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Trials & TRIBULATIONS

Health care act passes constitutional muster

In a decision issued last week, the Sixth Circuit Court of Appeals won the race to release the first appellate-level decision regarding the constitutionality of the Patient Protection and Affordable Care Act.

In *Thomas More Law Center v. Obama*, the court determined that the hotly-debated minimum coverage provision, which generally requires all U.S. citizens, with certain exceptions, to obtain a minimum level of health care insurance, was a constitutional exercise of Congress' power pursuant to the Commerce Clause.

The Sixth Circuit also addressed issues of standing, including whether the recent acquisition of health care insurance by a plaintiff purportedly facing future injury as a result of the looming minimum coverage provision could affect the remaining plaintiffs' standing. The court's review likewise included an analysis of the Anti-Injunction Act, an issue that appears to have delayed the Fourth Circuit's pending decision.

The panel's decision was by no means unanimous. Judge Boyce F. Martin Jr., a Carter nominee, authored the court's main opinion. Judge Jeffrey S. Sutton, a Bush nominee, former law clerk to Justice Antonin Scalia, and purported member of the Federalist Society, concurred in part and delivered part of the majority opinion. District Judge James L. Graham, sitting by designation, dissented from the panel's ruling regarding the constitutionality of the minimum coverage provision.

In an article published last month, my partner, Elizabeth Wolford, discussed the background of PPACA, as well as the cases pending before the Fourth Circuit. The Fourth Circuit heard oral argument on May 10, and it appeared that this circuit would be the first to officially weigh in on the constitutionality of the minimum coverage provision.

Following argument, the Fourth Circuit issued an order requesting supplemental briefing on the topic of the Anti-Injunction Act — a possible bar to judicial review of the minimum coverage provision. In the interim, the Sixth Circuit heard oral argument on June 1, and the court issued its decision less than a month later, on June 29.

Impacting the issue of standing, the plaintiff who initially provided a declaration establishing a potential injury as a result of the minimum coverage provision obtained private health insurance coverage during the pendency of the appeal. The Sixth Cir-

cuit allowed the plaintiffs to supplement the record with declarations from two other plaintiffs, thus curing any defects in standing.

The court also evaluated whether the Anti-Injunction Act barred its review. The Anti-Injunction Act bars suits "restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a). Although the minimum coverage provision includes a shared-responsibility payment termed a "penalty" and enforced by the IRS, the court found that the penalty provision of PPACA was not a "tax."

In short, the court concluded that although some taxes include statutory provisions labeled as "penalties," inclusion of the term penalty does not mean that the minimum coverage provision is, in fact, a tax.

Turning to the Sixth Circuit's Commerce Clause analysis, the court discussed Congress' authority to regulate pursuant to the Commerce Clause. Article I, Section 8, clause 3, better known as the Commerce Clause, permits Congress to regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate com-

merce, ... i.e., those activities that substantially affect interstate commerce," *Thomas More Law Center v. Obama*, No. 10-2388, Slip Op. at 15 (quoting *United States v. Lopez*, 514 U.S. 549, 558-559 [1995]). PPACA draws on the third realm of regulatory authority — activities having a substantial relation to interstate commerce.

The court analyzed the quartet of U.S. Supreme Court jurisprudence that has formed much of the legal debate on the constitutionality of the minimum coverage provision. The cases of *Gonzales v. Raich*, 545 U.S. 1 (2005) and *Wickard v. Filburn*, 317 U.S. 111 (1942) endorse Congress' use of its Commerce Powers, while *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) suggest limitations on such powers.

The Supreme Court has recognized that Congress can use its Commerce Clause authority to regulate even intrastate economic activity, as long as the activity "substantially affects interstate commerce," *Id.* Congress is also empowered to regulate non-eco-

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conomic intrastate activity, provided that this action “is essential to a larger scheme that regulates economic activity,” *Id.*

Wickard allowed Congressional restriction on the ability to grow wheat, even for the grower’s own use, because this activity could impact demand and thwart regulation of the interstate wheat market, *Id.* at 15-16 (discussing *Wickard v. Filburn*, 317 U.S. 111 [1942]). Likewise, *Raich* permitted Congress to preempt a state law permitting the growing and possession of marijuana for personal use, *Id.* at 16 (discussing *Gonzales v. Raich*, 545 U.S. 1 [2005]).

