia's *Lee* dissent, Blumstein told BNA in a Dec. 8 e-mail. Rather, it is Kennedy's "distinct argument" that requiring an objecting child to skip graduation to avoid any coercion "exacted too high a cost." "That is, the [government] was not allowed to establish a choice set that required plaintiff to forgo attendance at an important life cycle event—her graduation from middle school—in order not to hear a religious benediction," Blumstein said. "Understood as choice-set coercion, this allows for the argument that states are being coerced by the lack of real choice they face in having to accept new Medicaid, with the attendant new conditions, or affirmatively opting out of old Medicaid entirely."

Medicaid not only provides patient care, but helps states improve the health care delivery infrastructure, he noted. In denying new funding for those under 100 percent of the federal poverty level, Congress clearly assumed that states will not opt out of the program; it is using states as "cash cows" to avoid tough budget choices itself, he said. But states should not be forced to opt out of the modified program; rather Congress should take political responsibility for terminating the original program, he argued. "Where a substantial modification of an ongoing federal spending program such as Medicaid occurs and affects a substantial portion of a state's budget (as in Medicaid), the Federal Government may not use its leverage to impose the new conditions as a program modification," Blumstein posited.

Coercion Discounted. The statute's supporters begged to differ. Any Spending Clause coercion argument is "clearly contrary" to existing law, the National Senior Law Center's Lazarus said. While the states argue that as a practical matter, they cannot withdraw from Medicaid and do not want to take on the additional spending mandated by the PPACA, that only presents them with a "difficult choice"—one that executive and legislative officials are elected to make, Lazarus said.

Washington and Lee's Jost agreed with Lazarus that Vinson "signalled pretty clearly" that he is skeptical of any Spending Clause argument. Jost added that Texas has talked about dropping out of Medicaid, and that the Heritage Foundation issued a paper recommending that states drop out of the program to save money—both undercutting the argument that states have no options with respect to Medicare.

The United States' summary judgment brief in the Florida case asserts that "[c]redible projections indicate that any increase in state Medicaid spending will be dwarfed by new federal spending, and will be more than offset by new [PPACA]-created savings."

Alternative to *Dole*. But one of the statute's opponents argues that *Dole* and its progeny should not control in this context. The Goldwater Institute's Dranias questioned whether the *Dole* framework ''adequately protects state sovereignty when 20 percent or more of state budgets are controlled by the federal government. The Goldwater Institute is litigating a new legal theory that will ask courts to determine whether the strings attached to accepting federal funding for Medicaid are so onerous that they deprive states of the essence of their statehood—something neither state nor federal officials have the constitutional power to 'voluntarily' cede in exchange for federal funding,'' he said. ''This question should be answered before reaching any question of 'coercion' under *Dole*,'' he asserted.

Dranias said that in *Coons v. Geithner*, D. Ariz., No. 2:10-cv-01714, *filed* 8/12/10, the Goldwater Institute is seeking a preliminary injunction against PPACA provisions that bar repeal of the IPAB before 2017. ''If those provisions can be cleared away, the next Congress will have a much freer hand in repealing the worst abuses of power contained in the PPACA,'' he said.

10th Amendment: Angling for Kennedy. The Florida plaintiffs' Spending Clause claim overlaps with their 10th Amendment attack. They assert that the PPACA's ''new Medicaid regime imposes such onerous obligations and burdens that it impermissibly commandeers the States 'into the service of federal regulatory purposes' '' in contravention of *Printz v. United States*, 521 U.S. 898 (2000). But Thomas M. Christina, an employee benefits lawyer with Ogletree Deakins Nash Smoak & Stewart, Greenville, S.C., who also spoke at the AEI conference, proposed that a 10th Amendment attack target instead the PPACA's provisions for establishment of health benefit ''exchanges,'' or markets.

Christina agreed with Blumstein's characterization of Section 1321(c), which requires the federal government to establish an exchange within a state if a state elects not to, as an '' 'oops' fix'' for Section 1311(b), which provides that each state ''shall'' establish an exchange before Jan. 1, 2014. Blumstein and Christina concurred that Section 1311, standing on its own, would be struck down as federal ''commandeering'' of states to enforce federal law in violation of the 10th Amendment as construed in *Printz*.

