

Memorandum

To: Health Benefit Exchange Board

From: Gabriel Ravel, Staff Counsel, CHHS

Re: Legal Challenges to the ACA

Nearly two dozen lawsuits challenging the Patient Protection and Affordable Care Act (“ACA”) have been filed in federal courts around the country. Although several high-profile decisions have come down in the past months, these decisions are unlikely to have any practical effect on the implementation of the ACA. Nationwide implementation will continue as planned unless and until the Supreme Court decides all or part of the ACA is unconstitutional.

Each lawsuit raises some distinct arguments, but all of the plaintiffs contend that Congress lacked the power to enact the so-called individual mandate, ACA section 1501. The individual mandate requires all individuals to maintain a minimum level of health insurance each month beginning January 2014 or face a penalty. It has been called the linchpin of the ACA. Beginning in 2014, insurers will not be able to deny coverage based on preexisting conditions. Therefore, without an individual mandate to purchase insurance while healthy, uninsured individuals could have an incentive to wait until they become ill to purchase insurance, driving up premiums and costs and thwarting the ACA’s other benefits.

Opponents of the individual mandate argue that Congress did not have the authority to enact it. The federal government has limited powers. Congress may pass laws only if they fall under the powers enumerated in the Constitution. Congress purported to enact the individual mandate under its constitutional authority to regulate interstate commerce, known as the Commerce Clause. Since the New Deal, the Supreme Court has interpreted the Commerce Clause broadly, although there have been some recent cases retrenching that authority. The federal government argues that failure to purchase insurance has effects on interstate commerce because everyone eventually consumes medical care. Because the uninsured often cannot pay for medical services, the burden to pay for the uncompensated care shifts to individuals with insurance and to taxpayers. These costs affect interstate commerce. Plaintiffs in these cases argue that failure to purchase insurance is passive, non-economic activity beyond the Commerce Clause’s regulatory reach.

Alternately, the federal government argues that Congress had the authority to enact the individual mandate under the Necessary and Proper Clause and the General Welfare Clause. The Necessary and Proper Clause enables Congress to enact laws that are necessary and proper for the advancement of its enumerated powers. The federal government argues that the individual mandate is necessary for the whole ACA to work, and the rest of the law clearly is within its Commerce Clause authority. The General Welfare Clause permits Congress to tax to raise revenue. The federal government argues

that the penalty on failure to buy insurance constitutes such a tax. No court to consider the issue agreed with the tax argument because the penalty is designed not to raise revenue but to punish individuals for not complying with the mandate.

So far, three federal district judges held that the individual mandate is constitutional. Those courts are located in Detroit, Lynchburg, Virginia, and Washington, D.C. Four other district judges dismissed ACA lawsuits for procedural deficiencies.

Two federal district judges ruled the individual mandate unconstitutional. The first was in Richmond, Virginia, and the second in Tallahassee, Florida. The judges rejected the Commerce Clause argument, holding that failure to purchase insurance is not economic activity. These judges also rejected the Necessary and Proper Clause argument. They reasoned that the Necessary and Proper Clause enables Congress to pass laws that are necessary to exercise an enumerated power, but it has no independent force. Neither judge issued an injunction against implementation, however.

The Florida case, brought by twenty-six states, is noteworthy because of the scope of the decision. In that case, Judge Vinson held that the individual mandate is so inextricably bound with the rest of the ACA that it is not severable. As a result, his decision that the individual mandate is unconstitutional means that the entire ACA is unconstitutional. On March 3, 2011, however, Judge Vinson issued a stay of his ruling pending appeal, meaning that the ruling does not prevent ACA implementation.

The White House responded to the legal setbacks by proceeding as planned. The Department of Justice appealed all of the unfavorable rulings, and while the appeals work their way through the courts the federal government will continue to implement the ACA. There are no injunctions in place against implementation, and Judge Vinson's ruling is stayed, eliminating any barriers to implementation.

The issue is almost certain to reach the Supreme Court, but not soon enough for ACA opponents to hold off on implementation. Only Florida announced that it will not accept federal money to proceed with health care reform. Four courts of appeals granted expedited review of the cases so they can be resolved quickly. Virginia's Attorney General requested the Supreme Court to hear the case without appellate court review, but it is unlikely to take this extraordinary measure. The Supreme Court should decide this issue some time in the summer or fall of 2012. By that time, 2014 will be very close, and if the ACA is ruled constitutional, states that have not implemented the ACA will have to catch up impossibly quickly. As a result, the federal government and almost every state will do their part to comply with the ACA in case the Supreme Court upholds it.