

Federal Judge Rules Individual Mandate Is Unconstitutional

By DAVID HOGBERG, INVESTOR'S BUSINESS DAILY

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Virginia Attorney General Kenneth Cuccinelli speaks about the ruling from U.S. District Judge Henry E. Hudson that declared the foundation of... [View Enlarged Image](#)

The administration argued that the federal government can compel people to buy insurance via the interstate commerce clause of the Constitution.

Judge Hudson ruled that "to survive a constitutional challenge," the mandate "must involve activity." Defining the failure to buy insurance as an activity "lacks logical limitation and is unsupported by Commerce Clause jurisprudence." No court, he wrote, has ever "extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market."

"He's defining activity in a very common sense fashion," said Tom Christina, an attorney at the firm Ogletree Deakins. "The activity has to be something where you change your position instead of just remaining uninsured."

Gillian Metzger, a professor of law at Columbia University, disagrees: "Congress was regulating activity, the activity of accessing health care. Even if you don't purchase insurance, it's not the case that you are forgoing health care. ... Once you view the decision to forego insurance as a decision about accessing health care, it's activity, and Congress should be able to regulate it."

But such logic can "justify any mandate," said Ilya Somin, law professor at George Mason University.

"You can say a decision to not get a membership in a gym is a decision to do physical activity in some other way, so we can force people to buy gym memberships," he said.

Both sides agree that tossing the mandate but leaving in place provisions to guarantee coverage to those with pre-existing conditions would roil insurance markets.

"We will have either a rapid or slow death spiral in insurance markets," said Michael Cannon, director of health policy studies at the libertarian Cato Institute. "Healthy people leave the market, sick people are attracted to it, choice disappears, and premiums rise."

Pollack agreed that a "significant escalation of premiums" could result, with "tragic" results for those with pre-existing conditions.

Yet he hailed the "severability" part of the ruling .

When ObamaCare passed, Congress failed to include a severability clause that the rest of the law could continue even if courts ruled some

parts invalid. Virginia's attorney general had urged that the entire law be struck down if the mandate was ruled unconstitutional.

Judge Hanson refused, citing recent decisions that called for limiting "the solution to the problem, severing any 'problematic portions (of the law) while leaving the remainder intact."

But the administration has said the mandate is ObamaCare's "linchpin," Cannon pointed out.

"How many Democrats would have voted for the law without it?" he asked. "To suggest that this law would have passed without (the individual mandate) betrays a lack of understanding of the politics and history of this law."

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