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Health Policy Brief

JULY 8, 2011

Legal Challenges to Health Reform. The constitutionality of the individual mandate is likely to be decided by the Supreme Court.

WHAT'S THE ISSUE?

Approximately 30 lawsuits have been filed by state governments, organizations, lawmakers, and private citizens challenging aspects of the Affordable Care Act, the national health reform law enacted in March 2010.

In one major lawsuit, attorneys general of 26 states, led by Florida, are collectively seeking to overturn the law on the grounds that certain provisions of it are unconstitutional. Central to their argument is the claim that the law's "minimum coverage requirement," popularly called the individual health insurance mandate, exceeds the scope of the US Constitution's "commerce clause." This is the constitutional provision that gives Congress the authority to regulate interstate commerce.

To date, court rulings have been split. On June 29, 2011, the highest court yet to issue an opinion, the Sixth Circuit Court of Appeals, ruled in favor of the mandate, upholding the earlier decision of a federal District Court judge in Michigan. Previously, federal judges in the District of Columbia and Virginia had also held the mandate to be constitutional. By contrast, a District Court judge in Florida and another in Virginia have ruled that the mandate is unconstitutional.

Several other District Courts have dismissed related lawsuits on various other grounds.

As of the publication of this policy brief, cases challenging the law were pending in about half of the country's 13 US Courts of Appeals (Exhibit 1). The question of the constitutionality of the law will almost certainly move to the Supreme Court and a review by its nine justices. This brief provides background on the individual mandate and explores the legal arguments pro and con in greater detail.

WHAT'S THE BACKGROUND?

Section 1501 of the Affordable Care Act spells out the "individual responsibility requirement," or so-called individual mandate. As of 2014, the provision will require that most US citizens, nationals, and legal aliens maintain "minimum essential health insurance coverage" or pay a penalty. Coverage may be obtained individually, through an employer, or through a public program such as Medicare or Medicaid.

Under the law, there will be some limited exemptions to the mandate. Specifically, the cost of obtaining the essential health insurance will not be able to exceed 8 percent of a person's household income. Those whose household incomes are too low to file federal taxes will also be exempt, as will be people who are incarcerated, members of a Native American tribe, or religiously opposed to being insured. A person also will have to be uninsured for at least three months before the penalty can take effect.

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RATIONALE IN THE LAW: Anticipating resistance to the requirement, authors of the Affordable Care Act provided a lengthy rationale for it in the text of the law. They wrote that the mandate was "essential to creating effective health insurance markets" in which people would not be screened ahead of time to detect preexisting medical conditions. In effect, they wrote, universal health insurance will only function if coverage is spread widely and both the sick and healthy have it.

In the absence of the mandate, the authors wrote, other provisions in the act—such as the "guaranteed issue" provision requiring insurance to be sold to everybody, regardless of health condition—would increase the incentives for individuals to "wait to purchase health insurance until they needed care." As a result, the insurance market would not be viable. (See the Health Policy Brief published June 13, 2011, for more information on insurance plans and preexisting conditions.)

Because they also anticipated lawsuits on constitutional grounds, the authors of the Affordable Care Act asserted that the purchase of health care insurance is an inherently interstate economic transaction, and thus subject to regulation by Congress under the Constitution's commerce clause. (This clause gives Congress the power "to regulate Commerce... among the several States.")

To buttress the assertion that health insurance constituted interstate commerce, the authors of the Affordable Care Act noted that

EXHIBIT 1

Major Court Cases at the Appellate Level Challenging the Constitutionality of the Affordable Care Act

Case name	US District Court decision	Presiding US District Court judge	Quote from District Court judge's ruling	Appeal status
Thomas More Law Center v. Obama	Dismissed. Mandate constitutional. October 7, 2010	George Caram Steeh Democratic appointee	*"The decision whether to purchase insurance or to attempt to pay for health care out of pocket, is plainly economic."*	Dismissal upheld by Sixth Circuit Court of Appeals, Cincinnati, OH, on June 29, 2011.
Liberty University v. Geithner	Dismissed. Mandate constitutional. November 30, 2010	Norman Moon Democratic appointee	*"Far from 'inactivity,' by choosing to forgo insurance, [individuals] 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."*	Argued May 10, 2011, Fourth Circuit Court of Appeals, Richmond, VA. Combined with Commonwealth of Virginia v. Sebelius. Decision pending.
Commonwealth of Virginia v. Sebelius	For plaintiff. Mandate unconstitutional. December 13, 2010	Henry Hudson Republican appointee	*"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."*	Argued May 10, 2011, Fourth Circuit Court of Appeals, Richmond, VA. Combined with Liberty University v. Geithner. Decision pending.
State of Florida v. US Department of Health and Human Services	For plaintiff. Mandate unconstitutional, and entire law invalid. January 31, 2011	Roger Vinson Republican appointee	*"There are simply too many moving parts in the [Affordable Care] Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions…for me to try and dissect out the proper from the improper."*	Argued June 8, 2011, Eleventh Circuit Court of Appeals, Atlanta, GA. Decision pending.
Seven-Sky v. Holder	Dismissed. Mandate constitutional. February 22, 2011	Gladys Kessler Democractic appointee	*"It is pure semantics to argue that an individual who makes a choice to forgo health insurance is not 'acting,' especially given the serious economic and health-related consequences to every individual of that choice."*	To be argued September 23, 2011. DC Circuit Court of Appeals, Washington, DC.