Christina added that Section 1321 does not give states that elect to establish an exchange a real choice. It provides that they become ''electing states'' by adopting Department of Health and Human Services regulations as state regulations, or by enacting the substance of HHS regulations, he said. In either case, Section 1321 pushes electing states to enforce federal law, he submitted. Moreover, the individual income tax credit under Section 1401 available for citizens of states that have established their own exchanges is not available to citizens of states with HHS exchanges, he noted. He termed this an ''extraordinary'' dangling of money directly before voters.

Given the interaction of Sections 1311, 1321, and 1401, it could be argued that PPACA exchanges violate principles of federalism and ''commandeering'' because states' ''resistance is futile,'' payments to voters hinge on states' acquiescence to the federal scheme, and states' sovereign process is thus undermined, Christina said. The arrangement leaves voters ''mystified'' as to who to hold accountable for the working of the Medicaid program—the state or federal government, he asserted. Given these problems, the setup might be objectionable to Justice Kennedy, who articulated a ''link between sovereignty, accountability, and the electoral process'' in *Alden v. Maine*, 527 U.S. 706 (1999), and other opinions, Christina said.

On the other hand, UCI's Chemerinsky rejected the viability of any 10th Amendment attack. Under that amendment as construed in *Printz*, Congress cannot compel state legislative or regulatory action, he acknowledged. ''But Congress is not doing so here,'' he said. Under *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), ''states can be required to pay a minimum wage. The health care law thus can apply to states the same as other employers. Also, *Reno v. Condon* [, 528 U.S. 141 (2000),] holds that a law which applies to others can be applied to states as well without violating the Tenth Amendment,'' he said.

Severability. Michael S. Greve, a scholar at AEI, in brief comments at the Dec. 6 conference largely agreed with Blumstein's and Christina's presentations. Referring to the PPACA, he declared that ''this bastard has to be killed as a matter of political hygiene'' by any means necessary, and that anyone providing the fatal blow would be doing a ''service'' to the country. He asserted that the statute has many ''bizarre'' appointment provisions that might be subject to challenge. He predicted that the statute will be subjected to sustained and varied challenges for years to come.

But Ogletree's Christina, when asked whether it is significant that the PPACA has no severability clause (with the implication that if part of the statute is held unconstitutional, all of it may go), replied that, ''as a practical matter,'' it probably is not. Beating Judge Hudson to the punch, he reasoned that in a similar situation in *Free Enter. Fund v. PCAOB*, 78 U.S.L.W. 4766 (U.S. 2010), the Supreme Court declined to strike down the entire Sarbanes-Oxley Act despite finding that the ''dual for-cause limitations'' on removing members of the Public Company Accounting Oversight Board violated the separation of powers. Instead, it surgically excised the offending provisions. Christina inferred from this that the Roberts Court takes a ''very cautious approach'' in trying to save federal legislation to the extent possible.

Disagreeing, Michael A. Carvin, Jones Day, Washington, D.C., who filed an amicus brief on behalf of former attorneys general William Barr, Edwin Meese, and Dick Thornburgh supporting Virginia's challenge to the PPACA and represented the prevailing plaintiffs in *PCAOB*, told BNA Dec. 9 that it would be an ''unwarranted leap'' to read *PCAOB* as indicating that the Supreme Court is unlikely to throw out the PPACA as a whole if parts are found unconstitutional. Severability is a ''statute-by-statute analysis,'' and nothing can be inferred about the PPACA from what was done regarding Sarbanes-Oxley, he said. He added that *PCAOB* does show that a Supreme Court majority ''takes very seriously the structural limitations on the federal government,'' and that it will give a respectful hearing to serious challenges to the expansion of federal power.

