

## A Lawyer's Update

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Currently the law of the land, clients need education on the status of PPACA litigation and the portions of the legislation that could impact them.

# Patient Protection and Affordable Care Act Litigation

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (PPACA) into law. Lauded as a historic legislative accomplishment that would forever change the face of health care, the president's stated

goal was to make "significant improvements that will help to give American families and small business owners more control of their own health care." Politically divisive, the left received the PPACA with jubilation, the right with derision, and political acrimony rose above the expected squawking. Opponents of the bill unleashed a barrage of litigation aimed at overturning the PPACA. In particular, the lawsuits targeted the provision requiring most of the population to carry health insurance by 2014.

No matter where you fall on the political spectrum, this litigation is important for you as an individual and for you as a defense lawyer. Clients will undoubtedly expect their attorneys to predict whether

the act will survive legal challenges and to explain its impact. This article will provide background on the legislation, the litigation, and the implications of both. In other words, it will describe the important provisions of the PPACA, including those contested in courts, update the status of the cases as they have progressed through the courts, and summarize the major arguments on both sides. Finally, the article will analyze the impact of the PPACA should the court system uphold it, whether in part or in full.

### The Patient Protection and Affordable Care Act

As amended by the Health Care and Education Reconciliation Act, the PPACA contains provisions that became effective immediately, after 90 days, after six months, and by 2014. The principle behind the law recognizes that those who actually do or can purchase health insurance bear the cost burden for treating the uninsured and those rejected by health insurance companies. By requiring people to acquire health insurance, the legislation can shift the aggregate costs of health care from a small number of persons to a larger pool, thus reducing average costs for the entire population. Though voluminous, the leg-

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isolation contains a couple of essential components designed to improve access to and reduce the cost of health care.

The PPACA establishes tax credits for small businesses with 25 or fewer full-time employees that purchase health insurance for their employees, and it requires employers with more than 50 full-time employees to provide health insurance for their

employees. 26 U.S.C. §§45R, 4980H. The act also creates state-based and state-administered insurance exchanges for the individual and small group markets that will allow individuals and small businesses to leverage their collective buying power to obtain competitively priced insurance. 42 U.S.C. §18031. States may opt out of this requirement if they provide coverage at least as comprehensive as that required under the PPACA. The PPACA requires employers that offer coverage and contribute to the insurance plan offered by the employer to provide free-choice vouchers to qualified employees for the purchase of qualified health plans through the exchanges.

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The new law will expand Medicaid to cover all individuals under the age of 65 with incomes of up to 133 percent of the federal poverty level, and the federal government is required to fund 100 percent of the costs of newly eligible individuals for the first three years of expansion (2014–2016). 42 U.S.C. §§1396a, 1396d. The act expands federal programs to assist the poor with obtaining health insurance and complements that objective by offering tax credits for health-insurance premium payments and federal payments to cover out-of-pocket expenses. 26 U.S.C. §36B; 42 U.S.C. §18071. The PPACA also prohibits certain practices in the industry that have prevented individ-

uals from obtaining and maintaining health insurance by banning coverage exclusions for preexisting health conditions and coverage restrictions based on health status. 42 U.S.C. §300gg-1. Also prohibited under the law are charging higher rates for individuals based on their medical history, lifetime limits on benefits, and certain annual limits on benefits. 42 U.S.C. §300gg. Finally, the most controversial provision, and the main subject of litigation, requires certain individuals to obtain health insurance. Specifically, the PPACA requires that by 2014, every “applicable individual” obtain “minimum essential coverage” for each month. 26 U.S.C. §5000A. Failure to obtain coverage results in a tax penalty. The penalty will depend on household income. Exempt from the tax penalty are certain low-income individuals, members of Indian tribes, and individuals who suffer hardship. 26 U.S.C. §5000A(e). The law also exempts certain categories of persons from the definition of an “applicable individual,” including inmates and those objecting on religious grounds. 26 U.S.C. §5000A(d). Congress, after some study, concluded that the minimum coverage requirement would reduce the number of uninsured, which would in turn lower health-insurance premiums. Also, Congress interpreted legislative findings as indicating that the requirement was “essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.” 42 U.S.C. §18091(a)(2)(I). The individual mandate does this by minimizing adverse customer selection by insurance companies and broadening the health-insurance risk pool to include healthy individuals.