Commerce Powers are not without limitation. In *Lopez* and *Morrison*, the Supreme Court limited Congress’ power to regulate non-economic criminal activity where the statute was not part of a larger economic regulatory scheme, *Id.* (discussing *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 [2000]).

Ultimately, the Sixth Circuit determined that Congress implemented the minimum coverage provisions in an effort to regulate the health care market as a whole. This regulation had a substantial effect on interstate commerce and was part of a “broader economic regulatory scheme,” *Id.* at 20.

Applying the storied “rational basis test,” the court found that the minimum coverage provision regulated activity that substantially related to interstate commerce on two separate bases.

First, PPACA permissibly regulates intrastate commerce that substantially affects interstate commerce. Congress had a rational basis to conclude that an individual’s failure to obtain health insurance increased the cost of health care overall and shifted the burden of an uninsured individual’s care to third parties.

Second, even if PPACA did not regulate economic activity, the minimum coverage provision was still a valid exercise of Congressional Commerce Powers. Congress rationally concluded that the failure to regulate an uninsured individual’s decision to forgo the purchase of health care insurance would undercut Congress’ regulation of the health care market as a whole.

The court disposed of the Thomas More Law Center’s argument that Congress could not regulate inactivity — the failure to purchase health care insurance. Although the Supreme Court has not specifically addressed this issue, the court found that there are in essence no inactive health care consumers. Virtually all persons will at some point require medical care, and this health care is provided regardless of an individual’s ability to pay.

Judge Sutton’s separate opinion has gained wide-spread media attention, in large part because of his purported conservative credentials. Interestingly, as a private attorney, Judge Sutton was one of the attorneys on an *amicus curiae* brief filed on behalf of the State of Alabama in the *Morrison* case, *Brief for the State of Alabama as Amicus Curiae In Support of Respondents*, 1999 WL

1191432.

Judge Sutton and his colleagues argued that the Violence Against Women Act was an unconstitutional application of the Commerce Clause, the eventual majority holding in *Morrison*.

In his concurrence, Judge Sutton gave more credence to *Thomas More*’s “inactivity” claim.

Describing this argument as the “most compelling” offered to support invalidation of the minimum coverage provision, Judge Sutton suggested regulating inaction was a line that the Supreme Court had not crossed and, until PPACA, neither had Congress. He characterized this argument as whether the Commerce Clause empowers Congress to regulate “individuals who have never entered a given market and who prize that most American of freedoms: to be left alone,” *Thomas More Law Center*, no. 10-2388, Slip Op. at 40.

Judge Sutton determined that the Commerce Clause by its terms does not specifically limit regulation of inaction. He also suggested that a semantic puzzle could result if courts attempted to determine which statutes govern inactivity versus activity. An “enforceable line” is impossible to draw, especially with respect to health care, *Id.* at 45.

While Judge Sutton expressed some sympathy for the suggestion that the minimum coverage provision may impose a “penalty” on citizens “who take care of themselves physically and financially,” and perhaps responsibly choose not to purchase health care insurance, such an impact does not render the provision unconstitutional.

Ultimately likening this case to that of the historic *McCulloch v. Maryland*, 17 U.S. 316 (1918), which spoke to the “debate between the federalists and anti-federalists over the role of the national government in relation to the states,” Judge Sutton predicted that:

“Today’s debate about the individual mandate is just as stirring, no less essential to the appropriate role of the national government and no less capable of political resolution. Time assuredly will bring to light the policy strengths and weaknesses of using the individual mandate as part of this national legislation, allowing the peoples’ political representatives, rather than their judges, to have the primary say over its utility,” *Id.* at 53.

Although the Sixth Circuit is the first appellate court to issue a decision regarding the constitutionality of the minimum coverage provision, it certainly will not be the last. The Fourth Circuit has yet to issue its decision, and appeals are pending in the Third, Ninth and Eleventh Circuits. It is fair to state that debate over this issue will continue in the courts, as well as the legislature, for years to come.

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