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Overview of Litigation Filed to Stop Health Reform

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An important element of health care reform is the requirement that most individuals have minimum health insurance or pay a penalty. Elected officials and private citizens from a number of states are arguing that the Patient Protection and Affordable Care Act (Affordable Care Act) is unconstitutional because of this so-called "individual mandate."[2] This requirement is critical because, without it, healthy people can go without insurance coverage until they need it. If healthy people are able to neglect coverage in this way, implementation of the health care reform law would be seriously threatened. Insurance markets would struggle to adhere to provisions contained in the law that, for example, require insurers to charge premiums without differentiation based on health status and to provide coverage regardless of pre-existing conditions and without annual or life-time limits on coverage. *Compare* Charles Fried, *Health care law's enemies have no ally in Constitution,* BOSTON GLOBE, May 21, 2010 ("Insurance just won't work if you could wait until your house is on fire to buy it.").

Overview of the cases

Minutes after President Obama signed the Affordable Care Act into law on March 23, 2010, attorneys general from Florida and other states challenged the constitutionality of the law in federal court. Later that day, Virginia's Attorney General also filed suit. Since then, at least six other cases have been filed. The actions are summarized below:

1. *Florida et al v. Sebelius et al.*, No. 3:10-cv-00091 (N.D. Fla.). This case was filed on March 23d, by Florida Attorney General Bill McCollum and attorneys general from 12 states. Amended on May 14th, the complaint now includes attorneys' general and governors from 20 states: South Carolina, Nebraska, Texas, Utah, Louisiana, Alabama, Michigan, Colorado, Pennsylvania, Washington, Idaho, South Dakota, Indiana, North Dakota, Mississippi, Arizona, Nevada, Georgia, and Alaska. The National Federation of Independent Businesses and two individuals also joined. The amended complaint raises a number of constitutional challenges to the individual mandate and to the Affordable Care Act's requirement that states participating in the Medicaid program expand coverage to individuals with incomes below 133% of the poverty line.

   At a scheduling conference held on April 14th, the U.S. Department of Justice stated its intent to file a motion to dismiss the case. The attorneys general announced their

[1] Zachery Long, a law student at UNC-Chapel Hill, assisted with the preparation of this issue brief.
[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

plan to file a motion for summary judgment. Federal District Judge Vinson, who is hearing the case, said he will decide the motion to dismiss first, with oral argument set for September 14, 2010.

Judge Vinson also noted that he has received a number of requests to intervene in the case, many of them from *pro se* applicants. He denied a motion to intervene filed by Dr. Orly Taitz, an attorney and dentist. In his Order, Judge Vinson noted that the parties "indeed, the citizens of this country, have an interest in having this case resolved as soon as practically possible … [a] task … made exponentially more difficult if all those who have an opinion and an interest in the outcome of the case were allowed to intervene and to join in these proceedings." Order at 4-5 (Apr. 8, 2010). The court refused to focus on collateral issues, such as Dr. Taitz's allegation that President Obama was born in Kenya and, thus, unable to be the President. *Id.* In a subsequent order, Judge Vinson denied Dr. Taitz's motion for reconsideration, as well as the motions of four other individuals to intervene (on both sides of the issue). Order on Motions to Intervene (Apr. 23, 2010). The April 23rd Order also states that additional intervention requests will be summarily denied unless they satisfy the legal standard for intervention. *Id.*

2. *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10cv188 (E.D. Va.). This case is before Judge Henry Hudson, a federal district court judge in the Eastern District of Virginia. The Virginia legislature has passed a law that prohibits the federal government from requiring residents to obtain health insurance coverage. *See* Va. Code. § 38.2-3430.1 (2010). In its Complaint, the Commonwealth alleges that the collision between the state and federal schemes imposes an "immediate, actual controversy involving antagonistic assertions of rights." Complaint, ¶ 4. On May 24th, Secretary Sebelius moved to dismiss the case on a number of grounds, including ripeness. *See* Memorandum in Support of Defendant's Motion to Dismiss (May 24, 2010). She also cites Supreme Court precedent that the Commonwealth "cannot convert its political dispute with the federal government into a legal claim through the vehicle of a *parens patriae* suit brought on behalf of its citizens." *Id.* at 12 (citing Mass. v. Mellon, 262 U.S. 447 (1923). The Secretary argues further that Virginia lacks standing because the minimum coverage provisions of the Affordable Care Act will not operate on Virginia as a state, and the State cannot "manufacture standing" by passing legislation that purports to exempt its citizens from any requirement to purchase health insurance. *Id.* at 14. The motion to dismiss also argues for dismissal because the health reform law is a valid enactment under the Commerce Clause, and the minimum coverage provision is an integral part of the larger regulatory scheme, "necessary and proper" to Congress's regulation of interstate commerce. *Id.* at 30-35.

