

Attacks on Health Reform and Developing Litigation Issues in Managed Care

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Overview

- **Current Constitutional Challenges to PPACA**
 - **The Florida Action**
 - **The Virginia Action**

Overview (cont'd)

- **Current litigation issues in state health reform models that were the genesis of Federal Health Care Reform**
 - **Maine**
 - **Massachusetts**

TWO LAWSUITS CHALLENGING PPACA

- **Commonwealth of Virginia v. Sebelius
(C.A. No.: 3:10-cv-188) (E.D. VA)**
- **State of Florida v. United States Department
of Health and Human Services
(C.A. No.: 3:10-cv-91-RV/EMT) (N.D. FLA)**
- **Both cases challenge constitutionality of
PPACA**
- **Some shared arguments; some distinct**

COMMONWEALTH OF VIRGINIA

- **Brought by Attorney General, Kenneth Cuccinelli**
- **VA is sole plaintiff**
- **VA did not join FLA action**

2010 VA General Assembly Enacts Virginia Code §38.2 – 3430.1:1

- **“No Resident. . . shall be required to obtain or maintain a policy of individual insurance coverage. . . .”**
- **“No provision of this title shall render a resident liable for any penalty, assessment, fee or fine as a result of his failure to procure or obtain health insurance coverage. . . .”**

Allegations in the FLA. Complaint

- **Congress lacks “political will” to fund healthcare through tax and spending powers**
- **Forces healthy young adults and other rationally uninsured individuals to cross-subsidize older and less healthy citizens**

Alleged Violation of Commerce Clause

- **Art. 1, Section 8 grants Congress power to regulate “Commerce ... among the several states ...”**
- **Broadly enforced: Basis for Civil Rights Legislation**
- **VA argues that Congress does not have Constitutional authority to enact individual mandate**
- **VA claims a citizen is not a “Channel of Commerce”**
- **A person who chooses to go without insurance is a non-economic activity--Passive**
- **Congress cannot force citizens to purchase a good or service**

State of Florida Action

- **18 States currently**
- **Broader complaint than VA**
- **Alleges encroachment on the liberty of individuals**
- **Alleges encroachment on state sovereignty**

State of Florida Action (cont'd)

- **Major focus on PPACA's impact on Medicaid**
- **Florida forced to vastly broaden its Medicaid eligibility**
- **PPACA expands Medicaid to those under 65 with income up to 133% of poverty level**

State of Florida Action (cont'd)

- **FLA Claims:**
 - **This will bust their budget**
 - **Force massive administrative changes**
 - **Make Florida agencies an arm of the Federal Government**

The Florida Action – Constitutional Theories

I. Violation of Article 1 and 10th Amendment

- co-opting control over state budgetary process

II. Article 1, § 2, 9

- Capitation and a direct tax
- Not apportioned among the states per census data

The Florida Action – Constitutional Theories (cont'd)

III. Art. 1 (Commerce Clause) and 10th Amendment

- Forces citizens to procure health care or pay a tax penalty**
- compels them to perform an affirmative act or pay penalty**
- Inactivity is not commerce**

The Florida Action: Status

- **Briefing on the Motion to Dismiss will be completed by August 27, 2010.**
- **Oral Argument will be held on September 14, 2010.**
- **If the Motion is denied, the parties will then brief Summary Judgment Motions.**

Analysis of FLA and VA Actions

- **Supreme Court typically defers to Congress**
- **Broadly interprets commerce clause and taxing authority**
- **Some commentators however, characterize the individual mandate as unprecedented and not authorized under commerce clause**
- **Cannot use commerce clause to force citizens to buy a product**

Premium Rate Litigation

- **PPACA Section 1311 delegates to the States the authority to require plans participating in an Exchange to justify premiums.**
- **Given recent refusals by State Insurance Commissioners to permit rate increases, plans in an Exchange risk politics supplanting actuarial standards.**
- **Two recent cases, in Maine and Massachusetts respectively, highlight this problem.**

