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LEGAL ALERT

November 16, 2011

Supreme Court to Hear Appeal on Constitutionality of Health Reform Law

On Monday, November 14, the U.S. Supreme Court granted certiorari to hear an appeal from a decision by the U.S. Court of Appeals for the Eleventh Circuit that the individual mandate in the Patient Protection and Affordable Care Act (PPACA) is unconstitutional. More than 20 cases have been filed alleging that the individual mandate to purchase health insurance in an exchange or other aspects of PPACA are unconstitutional. The courts of appeals have issued decisions in five of the cases, and petitions for certiorari have been filed in four of them. In these cases:

- The Eleventh Circuit held that the individual mandate was unconstitutional, but that it could be severed from the remainder of PPACA, so that the rest of the law could be implemented. *Florida, Et Al. v. Dept of HHS, Et Al.,* 2011 WL 3519178 (11th Cir. Aug. 12, 2011).
- The Sixth Circuit held that Congress had the authority to enact the individual mandate and that it is not unconstitutional. *Thomas More Law Ctr. v. Obama,* 2011 WL 2556039 (6th Cir. June 29, 2011).
- The Fourth Circuit issued two decisions. In *Liberty Univ. v. Geithner,* 2011 WL 3962915 (4th Cir. Sept. 8, 2011), it held that a decision on the merits was premature at this time under the Anti-Injunction Act, also known as the Tax Injunction Act, which essentially provides that provisions of federal law imposing taxes cannot be challenged until the taxes are due. Under this reasoning, the individual mandate cannot be challenged until 2015. In *Virginia ex rel. Cuccinelli v. Sibelius,* 2011 WL 3962915 (4th Cir. Sept. 8, 2011), the Fourth Circuit held that the state of Virginia lacked standing to bring a challenge.
- The District of Columbia Circuit held that the individual mandate is constitutional. *Seven-Sky, Et Al. v. Holder, Et Al.,* 2011 WL 5378319 (DC Cir. Nov. 8, 2011). The parties in this case had not yet filed a petition for review by the Supreme Court.

The Court did not take action on the petitions filed by the plaintiffs in the *Thomas More*, *Liberty University*, and *Cuccinelli* cases. The *Cuccinelli* case will be considered by the Court during its November 22 conference; the *Thomas More* and *Liberty University* cases were considered during the Court's November 10 conference, along with the Eleventh Circuit decision. All the parties to the Eleventh Circuit's decision, including the Obama administration, had filed petitions requesting that the Supreme Court review the case. The case was viewed by the parties, again, including the government, as the best case to proceed for several reasons:

- There was no challenge to the standing of the plaintiffs, which represent 26 states, the National Federation of Independent Business (NFIB) and two individuals. In contrast, the standing of the Thomas More Law Center had been questioned, and Virginia had been found to lack standing.
- The Eleventh Circuit decision reached the issues of both the constitutionality of the individual mandate and whether that provision is severable from the balance of PPACA. Thus, both issues can be reviewed on appeal to the Supreme Court. In contrast, the Sixth Circuit did not reach the issue of severability of the mandate since it found the individual mandate constitutional, and the Fourth Circuit did not reach either issue.
- Though the application of the Anti-Injunction Act had not been decided in the Eleventh Circuit, there is a split in the Circuits on that issue. As noted above, the Fourth Circuit held the challenge to PPACA was premature based on the Anti-Injunction Act; the Sixth Circuit held to the contrary. The Obama administration's petition for certiorari in *Dept. of HHS v. Florida* asked that the Supreme Court hear arguments on that question, maintaining that the Anti-Injunction Act does not

bar a decision on the merits. The Court's order granting certiorari directed the parties to file briefs on, and argue, the issue of whether the suit is barred by the Anti-Injunction Act.

As noted above, all the parties to the Eleventh Circuit decision filed petitions for certiorari. The NFIB and the two individuals, who filed one petition, sought review only on the question of whether the individual mandate is severable from the other provisions of PPACA. The Obama administration sought review of the question of Congressional authority to enact the individual mandate, in addition to raising the question on the bar possibly presented by the Anti-Injunction Act. The 26 states filed a separate petition raising three questions on: (1) the constitutionally of the individual mandate and its severability; (2) the ability of Congress to impose "onerous conditions" on states in expanding Medicaid, an argument which the Eleventh Circuit rejected; and (3) whether Congress can treat states in the same manner as other employers when imposing employment-based mandates. The last issue relates to the "employer responsibility" or "pay or play" provisions of PPACA that impose taxes on large employers that do not provide minimum health coverage to employees. The district court had said that states could be treated the same as any other employers based on an earlier Supreme Court decision, and the Eleventh Circuit declined to rule on the issue on the basis of that earlier case. The Supreme Court apparently agreed with the district court's holding on this issue since it did not grant certiorari on this question.

The Supreme Court has granted five and one-half hours for the parties to argue the various issues raised, indicating the importance of the decision. In most cases, only one hour is granted for oral argument. The oral argument is expected in March 2012, and a decision is expected by late June.

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