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11th Circuit Decision Update — Severability Issue

Tue, 08/16/2011 - 4:41pm | posted by George Scoville

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News broke late last week that the 11th Circuit Court had ruled against the government in *Florida v. United States Department of Health and Human Services*, one of the many legal challenges to President Obama's new health care law. In my reporting, I noted that

- **The Court disappointed in its treatment of the non-severability issue.** In fact, it overturned the lower court's ruling, which held that, because the law lacked a severability clause, overturning any of the law's provisions means necessarily an overturning of the entire law.

*The Court's opinion is over 300 pages long — so it'll take me time I'm not even sure I have to sort out their reasoning on this last part. For now, I'll simply note that **this is a deeply troubling development**, and certainly a little rain on the liberty parade.*

I also noted [Megan McArdle's prognosis](#) for the health care market (and the federal budget deficit) if we wound up with a mandate-less Obamacare:

*Presumably, the insurance market across the United States ends up looking a lot like [New York's market](#), where during the debate over health care reform it was reported that **the cost of the average family policy in the individual market was over \$4,000 a month**. That's because **New York has the other features of ObamaCare—community rating and guaranteed issue—without the mandate**. The result was that all the healthy people dropped out of the pool, leaving a few very sick people to buy insurance.*

*There's a slight difference though: **the government is going to subsidize individuals in the private market**. If the subsidies keep pace with the cost, **Obamacare's nominal deficit reduction is going to turn into a gaping hole in the federal budget**.*

In truth, I haven't had moment one since the decision came down to really wade through the court's opinion — and I'm not a legal expert to boot, so I'm not sure my analysis would encapsulate everything important there is to say about this particular part of the ruling.

[Trevor Burrus](#), legal associate at the Cato Institute's Center for Constitutional Studies, has been spending some time with the decision, and he offers some excellent thoughts and observations about [the court's nuanced reasoning for ruling against the government](#) in this case on the issue of the individual mandate.

When I asked him about the severability issue and the 11th Circuit's treatment of it, he offered the following response in an email (emphasis mine):

*Severability is kinda a grab bag. Ironically, the two district court opinions that struck [the individual mandate] down either severed or didn't sever for the same reason: **that the mandate was too intertwined with the law to sever**. On one hand, severing would mean legislating from the bench, in a sense; that is, carving up the law into pieces. On the other hand, not severing would avoid doing that, and take the government at their word.*

*Similar, but more exacting, reasoning is employed in the 11th Cir. opinion...they ruled the mandate severable because a lot of things in the law (tanning taxes, etc.) can certainly stand without the mandate. Only difference is, **they didn't have a problem sitting as a "super legislature" and carving up the law**.*

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Burrus also adds, thankfully, that the Supreme Court will do what it wants when it hears the case — so at this stage of the proceedings, this particular part of the ruling is practically irrelevant.

Many thanks to Trevor for his help with my understanding of this issue.

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