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Disagreeing with two other federal district courts, Judge Henry E. Hudson of the Eastern District of Virginia has ruled unconstitutional the section of the Patient Protection and Affordable Care Act (PPACA) imposing a monetary penalty on those who do not purchase adequate health insurance. With two other federal district courts ruling contrarily, the future of the individual insurance mandate of the recently passed health care reform legislation is likely in for a long court battle.

Constitutionality of Individual Insurance Mandate in Health Care Reform Law – Score Now 2-1s

By Susan Hoffman

Disagreeing with two other federal district courts, Judge Henry E. Hudson of the Eastern District of Virginia ruled unconstitutional the section of the Patient Protection and Affordable Care Act (PPACA) that imposes a monetary penalty on those who do not purchase adequate health insurance. Judge Hudson severed that provision from the rest of PPACA, and denied the Commonwealth of Virginia's petition for injunctive relief, on the grounds that higher courts will have an opportunity to review the question before the penalty takes effect in 2014.

Virginia sued to have the individual mandate declared unconstitutional on three grounds: 1) that it overstepped Congressional authority under the Commerce Clause of the Constitution; 2) that it exceeds Congressional authority to regulate the general welfare; and 3) that it conflicts with the state's "Virginia Health Care Freedom Act" – a law adopted to prevent application within Virginia of PPACA's individual mandate to purchase health insurance. Judge Hudson primarily addressed the first two issues, finding it unnecessary to reach the question of state authority to outlaw PPACA's mandate.

The two other courts to have reached the question of constitutionality – Detroit¹ and Lynchburg, Virginia² – have found the law to be a valid exercise of the power of Congress under the Commerce Clause. All three decisions focused on the same cases – those upholding the right of the federal government to impose penalties on those who grow wheat for their own consumption or who grow "medical marijuana" for their own use. Even though those individual actions have no direct involvement in interstate commerce, because the decisions to grow their own product reduced demand for a product moving in interstate commerce, the U.S. Supreme Court had upheld the regulation as relevant to the power of Congress to regulate interstate commerce. The question under the PPACA that has divided these district courts is whether *non-activity* – a failure to purchase insurance – can be similarly regulated. While acknowledging the federal government's argument that those who fail to purchase insurance often end up obtaining medical care financed by others, and that the elimination of pre-existing condition exclusions contained in the PPACA would be economically nonviable without the individual mandate, Judge Hudson concluded that none of the prior precedents

permit Congress to regulate nonaction under the guise of regulating *activity* affecting interstate commerce. As Judge Hudson noted, no prior precedent “has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.”

Judge Hudson also dismissed the federal government’s argument that the mandate simply imposes a tax, and that such imposition is a valid exercise of its right to levy taxes. In this aspect of his holding, Judge Hudson relied on a line of cases decided during the early days of the Great Depression, which struck down various penalties designed to regulate, for example, child labor. Nevertheless, noting that those old cases had never been formally overruled, Judge Hudson cited the efforts by Congress to avoid calling the individual mandate penalty a “tax” despite the fact that it is contained in the Tax Code and reported on an individual’s income tax return. Based on the legislative language itself, he therefore rejected the federal government’s attempt to save the mandate under the authority to levy taxes. Because it is “in form and substance” a penalty, it had to be supported under some other Congressional authority in the Constitution, and he had already found that it was not supported by the Commerce Clause.

Because of the length of time before the individual mandate will be imposed under the PPACA, Judge Hudson rejected Virginia’s request for injunctive relief. He also limited the holding to the individual mandate itself – severing it from the remainder of the PPACA. And he acknowledged that “the final word will undoubtedly reside with a higher court.”

Because the severing of the individual mandate does not affect any of the PPACA provisions imposing requirements or restrictions on employers and employer plans, Judge Hudson’s decision should not affect employers’ planning for the implementation of PPACA’s requirements that take effect for plan years beginning in 2011.

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¹ *Thomas More Law Center v. Obama*, No. 2:10-CV-11156 (E.D. Mich. Oct. 7, 2010).

² *Liberty University, Inc. v. Geithner*, No. 6:10-CV-00015 (W.D. Va. Nov. 30, 2010).