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Eleventh Circuit: Individual Mandate Unconstitutional, but Rest of ACA Stands

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The recent high profile decision by the Eleventh Circuit affirmed the opinion by a lower court that the individual mandate under the health reform law is unconstitutional. However, the three-judge panel, which split 2-1, reversed the lower court on the issue of severability and found that the entire Patient Protection and Affordable Care Act should not be struck down, even though the individual mandate fails on constitutional grounds. There is now a circuit split between the Eleventh Circuit and the Sixth Circuit on the issue of the individual mandate, making it increasingly likely that the Supreme Court could resolve the matter even before the November 2012 election.

On August 12, 2011, the U.S. Court of Appeals for the Eleventh Circuit issued an opinion that found the individual mandate under the Patient Protection and Affordable Care Act (ACA) to be unconstitutional. In a reversal from the original federal district court decision on appeal, however, the Circuit Court found that the individual mandate was severable from the remainder of the ACA, and therefore concluded that the remaining parts of the ACA should stand. The greatest potential impact of the decision is twofold. Now that there is a circuit split between the Eleventh Circuit and the Sixth Circuit regarding whether the individual mandate is constitutional, the Supreme Court of the United States may take up the matter relatively soon, which makes it quite possible the high court will hear the case and rule on it prior to the November 2012 election. In addition, to the extent the high court finds the Eleventh Circuit's reasoning on severability to be persuasive, the Eleventh Circuit opinion may have *decreased* the odds of the whole ACA being struck down by the Supreme Court.

The three-judge panel, which consisted of two judges appointed by President Clinton and one appointed by President George H.W. Bush, split 2-1. This decision marks the first time that a judge appointed by a Democrat ruled against the Obama administration on the constitutionality of any aspect of the ACA.

The Eleventh Circuit's opinion is of significant interest to stakeholders, particularly on the severability issue. Many stakeholders are vested in knowing whether the various legal challenges to the ACA could, if successful, result in the entirety or only portions of the act getting struck down on legal grounds.

In the original district court opinion issued January 31, 2011, Judge Roger Vinson, after noting that the individual mandate had been referred to as the "linchpin" of the ACA, found that the whole of the ACA was not severable from the individual mandate and that, because the individual mandate was unconstitutional, the entire ACA must be struck down. First, Judge Vinson reasoned that, under the severability test established in federal case law, the remainder of the ACA could not be severed from the individual mandate "because the individual mandate was indisputably

essential to what Congress was ultimately seeking to accomplish" and, accordingly, "the record seems to strongly indicate that Congress would not have passed the [ACA] in its present form if it had not included the individual mandate." Judge Vinson's opinion also emphasized that the courts would not be in the position of having to make a close call regarding Congress' intent but for the fact that Congress had included severability language in a draft of the ACA bill, but stripped that language from the final law, raising a presumption the severability language was intentionally omitted by Congress.

The Circuit Court opinion stated the "district court placed undue emphasis on the [ACA's] lack of a severability clause," but the court also acknowledged the closeness of the severability question, particularly with regard to two reforms under the ACA: guaranteed issue health insurance, 42 U.S.C. § 300gg-1 (effective January 1, 2014) and the prohibition on pre-existing condition exclusions, *id*. § 300gg-3. The Circuit Court also acknowledged that, without the individual mandate, there is an argument that "healthy people can wait until they are sick to obtain insurance, knowing that they could not be turned away," which would tend to undermine how the ACA will function in part. Nevertheless, the Circuit Court found that even the guaranteed issue and pre-existing condition limitation provisions of the ACA were severable from the individual mandate and therefore would not be struck down.

Notably, the Circuit Court stated that the individual mandate was "engineered to be porous and toothless," and that this fact weakened its "ability to say that Congress considered the individual mandate's existence to be a *sine qua non* for passage of" the guaranteed issue and pre-existing condition provisions of the ACA. Such reasoning from the Circuit Court opinion is ironic, because a brief filed by the challengers also argued (with respect to an issue unrelated to severability) that the individual mandate was too inadequate to achieve its purpose under the ACA. That brief argued "the risk of 'free-riding' will substantially persist regardless [of whether the individual mandate is imposed]." The brief also cited a 2010 CBO report, which highlighted the weakness of the individual mandate and concluded that "roughly 4 million of the 8 million uninsured affected by the mandate will likely pay the penalty rather than purchase insurance … ."

The Eleventh Circuit case has been regarded as perhaps the most significant legal challenge to the ACA, in part because the challengers include 26 states, as well as the National Federation of Independent Business and two individuals. The Fourth Circuit has yet to rule in two other ACA challenges that are now pending before it, but regardless of the outcome in those cases, there is now a circuit split between the Eleventh Circuit and the Sixth Circuit on the issue of the individual mandate's constitutionality, making resolution by the Supreme Court virtually inevitable.

The Obama administration has 90 days from August 12 to decide if it wishes to request an *en banc* re-hearing before the full Eleventh Circuit or instead appeal the decision to the Supreme Court. The administration's decision will involve legal and political considerations. In an *en banc* re-hearing, there is potential risk of the full Eleventh Circuit

affirming the panel on the unconstitutionality of the individual mandate, but reversing the panel on the severability issue. Politically, an *en banc* re-hearing could perhaps delay a final Supreme Court decision on health care reform until after the November 2012 election. However, even if requested by the administration, an *en banc* re-hearing is not guaranteed because *en banc* re-hearings are disfavored under federal court rules,and the Eleventh Circuit could only order an *en banc* re-hearing upon the approval of a majority of all the eligible Eleventh Circuit judges. If the Supreme Court were to take up the ACA challenge in the term that begins in October 2011, then a decision would be expected no later than June 2012, obviously a scant five months before the presidential election.

There has been much speculation as to how the Supreme Court might ultimately rule on the individual mandate and the severability issue. The predominant view is that the decision will likely be 5–4 and that Anthony Kennedy would be the swing vote. Orin Kerr, a law professor at Georgetown University, recently wrote that, in his view, at least six Supreme Court Justices are likely to uphold the individual mandate as constitutional.