I suggest the following simple ten ways to avoid malpractice in litigation:

INSURANCE AND REINSURANCE

March 2011

IN THIS ISSUE

Elizabeth J. Bondurant and Steven D. Henry report on the constitutional challenges to the Patient Protection and Affordable Care Act.

Constitutional Challenges to the Patient Protection and Affordable Care Act

ABOUT THE AUTHORS

Elizabeth J. Bondurant is a business litigator with extensive experience in life insurance and financial services litigation, including ERISA matters. Mrs. Bondurant has represented numerous corporations and been lead counsel on a variety of cases involving complex insurance issues, ERISA, RICO, life, health, disability, and accidental death benefits, and class action litigation. Mrs. Bondurant is a partner in the Atlanta office of Smith Moore Leatherwood LLP.

Steven D. Henry represents businesses and individuals faced with complex legal, regulatory and business issues. He has represented clients in commercial, products liability, employment, environmental, healthcare, securities, financial services and general business matters, white collar criminal defense, client counseling, governmental and internal corporate investigations, and regulatory compliance. Mr. Henry is a partner in the Atlanta office of Smith Moore Leatherwood LLP.

ABOUT THE COMMITTEE

The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Michael A. Hamilton
Vice Chair of Publications
Nelson, Levine, De Luca & Horst, LLC
(215) 358-5172
mhamilton@nldhlaw.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

w: www.iadclaw.org  p: 312.368.1494  f: 312.368.1854  e: mdannevik@iadclaw.org
On March 23, 2010 the Patient Protection and Affordable Care Act (“PPACA”) Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010); became law. The PPACA focuses on reform of the health insurance market and attempts to provide better coverage for those with pre-existing conditions and improved prescription drug coverage in Medicare. It additionally extends the life of the Medicare Trust fund. However, its most notable and far reaching legislative mandate is its requirement that each American purchase health insurance. The PPACA has produced strong emotions across the political spectrum. Indeed, its passage into law was nearly a completely partisan affair. The PPACA passed the Senate on December 24, 2009, by a vote of 60–39 with all democrats and independents voting for it and all republicans voting against it. It passed the House of Representatives on March 21, 2010, by a vote of 219–212, with all 178 republicans and 34 democrats voting against it.

Since that time, no less than twenty-seven cases challenging the PPACA have been launched. As of the writing of this article, five of these cases have resulted in rulings from federal district courts. As is widely known, two of these rulings have declared the Minimum Essential Coverage Provision, or as it is more readily known, the “individual mandate,” unconstitutional. See Commonwealth ex rel. Cuccinelli v. Sebelius, 728 F.Supp.2d 768 (E.D.Va. 2010); Florida ex rel. Bondi v. U.S. Dept. Of Health And Human Services, --- F.Supp.2d ----, 2011 WL 285683 (N.D.Fla. 2011).

In these two cases, Commonwealth and Florida, the plaintiffs have focused on the Commerce Clause of the U.S. Constitution. The Commerce Clause states that the United States Congress shall have power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The issue here focuses on the second power – what is referred to as the “Interstate Commerce Clause.”

Essentially, this portion of the Commerce Clause allows Congress to regulate intrastate activities that have close ties to or a substantial relationship or effect on commerce or as necessary and proper to effectuate other regulations of commerce. Over time, the Commerce Clause has been used by Congress as authority for its most expansive regulations. The “high water mark” for the Commerce Clause most likely came in the case of Gonzales v. Raich, 545 U.S. 1 (2005), in which the Supreme Court voted to uphold federal laws against intrastate marijuana use because it was part of a genuine federal scheme to regulate interstate marijuana use.

The PPACA utilizes the Commerce Clause in a new way. Specifically at issue is the individual mandate because it requires all persons over age eighteen to purchase health insurance. Supporters of the individual mandate claim that it is necessary in order to render affordable the PPACA requirement that health insurers provide coverage for persons with pre-existing conditions without charging those persons a premium for coverage.

Commonwealth was the first case to hold the individual mandate unconstitutional. The holding focused on the historic expansion of the Commerce Clause via the individual mandate. Essentially, the court ruled that because the individual mandate does not focus on an activity “self-initiated” by an individual, the individual decision to “purchase – or decline to purchase – health
insurance from a private provider is beyond the historical reach of the Commerce Clause....” Id. at *782. Stated differently, the court rejected the individual mandate because it regulates economic inactivity, as opposed to activity, and requires an individual to engage in an economic transaction with a private company (i.e., purchase health insurance). The court also rejected the Department of Justice’s argument that the penalty for failure to comply with the individual mandate (which is part of the tax code) is a tax intended to raise revenue. Id. at *786. Instead, the court agreed with the Commonwealth of Virginia’s argument that the penalty is the “exercise [of] prohibited police power to compel individuals to enter into private commercial transactions.” Id. In Commonwealth, the court ruled the individual mandate was severable from the remainder of the PPACA. As a consequence, the remainder of the PPACA survived.1

In Florida; as in Commonwealth, the plaintiffs (twenty-six states) argued that the PPACA exceeded Congress’ authority under the Commerce Clause. Senior U.S. District Judge Roger Vinson agreed with the plaintiffs and granted their motion for summary judgment as to their request for a declaratory judgment and entered a separate “Final Summary Declaratory Judgment” declaring the entirety of the PPACA unconstitutional.1

Judge Vinson held that neither the Commerce Clause nor the Necessary and Proper Clause provide authority for the federal government to require an individual to purchase health insurance. The court held that in previous cases interpreting the Commerce Clause “the individuals being regulated … had the choice to discontinue that activity and avoid penalty.... Here, people have no choice but to buy insurance or be penalized.” Florida, 2011 WL 285683, *20 n. 14. As for the Necessary and Proper Clause, Judge Vinson wrote that the Department of Justice’s interpretation “would eviscerate the bedrock enumerated powers principle upon which the Constitution rests.” Id. at *31.