SOURCE *Health Affairs* research.

17.6%

Percentage of GDP that is related to health
Spending on health insurance and health care made up 17.6 percent of the gross domestic product in 2009, lawmakers noted in drafting the Affordable Care Act.

"The question of the constitutionality of the law will almost certainly move to the Supreme Court and a review by its nine justices."

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In addition, Congress noted that the Supreme Court had ruled in US v. South-Eastern Underwriters Association (1944) that insurance is manifestly part of interstate commerce, which means that Congress can enforce the individual mandate under its constitutional authority to do what is "necessary and proper" to carry out a federal law.

PLAINTIFFS' ARGUMENTS: The first lawsuit challenging the Patient Protection and Affordable Care Act was filed on March 23, 2010, the day the health care reform bill was signed into law. (Several technical amendments and other changes were enacted a week later in the Health Care and Education Reconciliation Act of 2010. The two bills together are called the Affordable Care Act.)

Plaintiffs have marshaled a variety of legal arguments to challenge various aspects of the Affordable Care Act. The preponderance of plaintiffs' arguments focus on the constitutionality of the individual mandate and related issues, as follows:

- Congress can regulate economic activity that constitutes or that bears on interstate commerce, but not buying individual health insurance is "inactivity," which cannot be regulated by Congress. Therefore, the act of not buying health insurance is beyond the reach of the commerce clause, and Congress cannot assert that it has power to enact the mandate under this provision of the Constitution.

- In enacting the mandate, Congress in effect has taken the unconstitutional step of compelling individuals to engage in interstate commerce. If the mandate is upheld, some plaintiffs contend, the federal government would have wide authority to require individuals to engage in activities of its choosing, such as joining a health club or eating only healthy foods.

- The consequence of not complying with the mandate is a penalty and not a tax, and therefore cannot be justified under Congress' power to tax and spend.

The constitutionality of the law is also challenged on other grounds. For example, the Tenth Amendment to the Constitution says that powers not granted to the federal government nor prohibited to the states by the Constitution are reserved, respectively, to the states or the people.

On these grounds, some plaintiffs have contended, the Affordable Care Act's requirements on employers to contribute to health coverage for their workers unduly interfere with a state's sovereignty. What's more, they argue, the law's requirement to expand Medicaid amounts to an unconstitutional exercise of Congress' spending power because states will be coerced into accepting the expansion against their will.

DEFENDANTS' ARGUMENTS: The core arguments made by the Obama administration in its defense of the law echo the rationale put forward in the law itself. They are as follows:

- The decision to purchase or not purchase health insurance has effects on the overall national health care market—in other words, on interstate commerce—and as such constitutes economic activity that Congress may regulate.

- Virtually everyone will need health care services at some point, including those without health insurance. Thus, everyone participates in the market for health care delivery, and they finance these services by either purchasing an insurance policy or by self-insuring. So rather than constituting "inactivity," the decision not to buy health insurance is actually a proactive decision to self-insure, and constitutes "activity." Through the practice of self-insuring, individuals make an assessment of their own risk and the extent to which they must set aside funds or arrange their affairs to compensate for probable future health care needs.

- Congress had a rational basis for concluding that leaving those individuals who self-insure for the cost of health care outside of federal control would undercut its overlying economic regulatory scheme. Without the minimum coverage provision, other aspects of the law would increase existing incentives for individuals to delay purchasing health insurance until they needed care, making the health insurance market unworkable.

COURT RULINGS TO DATE: As noted, the highest court yet to rule on the issue is the Sixth Circuit Court of Appeals, which handed down its decision on June 29, 2011. Of the approximately 26 cases filed in US District Courts, judges have issued decisions in nine of them. Nine more cases have been dismissed, primarily because the judges ruled that the plaintiffs

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Cases appealed
Six cases decided at the federal District Court level have been appealed.

lacked "standing" to sue because they had not yet suffered any injury from the individual insurance requirement, which does not take effect until 2014. At least two of those plaintiffs have voluntarily withdrawn their petitions. Decisions are pending in eight other challenges.

