



HEALTH LAW CHECKUP

November 2011



Paul J. Giancola
602.382.6324
pgiancola@swlaw.com



Barry D. Halpern
602.382.6345
bhalpern@swlaw.com



Brett W. Johnson
602.382.6312
bwjohnson@swlaw.com



Terry Roman
602.382.6293
troman@swlaw.com

What's Up With the Individual Mandate in the Health Care Reform Act?

The legal battle over the constitutionality of the Health Care Reform Act (Act) is on its way to the U.S. Supreme Court for a final decision. To date, multiple federal trial courts have been sharply divided on the constitutionality of the "individual mandate" requirement. The individual mandate is but one provision in a massive piece of legislation—but most consider it to be the linchpin to provide affordable health insurance coverage for all. This is because the Act requires all individuals to obtain health insurance or pay a penalty. The Act presumes that the vast majority of people will elect to purchase insurance rather than to pay a penalty. In exchange for providing a broad pool of insureds paying premiums to insurers, the Act prohibits insurers from denying coverage to applicants with pre-existing conditions, setting lifetime limits on coverage and setting annual benefit limits. If the individual mandate is invalidated, this balance collapses.

The constitutional question turns on whether Congress, under its power to regulate interstate commerce, can require individuals to purchase health insurance. The Commerce Clause provides that Congress has the power



Sara J. Agne
602.382.6026
sagne@swlaw.com



Anne W. Bishop
602.382.6267
abishop@swlaw.com



Robert F. Kethcart
602.382.6533
rkethcart@swlaw.com



Kathryn Hackett King
602.382.6332
kking@swlaw.com



Eric L. Kintner
602.382.6552
ekintner@swlaw.com

to “regulate Commerce ... among the several states” including activities “substantially affecting” interstate commerce. Judges do not agree on whether a requirement to purchase health insurance falls within this power. Five federal district court judges have ruled on the constitutionality of the individual mandate. Of those five, three upheld it and two struck it down. A judge in northern Florida reasoned that the individual mandate was so essential to the Act that he struck down both the individual mandate and the entire Act. These five decisions have been appealed to various U.S. courts of appeal. To date, the Sixth Circuit Court of Appeals upheld the individual mandate as constitutional; the Fourth Circuit dismissed the appeal for lack of jurisdiction; and the Eleventh Circuit, ruling in the northern Florida case, agreed that the mandate should be struck down, but ruled that the judge should not have struck down the entire Act.

As occurred in the district courts, there is currently a split on the constitutionality of the individual mandate in the U.S. courts of appeal and multiple petitions for review have been filed with the U.S. Supreme Court. Based upon the scope of the rulings in the lower courts, it seems logical, but it is not at all certain, that the Supreme Court will limit its review to the individual mandate. Most groups opposed to the law, such as many states and the U.S. Chamber of Commerce, are urging the Supreme Court to review the entire Act, not just the individual mandate.

It is tricky trying to predict what the Supreme Court may do. Prior cases, decided under the Commerce Clause by the Court, provide little definitive guidance. In prior cases, the Court has upheld the broad power of Congress under the Commerce Clause to regulate even non-economic intrastate activity if doing so is essential to a larger scheme that regulates economic activity. For example, in one case, the Court ruled that Congress, under the Controlled Substances Act, could prohibit medical marijuana grown by a farmer for home use. In another case, the Court upheld Congressional regulations that limited the amount of wheat that could be grown for personal consumption. However, in other cases, the Court emphasized that the Commerce Clause

has real limits. In one case, the Court struck down a regulation enacted under the Commerce Clause to criminalize a possession of a firearm in a school zone as part of the Violence Against Women Act, holding that the link between the regulated activity and economic activity was too attenuated.

The problem confronted by the lower courts to date is the need to identify a constitutionally significant limiting principle for congressional power under the Commerce Clause. Those courts that have ruled against the individual mandate argue that the Supreme Court has never authorized a regulation against inactivity (the failure to purchase insurance) and are worried that upholding the individual mandate could obliterate the boundaries inherent in the system of enumerated congressional powers. Those courts that have ruled in favor of the individual mandate argue that since everyone needs health care at some point in their lives and individuals receive health care services regardless of ability to pay, the Act regulates individuals who are, in the aggregate, engaged in active economic activity, which means that the need for health care (whether now or later) substantially affects the national health insurance market.

If the Supreme Court limits its review to the individual mandate and strikes it down, the rest of the Act would still remain standing. If this occurs, health insurers would still be required to provide coverage for applicants with pre-existing conditions and without limits in coverage—but without the cost-shifting requirement that everyone buy insurance, including the young and healthy. The individual mandate that expands the pool of insureds to include young and healthy individuals was a strong incentive for insurers to support the Act. As a result, the Act may significantly change how health insurance is financed and sold. It is difficult to predict how insurers will react without the assurance of a large healthy pool of insureds to offset the requirement to provide coverage to everyone who applies for insurance. In the meantime, insurers have deadlines to implement the provisions of the Act but must deal with the uncertainty of whether the individual mandate is constitutional. Moreover, even if the individual mandate

is upheld, health insurance experts have recently raised concerns that the penalty is so weak, that it is not going to compel a large portion of young, healthy individuals to buy insurance. This will likely result in increasing the cost of insurance for those who do purchase it and defeat a primary goal of the Act to provide affordable coverage for all.

Stay tuned for new developments. Regardless of the outcome at the Supreme Court, there appears to be a rocky uncertain road ahead for health insurance under the Act.

Past Issues
Health Care Group
Snell & Wilmer

©2011 All rights reserved. The purpose of this newsletter is to provide readers with information on current topics of general interest and nothing herein shall be construed to create, offer or memorialize the existence of an attorney-client relationship. The content should not be considered legal advice or opinion, because it may not apply to the specific facts of a particular matter. Please contact a Snell & Wilmer attorney with any questions.

Snell & Wilmer L.L.P. | One Arizona Center | 400 East Van Buren Street | Suite 1900 | Phoenix, Arizona 85004
The material in this newsletter may not be reproduced, distributed, transmitted, cached or otherwise used, except with the written permission of Snell & Wilmer L.L.P.