In declaring the entirety of the PPACA unconstitutional, Judge Vinson reasoned that “Congress has … acknowledged in the Act itself that the individual mandate is absolutely ‘essential’ to the Act’s overarching goal of expanding the availability of affordable health insurance coverage and protecting individuals with pre-existing medical conditions....” Id. at * 37. As a consequence, unlike in Commonwealth, the Florida court determined that the individual mandate could not simply be severed from the PPACA.

Three other federal district courts have reviewed the constitutionality of the PPACA and upheld it. In Thomas Moore Center v. Obama, 720 F.Supp.2d 882 (E.D. Mich. 2010); the individual mandate was upheld in the face of a Commerce Clause challenge. The Commerce Clause claim focused on the PPACA’s regulation of “inactivity.” The court relied on Raich in concluding that Congress’ presumption that an individual’s decision to not purchase health insurance would have a substantial effect on the market for insurance. Id. at *893-94.

In Liberty University, Inc. v. Geithner, --- F.Supp.2d ----, 2010 WL 4860299 (W.D.Va.); the court decided that the decision to not purchase health insurance was not “inactivity.” Instead, the court characterized it as an economic decision to pay for health care directly and decided it was rational to believe the failure to regulate the uninsured would undercut the PPACA’s larger

---

1 The authors have learned that oral argument is scheduled for May 10, 2011 in the Fourth Circuit Court of Appeals in Commonwealth.
regulatory scheme for the interstate health insurance market. *Id.* at *14-16.

In *Margaret Peggy Lee Mead, et al. v. Eric H. Holder, Jr., et al.*, No. 10-950 (D.D.C. Feb. 22, 2011) (order granting motion to dismiss); the plaintiffs sought a declaration that the individual mandate is unconstitutional on the ground that it violates religious freedom. The plaintiffs intend to refuse medical treatment for the remainder of their lives or want to pay for medical treatment with their own money. The court held that the individual mandate would not impose a “substantial burden” on the exercise of religious beliefs because it permits an individual to pay a “shared responsibility payment” in lieu of actually obtaining health insurance. *Id.* at p. 62. The court held that the individual mandate is a “critical element of Congress’ comprehensive plan to reduce the spiraling health care costs that this country has experienced and is expected to experience in the future.” *Id.* at p. 5. The court further opined that the individual mandate “serves a compelling public interest and is the least restrictive means of furthering that interest.” *Id.* at p. 62.

Thus, right now, the opinions upholding the PPACA outnumber those declaring it unconstitutional three to two. As these cases are appealed, ultimately, to the United States Supreme Court, many more legal arguments and decisions will be forthcoming. These decisions regarding the constitutionality of the individual mandate, and, by extension, the entirety of the PPACA are incredibly important. One reason is obvious – the PPACA will, if implemented, radically alter healthcare in the United States. Further, and perhaps even more importantly, if the individual mandate stands, the resulting case law will necessarily declare as constitutional an enormous expansion of Congress’ power to regulate Americans’ everyday lives pursuant to the Commerce Clause.
PAST COMMITTEE NEWSLETTERS

Visit the Committee’s newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

JANUARY 2011
High Anxiety: Does the Wisconsin Supreme Court’s Opinion in Johnson Controls Create a New “Drop Down” Exposure for Excess Insurers?
Michael F. Aylward

APRIL 2010
Second Circuit Clarifies Scope of Independent Counsel Doctrine in New York
Michael F. Aylward

APRIL 2010
Sarah J. Delaney, Sharon Angelino, and Daniel W. Gerber

FEBRUARY 2010
Mortgagee Foreclosure and Insurance Claims
John Anderson and Jonathan Franklin

FEBRUARY 2010
The Practical Art: History as an Element of Interpretation for the Liability Policy
Gary L. Johnson

FEBRUARY 2010
How Insurance Agencies and Brokerages Can Benefit from the Upside of Social Networking While Minimizing the Downside of a Possible E&O Risk
Colleen M. Murphy, Daniel W. Gerber, Richard J. Cohen, Christopher J. Belter

OCTOBER 2009
Liability Insurance Coverage for Construction Deficiencies - The Canadian Perspective
Nigel Kent and Glen Boswall

OCTOBER 2009
Will Boston Gas Open A New Front In The Allocation Wars?
Michael F. Aylward

OCTOBER 2009
“Back To Back” Does Not Enlarge the Risk Reinsured
William J. Perry