Anthem Health Plans of Maine v. Superintendent of Insurance, Kennebec Sup. Ct. Civil Action No. BCD-WB-AP-08-24 (2010)

- **Suit brought by Anthem following ME Insurance Superintendent’s refusal to permit a 2009 premium that included any profit.**
- **Insurance Superintendent decision to “allow no profit and risk margin this year” is based on:**
 - **The financial hardship of those subscribing to individual products in Maine; and**
 - **The overall financial health of Anthem BCBS.**

Anthem Arguments

- **Anthem lost more than \$3.7 million in individual business in Maine in the last 5 years.**
- **Proposed premium increase permitted for only 3% profit.**
- **Improper for Insurance Department to base rate determinations on overall profitability of the carrier.**
- **The Superintendent's reliance on the comments of policyholders is improper.**
- **The refusal to permit Anthem any rate of return violates its equal protection rights.**

The ME Insurance Department's Response

- **The ME Insurance Code does not require the Superintendent to provide for a profit “for all products at all times”.**
- **The ME Insurance Code does not prohibit the Superintendent from considering the overall financial health of a carrier.**
- **The Insurance Superintendent's treatment of Anthem is permissible because it is rationally related to a legitimate government interest.**

The Court's April 21, 2010 Ruling

- Oral argument held on the Anthem petition for review on March 24, 2010.
- Last Wednesday, the Court upheld the Commissioner's conclusion that Anthem is not entitled to profit as part of its 2009 rates.
- The Court concluded that nothing in the Insurance Code mandates "that a rate is inadequate if it is sufficient to cover projected losses but fails to include a reasonable profit."
- The Court also found that nothing in the Insurance Code "limits the ... inquiry into the adequacy of a particular rate to the performance of related individual insurance products."
- Finally, the Court ruled that there was no Equal Protection Clause violation.

Massachusetts Association of Health Plans et al. v. Murphy, Suffolk County, Superior Court Civil Action No. 10-1377-BCS2 (2010)

- **Massachusetts Plans submitted proposed rate increases in early March 2010 for April 1, 2010 effective dates.**
- **MA Insurance Commissioner denies 235 of 274 proposed rate increases in the individual and small group markets.**
- **On April 1, 2010, the Commissioner concluded that the proposed rate increases are excessive and unreasonable.**

Plan's Motion for Preliminary Injunction

- **On April 5, 2010, 7 plans joined the Massachusetts Association of Health Plans in moving to enjoin the Insurance Commissioner.**
- **The plans argue that the Commissioner is not basing his determination on actuarial principles.**

The Court's Ruling on the Preliminary Injunction

- **On April 12, 2010, the Court denied the motion for preliminary injunction without addressing the merits of rate rejections.**
- **Instead, the Court ruled that the MA Insurance Code provides an administrative remedy prior to redress in the Courts.**

Current Status of the Massachusetts Rate Dispute

- **Most of the affected plans simultaneously pursued their administrative hearing rights before the Division of Insurance.**
- **Those hearings began last week, at which time the MA Attorney General, Martha Coakley, intervened.**
- **Following completion of the hearings, the Division of Insurance will have 30 days to issue a ruling.**

Current Status of the Massachusetts Rate Dispute (cont'd)

- **Separate request by the Commissioner for an injunction against Harvard Pilgrim and Fallon**
- **Last Wednesday, Judge Superior Court granted the Commissioner's injunction.**
- **The Court ruled that the Commissioner's interpretation of the rate regulations is entitled to deference and that, as a result, the plans must use April 2009 base rates to request increases.**

Analysis

- **Disturbing trend of premium rates being dictated by politics rather than actuarial soundness?**
- **Could this extend to rates established in an Exchange under PPACA?**
- **Is the action of these Insurance Departments arbitrary and capricious?**
- **Do these premium caps address the core issue driving premium increases?**