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Health Care Battle Heats Up

Marcia Coyle

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The battle over health care reform will continue this fall, with three key challenges under way in the federal courts and several states considering ways to block the new law.

The Obama administration's hopes of an early end to Virginia Attorney General Ken Cuccinelli's attack on the health law were dashed last week when U.S. District Judge Henry Hudson refused to dismiss the lawsuit. Hudson will hear arguments on the merits in his Richmond courtroom on Oct. 18. A step ahead of the Virginia litigation is a challenge brought by the Thomas More Law Center, a national public interest law firm in Ann Arbor, Mich. U.S. District Judge George Steeh in Detroit heard arguments on July 21 on the merits and the center's request for a preliminary injunction. There is also the lawsuit by 20 state attorneys general filed in a Florida federal district court. Senior Judge Roger Vinson has set Sept. 14 for arguments on the government's motion to dismiss.

Although the Virginia case differs in a significant way from those filed in Florida and Michigan, critics of the Patient Protection and Affordable Care Act point out that the government has raised standing and ripeness objections in all three cases. "[Hudson's decision] certainly is a good thing," said David Rivkin Jr., partner in the Washington office of Baker Hostetler, who, with partner Lee Casey, is part of the legal team in the state attorneys general lawsuit. Hudson's ruling, he said, "provides a positive signal by a respected federal court judge in a case that is basically a subset of our case."

Less than 24 hours after Hudson's ruling, Rob Muise, senior trial counsel at the Thomas More Law Center, had filed it as supplemental authority with Steeh.

"You now have a judge who looked at this and said there is something there and you shouldn't dismiss this out of hand," Muise said. "The Obama administration had said these lawsuits were frivolous."

But the law's supporters remain convinced that all three lawsuits ultimately will fail. "I don't think a decision that does no more than decline to dismiss on the pleadings will have any influence on other cases," said Walter Dellinger, chairman of the appellate practice at O'Melveny & Myers. "I believe these lawsuits are borderline frivolous."

Health law scholar Timothy Jost of Washington and Lee University School of Law agreed, saying Hudson "stretched considerably" in finding that Virginia had standing to challenge the federal law. "And ripeness remains a serious issue in all of the cases."

GETTING INTO POSITION

What sets Virginia's lawsuit apart from the other two is its claim that a recently enacted state law, protecting Virginia residents' right to refuse health insurance, will fall unless the federal law is unconstitutional. The federal law imposes penalties on anyone who does not purchase health insurance. There are no similar state laws at stake in the suits brought by the state attorneys general and the Thomas More Law Center.

Although states generally cannot litigate the interests of their citizens, Hudson, in *Commonwealth of Virginia v. Sebelius*, found that the conflict between Virginia's law and the federal insurance mandate (not effective until 2014) gave the state standing to sue. On ripeness, Hudson decided that, because the state government and its residents must begin now to adjust their health insurance plans, the lawsuit's issues were ripe for decision.

The case attracted nine amicus briefs, more than half supporting Virginia. The briefs reflected views of more than four dozen groups and individuals, including members of Congress, the libertarian Cato Institute, law professors and the March of Dimes Foundation. They were represented by McGuireWoods, Mayer Brown of Chicago, Troutman Sanders of Atlanta and several Virginia-based firms.

But you won't see the same amicus turnout in the Florida and Michigan cases at this stage of the proceedings. Vinson in *State of Florida v. U.S. Dep't of Health & Human Services* issued an order stating: "Amicus curiae briefs will not be allowed in support of, or in opposition to, the defendants' anticipated motion to dismiss, as it is expected that motion will raise discrete legal or procedural issues for which amici involvement would not be helpful or beneficial. Rather, an amicus may only seek to file a brief on the merits, which for purposes of this litigation will be at the summary judgment stage."

Vinson even rejected an attempt to file an amicus brief by the governors of Colorado, Michigan, Pennsylvania and Washington who disagree with the positions of their attorneys general in challenging the federal law. And Muise of the Thomas More Law Center said he believed amicus briefs are more helpful at the appellate level than at the trial level.

But Cory Andrews, senior litigator with the pro-business Washington Legal Foundation, which supports Virginia's challenge, said, "We thought we could make a difference in the Virginia lawsuit. The Florida lawsuit has a lot of firepower with 20 state attorneys general."

Andrews and others supporting the challenges agreed that Hudson's standing decision might have "negative implications" for the Florida and Michigan suits, since there is no comparable state law at stake. But, Andrews added, the National Federation of Independent Businesses has joined the state attorneys general's challenge as a party and its individual members, subject to the federal health law, could provide standing.

The state attorneys general, he said, also might argue they have standing under the U.S. Supreme Court's expansive view of state standing in *Massachusetts v. EPA*, a 2007 decision involving a challenge to the government's failure to issue greenhouse-gas regulations.

"The Court endorsed a broad theory of state standing in that decision," Andrews said.

And the lawsuit in Michigan -- *Thomas More Center v. Obama* -- is brought on behalf of four residents in southeastern Michigan who object to the federal insurance mandate and to being forced to pay for abortions, contrary to their religious beliefs.

"Even though the mandate kicks in in 2014, it is causing present harm," Muise said. "One of our plaintiffs is a single mom with two kids. It's going to cost her $9,000 a year for health insurance. To say she isn't going to start planning now is nonsense. Present economic harm is still sufficient harm to show injury and to have standing."

But "for at least most of the states, if not all, Hudson's ruling is no precedent for finding standing," said Washington and Lee's Jost. "I think the Supreme Court held in *Massachusetts v. EPA* that a state cannot simply challenge the constitutionality of a federal law."

O'Melveny's Dellinger agreed, adding, "Four years from now, when an individual can assert that a state law trumps federal law, however weak that claim might be, that's the time and person to make that assertion. It has been a core part of conservative judicial philosophy that courts are there to resolve actual disputes among litigants. This would allow states to bring public policy objections when there is no concrete injury to the state itself."

SYMBOLIC OR CONSTITUTIONAL?

While the federal courts grapple with standing, ripeness and the core constitutional arguments involving Congress' commerce clause and tax powers, reaction at the state level has been intense.

In the past 12 months, 39 states have considered or are considering some type of legislative measure proposing to challenge, opt out or push back on federal health insurance reform, said Richard Cauchi, health program director for the National Conference of State Legislatures.

The scorecard as of last week:

Five states (Georgia, Idaho, Louisiana, Utah and Virginia) have enacted laws saying, with variations, residents do not have to purchase health insurance, employers do not have to contribute to it and there will be no penalties for failing to do so.

Four states have ballot questions. Primary election voters in Missouri last week approved the rejection of the federal insurance mandate. Florida had a proposed constitutional amendment barring state implementation of the federal law

on its November ballot, but a state judge removed it on July 29 because of misleading wording. Arizona and Oklahoma have similar proposed constitutional amendments on their November ballots.

Cauchi said that, in 25 states, similar measures were proposed and rejected and those states are now out of session.

"It's a mixed record," he said. "In fairness, there is a fair amount of action and not really a resolution of what the state role will be. Are these symbolic or constitutional actions?"

More questions for the courts, and possibly the U.S. Supreme Court, agreed proponents and opponents. "This transcends health care," Muise said. "It goes to the role and limits of our federal government. Whether health care or some other regulation that is a broad power grab, we would be interested."