### The Litigation

No fewer than 25 lawsuits had been filed when the authors wrote this article—some extraordinarily complex and some completely absurd—challenging the new health care legislation. At the time of drafting this article, only one appellate court had addressed the constitutionality of the PPACA—the Sixth Circuit in *Thomas More Law Center v. Obama*, Case No. 10-2388—though the Fourth and Eleventh Circuits have heard arguments in other cases. Setting that appellate case aside for now, the

district courts have reached widely varying conclusions when addressing the constitutionality of the legislation and, in particular, the minimum coverage provision. On the substantive legal questions, whether through a motion to dismiss or summary judgment, three district courts have upheld the law, while three have held at least part of the PPACA unconstitutional. The courts that have upheld the law are the District Court for the District of Columbia in *Mead v. Holder*, 766 F. Supp. 2d 16, the District Court for the Eastern District of Michigan in *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, and the District Court for the Western District of Virginia in *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611. Of courts finding the law unconstitutional, one court struck only the minimum coverage provision, *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), while another held that the provision was not severable from the rest of the legislation and found the entire law unconstitutional. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 2011 WL 285683 (N.D. Fla. 2011). Unsurprisingly to most, the decisions split along apparently partisan political lines. All of the judges upholding the law were appointed by Democratic presidents while those rejecting it were appointed by Republicans.

The federal government has asserted two main sources of constitutional authority to enact the PPACA: the Commerce Clause and the Necessary and Proper Clause. Defenders of the law have also cited Congress’ taxing power, but courts rarely adopt that argument. On the first source, the federal government has argued that Commerce Clause jurisprudence demonstrates that Congress’ authority under that clause is very broad. Two cases—*Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzalez v. Raich*, 545 U.S. 1 (2005)—are cited by the government as outlining the boundaries of Congress’ Commerce Clause power. *Wickard* dealt with a federal law limiting the amount of grain that a farmer could grow for his own personal consumption. The Supreme Court upheld the law agreeing that Congress had a rational basis to regulate this wheat growth because failure to do so would undercut its regulation of the broad, interstate wheat market. Thus, growing wheat for a family’s personal consumption constituted “commerce” or



“economic activity” that Congress could regulate under the Commerce Clause. *Raich* tested the boundaries of *Wickard* by holding that Congress could prohibit the home growth and use of marijuana that California law had made illegal. Together, those two cases establish that “Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.” *Raich*, 545 U.S. at 18. The PPACA minimum coverage provision, thus argues the federal government, is constitutional because failing to regulate this activity would undercut the overarching purpose of the health care reform legislation. Moreover, failing to purchase health insurance is not inactivity; rather, it represents an active choice to “self-insure” in a universal health care market. To regulate that market, Congress can regulate the substantially related activity of self-insurance. This captures the gist of the government’s Commerce Clause argument although the ideas presented here may not directly reflect the federal government’s nuanced argument in each individual case. We have striven to provide a very general explanatory background for each major legal issue.

The Necessary and Proper Clause argument is much simpler. Because Congress has the power to regulate the interstate health-insurance market and those intrastate markets that are substantially related, Congress may require individuals to purchase health insurance because it is a necessary and proper means to an end; that is, it is a rational method of effectuating a reform of discriminatory and unduly expensive insurance practices. Most, if not all, of the courts upholding the law have not adopted this argument but have usually based their decisions on the Commerce Clause.

Those challenging the law, however, have asked how deciding not to take any action at all suffices as “commerce” or “economic activity” that Congress may regulate. Opponents’ arguments center on the key distinction between economic “activity” and economic “inactivity.” Congress cannot regulate the latter, they say. In that vein, *Wickard* and *Raich* are inapposite to analyzing the PPACA because the parties in those cases already were acting within the mar-

ketplace of goods that the federal government sought to regulate. In *Wickard*, argues the PPACA opponents, the farmer growing wheat for his family was already acting—growing a certain amount of wheat and keeping it at home rather than releasing it into the open market, which the federal government sought to repress or prevent. The same goes for those growing marijuana in their homes for personal use in *Raich*. In neither of those cases did the federal government attempt to force an individual to undertake some economic activity; rather, the federal government simply sought to regulate and proscribe activity in which the individual had already engaged. Commerce Clause jurisprudence does not address forcing someone to act or undertake a new task, and the Commerce Clause does not authorize it. Therefore, the minimum coverage provision is unconstitutional.