3. *Liberty Univ. et al. v. Geithner et al.*, No. 6:10-cv-00015 (W.D. Va.). This Complaint includes claims that the Affordable Care Act grants the federal government the authority to determine which religions are recognized under the Affordable Care Act's religious exemption and this violates the Establishment and Free Exercise Clauses of the First Amendment. Complaint, ¶¶ 126-55. The case is assigned to Judge Norman K. Moon of the Western District of Virginia.

4. *Thomas More Law Center et al. v. Barack Hussein Obama*, No. 2:10-cv-11156 (E.D. Mich.). According to the Complaint, the Thomas More Law Center "engages in

litigation on behalf of its members that promotes and defends America's Christian heritage and moral values, including the sanctity of human life, traditional family values, and an independent and sovereign United States of America." Complaint, ¶ 11. The four individual plaintiffs allege they do not have private health insurance and object to being compelled by the federal government to purchase coverage or contribute in any way to the funding of abortion. *Id.,* ¶¶ 13-16. The Complaint includes a claim that the Affordable Care Act interferes with their free exercise of religion under the First Amendment. The plaintiffs have filed a motion to enjoin implementation of the Affordable Care Act. *See* Plaintiffs' Motion for a Preliminary Injunction & Brief in Support (Apr. 6, 2010). President Obama responded to the motion arguing that the plaintiffs do not have standing (i.e. they have not explained how they have been harmed) and that the case is not ripe for review (the provisions being challenged do not take effect under 2014), and that the plaintiffs are not likely to succeed on the merits of their claims that the legislation exceeds the scope of Congress' authority to make laws. *See* Defendants' Response to Plaintiffs' Motion for Preliminary Injunction and Brief in Support. The Thomas More reply brief is due by June 1, 2010. The case is before Eastern District Judge George C. Steeh, who has set a status conference for June 15, 2010.

5. *Calvey et al. v. Barack Hussein Obama*, No. 5:10-cv-00353 (W.D. Okla.). The lead plaintiff, Kevin Calvey, is running for the U.S. Congress. The complaint appears to be modeled on the complaint filed in *Thomas More Law Center*. The plaintiffs object to being compelled by the federal government to purchase insurance coverage and contribute in any way to funding abortion. *See* Complaint, ¶ 8. The case is assigned to Judge David Russell.

6. *Lt. Gov. Phil Bryant et al. v. Holder et al*., No. 2:10-cv-76 (S.D. Miss.). The complaint argues that, since, *NLRB v. Jones & Laughlin Steel,* 301 U.S. 1 (1937), Congress "has continued to usurp additional powers by pretending the Commerce Clause has virtually no limits." Complaint, ¶ 39. The Complaint seeks certification of a statewide class. *Id.* at ¶¶ 97-106. Currently, the Defendants' Answer is due on June 14, 2010. Judge Keith Starrett, Southern District of Mississippi, is presiding.

7. *Association of American Physicians & Surgeons v. Sebelius et al*., No. 1:10-cv-00499 (D.D.C). The Complaint includes claims that AAPS members are being illegally forced to participate in Medicare Part A and that the Affordable Care Act's insurance mandates are unconstitutional. This case was filed two days after a district judge had denied the federal government's motion to dismiss *Hall v. Sebelius*, a case that also challenges participation in Medicare Part A. *AAPS* added the Affordable Care Act claim and then asked to have the case assigned to the *Hall* judge as a "related case." Secretary Sebelius and the other government officials have filed a notice opposing the related case designation. They argue that the cases lack an essential ingredient of related cases—common facts—and that the motion has the appearance of judge shopping. *See* Notice of Opp. to Related-Case Designation (May 12, 2010).

8. *New Jersey Physicians, Inc. et al. v. Obama et al*., No. 2:10cv01489 (D. N.J.). Filed on March 30, 2010, this complaint alleges that the individual mandate and tax penalties are unconstitutional and that the Congress and President are violating the Fifth Amendment.

9. *United States Citizens Association et al. v. Obama et al*., No. 5:10-cv-1065 (N.D. Ohio). This complaint was filed on May 12th by the Association and five individual members of the Association. The case argues that the individual mandate violates the Commerce Clause and the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution. The case is assigned to Judge Dowd of the Northern District of Ohio.