'Tax' Issues. The plaintiffs in the Michigan and Florida cases asserted that the penalty imposed for noncompliance with the PPACA's individual mandate is unconstitutional as an improperly apportioned direct tax. In the Florida case, the United States countered that the

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sanction is indeed a tax, but that it is proper under Article I, Section 8, clause 1 of the Constitution, which provides that Congress ''shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States, but all Duties, Imposts and Excises shall be uniform throughout the United States.'' The United States argued that the suit was thus barred under the Anti-Injunction Act, 26 U.S.C. § 7421(a), which provides that ''no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.''

The Michigan court upheld the sanction as a penalty ''imposed incidentally under the Commerce Clause.''

The Florida court similarly found in its Oct. 14 order that the sanction is a penalty, not a tax. It cited Congress's use of the term ''tax'' in referring to the individual mandate sanction in earlier versions of the statute as indicating that its switch to ''penalty'' in the final version was deliberate. It also cited use of the term ''tax'' in other provisions of the statute as indicating that ''Congress knew how to impose a tax when it meant to do so.'' It further found that Congress failed to identify in the statute any revenue that would be raised from it. The court thus concluded that the plaintiffs' claim was invalid, but that the suit was not barred.

In like manner in Virginia's suit, the court held that the penalty imposed for noncompliance with the individual mandate was not a ''tax.'' Congress changed its name from a ''tax'' to a penalty, specifically invoked its commerce rather than tax power, and did not identify any revenue-generating purposes of the provision, the court said. It cited *United States v. La Franca*, 282 U.S. 568 (1931), and *Montana Dep't of Rev. v. Kurth Ranch*, 511 U.S. 767 (1994), as distinguishing between a ''penalty'' and a ''tax,'' and ruled that the PPACA had imposed only a penalty.

UCLA's Winkler vehemently disagreed. He said that the ''extremely broad'' tax power is the ''second strong argument'' for the constitutionality of the individual mandate. ''Challengers have argued that the individual mandate is not a tax because it wasn't sold to the American people as a tax. What's in a name?'' Winkler asked. ''Is a tax not a tax because it is called something else? The challengers' argument leads to the absurd result that if Congress reenacted the very same provision but labeled it a 'tax,' then it would be constitutional. The Supreme Court has no business telling a coordinate, co-equal branch of government what labels to use in fulfilling its constitutional responsibilities,'' he said.

Chemerinsky agreed that the individual mandate ''is constitutional under the taxing and spending power. Congress in essence is taxing those who do not purchase health insurance. This is a permissible tax.''

Standing Defense. The United States has generally argued that the plaintiffs lack standing to challenge the PPACA, or relatedly that the suit is not ripe, because the individual mandate won't take effect until 2014. The Florida court rejected the claim, finding that the plaintiffs had established a ''realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement'' that is reasonably ''pegged to a sufficiently fixed period of time'' and not ''merely hypothetical or conjectural.'' The Michigan court likewise upheld the plaintiffs' standing, even though it rejected their claim on the merits.

On the other hand, the standing defense has succeeded in some cases. In both *Baldwin v. Sebelius*, No. 10CV1033 DMS (WMC) (S.D. Cal. 8/27/10), and *New Jersey Physicians Inc. v. Obama*, D.N.J., No. 10-1489 (SDW) (MCA), 12/7/10, the courts found that plaintiffs challenging the individual mandate did not establish the necessary injury in fact for Article III standing. The courts reasoned that the individual plaintiffs, even if they do not now have health insurance, might obtain it through new employment by 2014, or might be too poor to be subject to the individual mandate. In addition, employer plaintiffs were held to lack standing to challenge the employer responsibility provision, Section 1513(d)(2)(A) of the PPACA, which requires that states and employers of 50 full time employees provide a minimum level of health insurance coverage. They did not allege that they have or will have 50 full time employees by 2014. The *Baldwin* court also found no adequately alleged injuries accompanying the individuals' claims of violation of privacy, and thus no standing as to them either. Their challenge to the alleged use of public funds for abortions stated only a ''generalized grievance,'' the court added.

Other challenges to the PPACA have been based on the First Amendment's Free Exercise Clause (pertaining to the statute's alleged funding of abortion), substantive due process, privacy, and the right of intimate association, as shown on the accompanying chart.

By Thomas D. Edmondson