Opponents of the provision also contest that Congress has the authority under the Necessary and Proper Clause. Essentially,

they propose that even if the minimum coverage provision enacts a “necessary” exercise of Congress’ power, it is not “proper” because the action exceeded Congress’ power under the Commerce Clause. Citing *Printz v. United States*, 521, U.S. 898 (1997), the opponents reiterate the point about the Necessary and Proper Clause that has been made time and time again: the Necessary and Proper Clause is “the last, best hope of those who defend ultra vires congressional action.”

So which side has the better argument? Well, that’s difficult to say. Defenders of the PPACA have the full scope of the Commerce Clause on their side while also recognizing that the Supreme Court has struck down only two laws on Commerce Clause grounds since 1937, and both cases involved single-subject criminal statutes. See *U.S. v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional the Gun Free School Zones Act as exceeding Congress’ Commerce Clause powers); *U.S. v. Morrison*, 529 U.S. 598



(2000) (holding unconstitutional the Violence Against Women Act as exceeding Congress' Commerce Clause powers). On the other hand, opponents of the PPACA are correct, at least to some degree, in arguing that Congress has never attempted to force individuals to undertake activity in the economic marketplace that they would not have otherwise undertaken.

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**By educating clients**

on the parameters of the legislation and the progress of the litigation, we allow them to better analyze the health care environment and better plan for the future.

As we mentioned before, only one appellate court had addressed these arguments at the time this article was written, and it decided that the law was constitutional and did not exceed the bounds of the Commerce Clause. In *Thomas More Law Center v. Obama*, Case No. 10-2388, 2011 WL 2556039, the Sixth Circuit signaled the viewpoint that the Supreme Court could take in a decision that will ultimately rest in its hands. While uncomfortable forcing individuals' hands in the economic marketplace, in the Sixth Circuit's view, the supporters of the PPACA have the better side of the argument given current Commerce Clause jurisprudence.

The 2-1 majority opinion held that Congress was not forcing economic activity. Rather it was regulating the "self-insurance" market, the choice not to purchase insurance. Congress had a rational basis to believe that self-insurance has substantial effects on interstate commerce and a rational basis to believe that the minimum coverage provision was "essential to its larger economic scheme reforming the interstate markets in health care and health insurance." 2011 WL 2556039, at \*11. The Sixth Circuit drew a similarity between

the way that wheat growing for home consumption would affect Congress' legitimate commerce regulatory interests in *Wickard* to the way that those who did not purchase health insurance affected the health care services marketplace and essentially characterized them as "self-insuring" by paying for health care services directly. And so under the Commerce Clause, through the minimum insurance coverage provision in the PPACA, Congress could regulate the self-insurance market due to its effect on interstate commerce. The opinion also held that the Commerce Clause does not make a textual distinction between activity and inactivity, and thus the Constitution does not support that aspect of the opponents' argument.

More interesting, and perhaps more significant, is the opinion of Judge Jeffrey Sutton, concurring in part and delivering the opinion of the court in part. Significant, because in concurring in the judgment that Congress had the authority under the Commerce Clause to enact the PPACA's "individual mandate," he became the first judge appointed by a Republican president to uphold the legislation. Interesting, because in the opinion Judge Sutton recognizes the legislation's pitfalls and the discomfort that it elicits among the populace.

"In my opinion, the government has the better of the arguments," he wrote. 2011 WL 2556039, at \*23. The "rub," as Judge Sutton puts it, is that not buying health insurance actually constitutes "the other method of paying for medical care: self-insurance." 2011 WL 2556039, at \*24. And legislative findings indicate that "self-insurance" of that type substantially affects interstate commerce: providing uncompensated medical care to the uninsured cost \$43 billion in 2008, and insured individuals absorbed those costs through higher premiums. See *id.*; 42 U.S.C. §18091(a)(2)(F). Enacting the minimum coverage provision was how Congress chose to regulate this group of "self-insurers": "Call this mandate what you will—an affront to individual autonomy or an imperative of national health care—it meets the requirement of regulating activities that substantially affect interstate commerce." 2011 WL 2556039, at \*24.