10. *Shreeve v. Obama et al*., No. 1:10-cv-71 (E.D. Tenn.). Mr. Shreeve, a resident of Jefferson County, alleges that the Constitution does not grant the federal government the authority enact "Obamacare" to regulate health care and that President Obama, Senator Harry Reid, and Speaker Pelosi violated their oaths of office by voting for and signing Obamacare. *See* Complaint (Apr. 8, 2010).

To date, the legal landscape has been quite fluid and more cases could be filed.

While the claims differ somewhat, all of these cases focus on the so-called "individual mandate" provision of the Affordable Care Act—which requires most individuals to either have and maintain minimum health insurance coverage or pay a penalty as part of their income tax filing. According to the complaints, the individual mandate exceeds the scope of authority given to Congress in the Constitution.

The Affordable Care Act is enacted pursuant to the Commerce Clause. See PPACA, Pub. L. No. 111-148, § 1501, as amended by § 10106. Not surprisingly, the anti-reform cases focus on Congressional authority under the Commerce Clause "to regulate Commerce … among the several States." U.S. Const., Art. I, § 8. The crux of the plaintiffs' claims is that the Constitution does not authorize Congress to impose an "individual mandate" and that the Affordable Care Act regulates not interstate activity but *non*economic inactivity by penalizing individuals who decide not to obtain minimum health insurance. However, as Yale Law School Professor Jack M. Balkin has pointed out, almost everyone consumes health care, and individuals not purchasing health insurance are instead self-insuring through various means, including out-of-pocket payments, reliance on family and friends, and use of emergency rooms. Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 N. ENG. J. MED. 482 (Feb. 25, 2010); *see also* Akhil Reed Amar, *Constitutional objections to Obamacare don't hold* up, LOS ANGELES TIMES, Jan. 20, 2010 (noting that in 1791 President Washington signed legislation creating a national bank even though the word "bank" does not appear in the Constitution). [3]

To succeed on this claim, these challengers will need to distinguish decades of Supreme Court precedent. At least as far back as 1944, the Supreme Court has recognized that the business of insurance falls within Congress' authority under the Commerce Clause. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 (1944) ("Perhaps

[3] The Constitution allows Congress to make all laws that are "necessary and proper" to carrying out the Commerce Clause authority. U.S. Const., Art I, § 8. In a recent Supreme Court case, ten states whose officials are participating in the Florida case submitted a friend-of-the-court brief arguing that the test under the necessary and proper clause is simply whether the Congressional enactment is a rational and appropriate means for carrying out an enumerated power. See Brief for the State of Kansas et al as Amici Curiae in Support of Petitioner in United States v. Comstock, No. 08-1224 (Sept. 4, 2009) (states included AL, AZ, FL, LA, MI, MS, PA, SC, UT, WA). *See* United States v. Comstock, _ S.Ct. _, 78 USLW 4412, 2010 WL 1946729 (May 17, 2010) (upholding federal statute under "necessary and proper" clause).

no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States."). Notably, the Supreme Court has recently affirmed a broad Congressional authority to regulate under the Commerce Clause in similar situations. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding federal regulation of marijuana grown for home use as part of a national scheme for banning controlled substances). In *Gonzales*, Justice Scalia noted, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (concurring opinion). *See* Simon Lazarus, *Mandatory Health Insurance: Is it Constitutional?, at* http://acslaw.org/pdf/Lazarus%20Issue%20Brief%20Final.pdf (hereafter Lazarus, *Is it Constitutional?*). *Compare United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995) (limiting Congress' authority under the Commerce Clause when activity is non-economic); *see* Lazarus, *Is it Constitutional?* at 5-6 (discussing *Lopez* and *Morrison*).

The plaintiffs also charge that the Affordable Care Act does not fall within Congress' authority to "lay and collect Taxes, Duties, Imposts, and Excises, to … provide for the common Defense and general Welfare of the United States." U.S. Const., Art. I, § 8; *see* U.S. Const., XVI Amend. They argue that the insurance mandate provision is a "direct" tax that is prohibited by Article I, § 9. This argument is untenable given the wording of the Affordable Care Act, which clearly structures the payment as a tax. *See* Lazarus, *Is it Constitutional?* at 10-12.[4]

The Virginia case raises an additional constitutional issue. As noted, Virginia has enacted state legislation designed to block, or nullify, enforcement of the federal reform law. The question arises, then, whether the Virginia law violates the Supremacy Clause, which makes federal law the "supreme Law of the Land … any Laws of any State to the Contrary notwithstanding." U.S. Const., Art. IV. Many Supreme Court cases confirm the supremacy of federal law. *E.g., Cooper v. Aaron*, 358 U.S. 1 (1958) (confirming supremacy of federal Supreme Court decision requiring school desegregation over an Arkansas constitutional amendment that prohibited integration); *see* Timothy S. Jost, *Can the States Nullify Health Care Reform?*, 362 N. ENG. J. MED. 869 (Mar. 11, 2010) and posted by nejm.org (Feb. 10, 2010).

