

FEDERAL HEALTH REFORM IN THE SUPREME COURT – THE LAY OF THE LAND

By Jeanine Freeman, JD

Several constitutional challenges have been mounted against the federal Patient Protection and Affordable Care Act (“ACA”) and the federal courts have come to varying conclusions regarding the law’s constitutionality. On November 14, the Supreme Court agreed to review a decision of the 11th Circuit Court of Appeals which, among other things, ruled as unconstitutional the ACA’s mandate that citizens purchase health insurance or pay a tax. Importantly, the 11th Circuit further ruled that the invalid mandate provisions could be severed from the ACA, allowing the rest of the law to stand. Touted as a landmark case, a Supreme Court decision on the ACA is important not only to constitutional scholarship but to the future direction of our nation’s health care payment and delivery system.

A brief primer on the federal court system.

Cases start in federal district court which is the federal judiciary’s trial court. There are 94 federal judicial districts. For instance, Iowa has two, the Northern District Court (Cedar Rapids and Sioux City) and the Southern District Court (Des Moines). A party unhappy with a decision of a federal district court may appeal to a federal court of appeals which is the federal judiciary’s appellate court. There are 12 regional circuits, each with a court of appeals. For instance, decisions of the Northern District or the Southern District of Iowa are appealed to the 8th Circuit Court of Appeals. Parties unhappy with a circuit court of appeals decision may seek further review before the U. S. Supreme Court by filing a petition for certiorari. In a given year, the Supreme Court receives 8,000 or so petitions for review, of which the Court generally accepts about 100. Cases most likely to be heard by the Supreme Court are those that present significant issues of federal law or constitutional challenge and/or issues on which the circuit courts do not agree.

How did this challenge to the ACA make it to the U. S. Supreme Court?

As noted above, constitutional challenges against the ACA were initiated by various parties in several federal district courts and eventually appealed through the federal circuit courts. The circuit courts have ruled differently so conflicts exist among the federal appellate courts on the constitutionality of the ACA. Too, the ACA, affecting all citizens and all states, is comprehensive in reach and impact.

The 11th Circuit Court of Appeals decision – a bird’s eye summary.

The Supreme Court chose the 11th Circuit’s decision as its vehicle for review of the ACA. Parties challenging the constitutionality of the ACA before the 11th Circuit were 26 states, including Governor Branstad of Iowa (“states”), and the National Federation of Independent Businesses (“NFIB”). Parties defending the ACA were the federal Departments of Health and Human Services (HHS), the Treasury, and Labor (“government”), each of which has implementing responsibilities under the ACA. The 11th Circuit’s final ruling: 1) invalidated on constitutional grounds the ACA’s mandate that each citizen not otherwise exempted purchase health insurance coverage by 2014 or pay a tax penalty; 2) upheld as constitutional the ACA’s provisions extending coverage to additional persons under Medicaid; and 3) severed the unconstitutional purchasing mandate and tax penalty provisions from the ACA, allowing the rest of the law to stand.

The Supreme Court’s review – parties and issues.

The Supreme Court accepted three petitions for review of the 11th Circuit’s decision, the first from the NFIB, the second from the government, and the third from the 26 states. In doing so, the Court gave clear direction on the issues it would address and assigned an unusual 5 and ½ hours for argument on those issues.



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Issue 1: Constitutionality of the ACA's individual purchasing mandate and tax penalty. Central to this Supreme Court review is the question of constitutionality of the ACA's mandate that individuals purchase health coverage or pay a tax in lieu of doing so. The 11th Circuit, in a divided opinion among the judges, ruled that the purchasing mandate and its tax penalty ventured too far afield from Congress' power to regulate economic interstate activity under the Commerce Clause and to impose tax penalties under the Taxing and Spending Clause of the Constitution. The government argues that Congress is faced with a crisis in the national health care marketplace affecting interstate commerce; that cost shifting occurring as a result of substantial levels of uncompensated care directly impacts this national crisis; and that the purchasing mandate and its tax penalty are a proper exercise of Congress' constitutional Commerce Clause powers toward the end of ameliorating the crisis.

Issue 2: Severability of the mandate. Severability is an issue only if the Supreme Court agrees with the 11th Circuit that the ACA's individual purchasing mandate is unconstitutional. The NFIB and the 26 states disagree with the 11th Circuit Court of Appeals' ruling which essentially removed or "severed" what it believed was an unconstitutional mandate from the ACA, leaving intact the rest of the law. The NFIB and the states argue that the mandate is the principal driver upon which all other ACA provisions tether, especially in balancing the economic impact of those provisions. Interestingly, the government argues that severability is appropriate except for the guaranteed issue and community rating provisions of the ACA which it says are intrinsically linked to the mandate.

Issue 3: Constitutionality of the ACA's expansion of Medicaid coverage. At the

request of the 26 states, the Supreme Court also agreed to review the 11th Circuit's determination that Congress acted within the boundaries of its constitutional authority under the Spending Clause in linking state receipt of federal Medicaid funds to state compliance with the ACA's new coverage requirements. Further, the fact that federal monies will pay the bulk of the costs of such expansion avoided claims of federal coercion of state activity. On appeal, the states argue that consequent costs to them amount to coercive congressional action and a violation of the constitutional divide between federal and state governing authority.

Issue 4: Applicability of the Anti-Injunction statute. Finally, the Court directed the parties to address whether challenges to the individual mandate and its taxing penalty are prohibited by the Anti-Injunction Act which says that no lawsuit can be brought to restrain the assessment or collection of a tax. The 11th Circuit Court did not address this issue but other circuits have and those decisions disagree on whether this law precludes challenges to the ACA's taxing penalty.

Predictions? The challenges to the ACA now before the Supreme Court are complex and the outcome is far from known. Legal and political pundits have analyzed potential outcomes based on the constitutional views of the individual justices. A quirk in the case is whether certain justices should excuse themselves from the case, namely Justice Clarence Thomas because of his spouse's advocacy in opposition to the ACA and Justice Elena Kagan because of her employment as Solicitor General during the Obama Administration's early work on federal health reform legislation. The Court is expected to rule by the end of June 2012 if not sooner.