Judge Sutton's opinion also recognizes the strength of the plaintiffs' argument that the Commerce Clause may apply only

to individuals already engaged in commerce: "it empowers Congress to regulate economic 'activities' and 'actions,' not inaction—not in other words individuals who have never entered a given market and who prize that most American of freedoms: to be left alone." 2011 WL 2556039, at \*25. He thought this argument, of all those opposing the PPACA, "the most compelling." *Id.* Compelling, because neither the Court nor Congress have ever addressed this type of mandate before. The law's novelty could not, however, dispose of the case for three reasons: (1) a court of appeals cannot depart from years of Supreme Court precedent interpreting congressional Commerce Clause authority broadly and supplying the necessary authority to this legislation; (2) the argument does not necessarily suggest that the legislation is unconstitutional, and it could suggest that Congress simply crafted a novel, constitutional solution; and (3) the Commerce Clause does not contain a textual distinction between action and inaction. Judge Sutton concludes with an almost personal sentiment, reflecting a common-sense opposition to the law: "That brings me to the lingering intuition—shared by most Americans, I suspect—that Congress should not be able to compel citizens to buy products they do not want. If Congress can require Americans to buy medical insurance today, what of tomorrow? Could it compel individuals to buy health care itself in the form of an annual check-up or for that matter a health-club membership?" 2011 WL 2556039, at \*32.

Whether you agree with Judge Sutton's concerns, we all tend to agree that he will not have the final word on this issue. The opinion makes multiple references to an imminent Supreme Court review, and all pundits agree that this disagreement will culminate in the highest court of the land. With decisions from the Fourth and Eleventh Circuits due within the coming months, circuit judges seem "[m]indful that we at the court[s] of appeals are not just fallible but utterly non-final" on this law. 2011 WL 2556039, at \*23. While many predict a fair challenge for the law in what is viewed as an ever-increasingly conservative Supreme Court, the admonition of Judge Sutton, who once clerked for Justice Antonin Scalia, that the federal

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government “has the better of the arguments,” may foreshadow that a surprising coalition may uphold the law. Only one thing remains certain in the litigation over the PPACA: a high-noon showdown in the Supreme Court is inevitable.

### The Implications and Communicating with Clients

Perspective is crucial. Love it or loathe it, the Patient Protection and Affordable Care Act is currently the law of the land. Clients need education on the current status of the litigation and the portions of the PPACA that could impact them. The legal arguments are important and interesting to us as lawyers, but the practical impact is considerably more significant in the end. Hospitals and private health care providers are apprehensive about the business repercussions of a constitutional PPACA. While the bulk of the litigation focuses on the minimum coverage provision for individuals, the overall impact of the litigation is much more pervasive. The requirement that certain businesses purchase health care for their employees and offer them the choice to participate in those plans will be critical obligations in the coming years.

If the entire law is upheld as constitutional, then employers will face a very real decision: should they provide health insurance for all employees at the levels required by the PPACA or pay penalties and allow their employees to fend for themselves on the state exchanges? If many employers conclude that the penalty is a less expensive option, this could theoretically lead to the single-payer system that some health care providers fear will cripple their bottom lines. Specifically, these clients have expressed concern that the expansion of Medicaid and Medicare, along with increased participation in state- and federal-funded insurance exchanges, will result in more reimbursements at Medicare rates, which could drive down profits and actually increase the cost of private health insurance. Those health care providers who depend on private insurance to make up the financial gap between the prices of treatment and what Medicaid and Medicare pay for those treatments are among the most concerned. In the opinion of these health care provid-

ers, privately insured individuals create the profit margin enabling the providers to stay in business and remain profitable. That is not to say that this much-maligned single-payer system would come to fruition, or even that it is feasible or theoretically possible. But it is a very real concern, and very real concerns drive very real business attitudes and decisions. By educating clients on the parameters of the legislation and the progress of the litigation, we allow them to better analyze the health care environment and better plan for the future.

The Supreme Court will reach a decision in May 2012 at the earliest, assuming that it does not independently accelerate the process, which we do not expect. In the interim, expect to read decisions from the Fourth and Eleventh Circuits along with much conjecture about a forthcoming Supreme Court decision. In the meantime, consult with your clients and ensure that they have the best information to accom-

modate the PPACA, no matter which argument or arguments prevail.

### Postscript

Since this article was written, three courts have addressed the PPACA. The Middle District of Pennsylvania, through a Republican-appointed judge, held the individual mandate unconstitutional. *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011). The Eleventh Circuit also invalidated that provision in a 2-1 decision, creating a circuit split and making Supreme Court review even more likely. *Florida ex rel. Atty Gen. v. U.S. Dep't of Health & Human Servs.*, 2011 WL 3519178 (11th Cir. Aug. 12, 2011). The Fourth Circuit dismissed the case on jurisdictional grounds, holding that the state of Virginia did not have standing to bring suit. *Virginia ex rel. Cuccinelli v. Sebelius*, 2011 WL 3925617 (4th Cir. Sept. 8, 2011).