Aside from these substantive arguments, there are sure to be questions raised as to the plaintiffs' standing to file the cases. As noted above, the Department of Justice has already raised a number of these issues in its opposition to the request for a preliminary injunction in *Thomas More Law Center*, the case filed in the Eastern District of Michigan. There are numerous concerns, such as: (1) whether the cases are ripe for review—the individual mandate provision does not become effective until 2014; (2) whether plaintiffs who are state officials can challenge the constitutionality of a federal law—Supreme Court precedent, *e.g. Massachusetts v. Mellon*, 262 U.S. 447 (1923), says the United States serves the *parens patriae* role; and (3) whether plaintiffs who are individuals have standing to challenge the individual mandate as an unauthorized tax—the accepted means for citizens to challenge taxes are to pay the tax and raise their arguments when asking for a refund or to refuse to pay the tax when it comes due and make their claims when and if the federal

[4] The complaints also allege that the Affordable Care Act violates the Tenth Amendment and the Equal Protection and Due Process Clauses of the U.S. Constitution.

government seeks payment. *See, .e.g.,* Timothy S. Jost, *Sanction the 18 state AGs*, THE NATIONAL LAW JOURNAL, Apr. 12, 2010 (also pointing out problems with factual allegations).

Conclusion and recommendations

The litigation is a legal and political lightening rod that should be reviewed on an ongoing basis. We suggest the following:

1. *Monitor litigation*. If individuals in your state are considering anti-reform litigation, urge careful consideration of the issues. It is important to understand your state's unique situation. For example, Washington's attorney general has joined the challenge in Florida, arguing that the Medicaid expansion is too onerous. Meanwhile, the State of Washington is considering an option contained in the health reform law that allows early expansion of Medicaid to additional populations that would not otherwise take effect until 2014.

> Consult the health reform folder on our Web site, www.healthlaw.org, for pleadings and resource materials.

2. *Gain an understanding of the reasoning behind these law suits*. As state residents and taxpayers funding these law suits by state officials, it is important to know as much as possible about the considerations leading to the litigation. Find out whether Freedom of Information Act/Public Records Act requests have been filed with the state officials considering or entering these cases. For example, the Washington State Democrats have filed a request with Attorney General Robert McKenna to obtain access to "all documents relating in any way to your decision to join in bringing or threatening a lawsuit challenging some or all of the historic health-care legislation." Letter from Dwight Pelz, Chair, Washington State Democrats, to Attorney General McKenna (Mar. 23, 2010).

3. *Monitor state legislative/ballot initiative activities*. The National Conference of State Legislatures tracks legislative proposals at www.ncsl.org/default.aspx?tabid=18906. As of early May 2010, 39 states were considering constitutional/legislative amendments designed to opt out of or nullify health reform. In three states, Virginia, Idaho, and Utah, legislation has been signed. *Id.* The Center for Budget and Policy Priorities and Families USA are providing advocacy support.

When reviewing a proposed measure, it is important to understand not only what the proposal is intended to do but any unintended consequences the law could have on the state's ability to regulate health insurance. For example, Colorado Ballot Initiative 45 says that the State may not "deny, restrict or penalize the right or ability of any person to make or receive direct payments for lawful health care services." This provision could be broadly read to prohibit the State from regulating the scope or practice of medicine, enacting mandated insurance benefit requirements, or prohibiting "balance billing" practices where health care providers collect amounts from patients that exceed rates negotiated with a health plan or insurer. The Colorado law also illustrates the importance of monitoring these enactments against state constitutional and statutory requirements that establish procedures that must be used when laws are being enacted. Colorado AARP, the Colorado Consumer Health Initiative, and others have filed a state court case raising numerous questions about whether the law was properly enacted. *See Earnest et al. v. Gorman et al*., No. 2010SA100 (Co. S. Ct.).