Of the nine cases decided at the federal court level to date, six have addressed the constitutionality of the minimum coverage requirements. Three District Court judges—all appointed by Democratic presidents—have upheld the law's constitutionality, while two District Court judges—appointed by Republican presidents—have declared the individual mandate provision to be unconstitutional. The Sixth Circuit appellate panel also split, 2-1, but not along "party lines." The two judges who upheld the law were each appointed by presidents of different political parties.

Based on the Sixth Circuit Court's decision, on July 1, 2011, Senior US District Court Judge David Dowd of the Northern District of Ohio, which is part of the Sixth Circuit and bound by its rulings, granted summary judgment in favor of the federal government and dismissed another of the constitutional challenges to the individual mandate. Dowd was appointed by a Republican president.

THE CORE ISSUE: In each of these cases, the core issue has been whether Congress has authority to enact the individual mandate under the commerce clause. Judicial decisions starting with the New Deal have interpreted the commerce power expansively, but since 1995 the Supreme Court has twice ruled that Congress reached too far in applying the commerce clause. These different legal precedents have been invoked by either side in arguing that the individual mandate either is or is not unconstitutional.

"In each of these cases, the core issue has been whether Congress has authority to enact the individual mandate under the commerce clause."

On January 31, 2011, for example, Senior US District Court Judge Roger Vinson of Pensacola, Florida, ruled that the individual mandate was unconstitutional. He wrote that even the broadest definition of the commerce clause has always included some identifiable economic activity—and that the decision not to purchase health insurance constituted no such economic activity. If the government could penalize people for failing to engage in commerce, he wrote, it is "difficult to perceive any limitation on federal power."

However, in upholding the individual mandate on June 29, 2011, Sixth Circuit appellate Judge Jeffrey Sutton reasoned that individual "non-activity" decisions "when aggregated, have a substantial effect on interstate commerce." Sutton also noted that neither the Constitution nor the Supreme Court has drawn any explicit distinction between economic "action" and "inaction," and pointed out that the Supreme Court has said that Congress's authority to legislate under the commerce clause is informed by "broad principles of economic practicality."

CASES UNDER APPEAL: Six of the cases decided at the federal District Court level have since been appealed, including the one decided by the Sixth Circuit. Oral arguments in two of the cases, Virginia v. Sebelius and Liberty University v. Geithner, were heard in the Fourth Circuit on May 10, 2011. Arguments were heard in Florida v. US Department of Health and Human Services in the Eleventh Circuit on June 8.

The Third Circuit in Newark, New Jersey, heard an appeal of a New Jersey case on June 22. The Ninth Circuit in San Francisco will hear an appeal on July 13 (this case is based on standing, not on a constitutional issue). Seven-Sky v. Holder (called Mead v. Holder in District Court) will be argued in the District of Columbia Circuit Court on September 23. Another appeal is pending without a date yet set for arguments in the Eighth Circuit in St. Louis, Missouri.

On April 25, 2010, the Supreme Court turned down, without comment, a request by Virginia Attorney General Kenneth Cuccinelli that it put the Affordable Care Act challenge on a fast-track schedule for review. The decision was expected: The high court rarely hears expedited appeals, and in this case, the individual mandate does not take effect for two-and-a-half more years.

WHAT'S NEXT?

Following the decision by the Sixth Circuit Court of Appeals to uphold the individual mandate, five cases are pending before various US Courts of Appeals. Decisions are expected in most of these cases during the summer of 2011. The matter is almost certain to be taken up by the US Supreme Court, especially if the various appeals courts hand down contradictory decisions.

It is not known when the court will act. It could try to decide on the law's constitutionality fairly soon, or it could wait until more, or

even all of the decisions have been issued by the various appeals courts. If the high court does agree to hear a case during its 2011–12 session, which begins in October 2011, it could issue a decision in 2012, possibly before the national elections on November 6, 2012. But some legal observers note that the court might wait until after the elections to issue a ruling.

It is also unknown whether the Supreme Court will limit any potential ruling to the individual mandate or will address the constitutionality of the broader health care reform law. Clearly, if the high court were to rule that the individual mandate or the entire law were unconstitutional, the effects on implementation of major provisions of the Affordable Care Act would be enormous.■

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Health Policy Briefs are produced under a partnership of *Health Affairs* and the Robert Wood Johnson Foundation.

Cite as:
"Health Policy Brief: Legal Challenges to the Affordable Care Act," *Health Affairs*, July 8, 2011.

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