

## The New York Times

Reprints

This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers [here](#) or use the "Reprints" tool that appears next to any article. Visit [www.nytreprints.com](http://www.nytreprints.com) for samples and additional information. [Order a reprint of this article now.](#)

PRINTER-FRIENDLY FORMAT  
SPONSORED BY



May 10, 2010

# Florida Suit Poses a Challenge to Health Care Law

By **KEVIN SACK**

As they constructed the requirement that Americans have [health insurance](#), Democrats in Congress took pains to make their bill as constitutionally impregnable as possible.

But despite the health care law's elaborate scaffolding, attorneys general and governors from 20 states, all but one of them Republicans, have now joined as confident litigants in a bid to topple its central pillar. In the process, they hope to present the [Supreme Court](#) with a landmark opportunity to define the limits of federal authority, perhaps for generations.

In the seven weeks since the legislation passed, at least a dozen lawsuits have been filed in federal courts to challenge it, according to the Justice Department. But the case that could carry the most weight, and may be on the fastest track in the most advantageous venue, is the [one filed in Pensacola, Fla.](#), by state officials, just minutes after [President Obama](#) signed the bill.

Some legal scholars, including some who normally lean to the left, believe the states have identified the law's weak spot and devised a credible theory for eviscerating it.

The power of their argument lies in questioning whether Congress can regulate inactivity — in this case by levying a tax penalty on those who do not obtain health insurance. If so, they ask, what would theoretically prevent the government from mandating all manner of acts in the national interest, say regular exercise or buying an American car?

Other experts, however, [dismiss the Florida lawsuit](#) as a politically motivated lark at taxpayer expense, and argue that the insurance mandate falls comfortably within Supreme Court precedents. The states, they say, may not even withstand a challenge to their standing to bring the suit, since they are only indirectly affected by the mandate.

The focus of the litigation is the 16-word clause in [Article 1, Section 8](#) of the Constitution that allows Congress to regulate interstate commerce, a provision the court has interpreted broadly but not without boundaries. The lead plaintiff, Attorney General [Bill McCollum](#) of Florida, who is running for the Republican nomination for governor, argues that the new law's historic reach presents the courts with fresh circumstances.

"In the last 50 years or so," Mr. McCollum said, "other than *Brown v. Board*, I think the constitutional precedents here will have a greater impact on more people than maybe anything else the court has decided."

Jonathan Turley, who teaches at [George Washington University](#) Law School, said that if forced to bet, he would predict that the courts would uphold the health care law. But Mr. Turley said that the federal government's case was far from open-and-shut, and that he found [the arguments against the mandate compelling](#).

"There are few cases in the history of the court system that have a more significant assertion of authority by the government," said Mr. Turley, a civil libertarian who acknowledged being strange bedfellows with the conservative theorists behind the lawsuit. "This case, more than any other, may give the court sticker shock in terms of its impact on federalism."

Mr. McCollum, 65, said he first became fixated on the constitutionality of the mandate last September, after reading a [column](#) in *The Wall Street Journal* by two Washington lawyers, [David B. Rivkin Jr.](#) and [Lee A. Casey](#), of the white-shoe firm Baker Hostetler. Mr. McCollum had worked for the firm after retiring from the House of Representatives in 2001, but said he had never collaborated with the men and knew them only well enough to say hello in the hallway.

Mr. Rivkin, 53, and Mr. Casey, 52, who have worked together since meeting in the Reagan Justice Department, had been warning in columns since the early 1990s that a health insurance mandate would extend Congress's power to regulating Americans "merely because you exist."

The lawsuit grew out of regular conference calls among a group of attorneys general who were threatening to challenge the so-called Cornhusker Kickback, a provision favoring a single state, Nebraska, that ultimately was dropped from the bill.

The complaint initially was filed by attorneys general from 13 states, with Mr. McCollum's name listed first, like John Hancock's. Seven other states have since committed to join, some after [bitter disagreements](#) between governors and attorneys general from opposing parties.

Virginia, which pre-emptively enacted a [law](#) intended to nullify a federal insurance mandate, has filed a separate lawsuit.

The states have hired Mr. Rivkin and Mr. Casey as outside counsel under a contract that restricts their fees to \$50,000 this year. The lawyers agreed to reduce their hourly rate to \$250, from \$950, a practice Mr. Rivkin said was standard for public-sector clients.

Four of the attorneys general named as plaintiffs are running for governor. Attorney General Henry McMaster of South Carolina, who faces a competitive Republican primary for governor in June, is broadcasting a [television advertisement](#) about the litigation in which he vows to “protect the sovereignty of South Carolina.” Mr. McCollum’s campaign Web site features a [petition](#) in support of his lawsuit to “stop Obamacare.”

The Justice Department said it would “vigorously defend” the cases. “We are confident that this statute is constitutional and that we will prevail,” said Tracy Schmalzer, a department spokeswoman.

Congressional bill writers took steps to immunize the law against constitutional challenge. They asserted in the text that the insurance mandate “substantially affects interstate commerce,” the Supreme Court’s standard for regulation under the Commerce Clause. They labeled the penalty on those who do not obtain coverage an “excise tax,” because such taxes enjoy substantial constitutional protection. Supportive analyses by prominent law professors were read into the Congressional Record.

Nonetheless, there is a broad assumption that the health care law will earn Supreme Court review, although it could take two years or more to get there. The judge in Pensacola, Roger Vinson, has [scheduled](#) oral arguments for Sept. 14 on the Justice Department’s anticipated motion to dismiss the case. With no real facts to try, those legal arguments would effectively serve as a trial.

The lawsuit could have been filed anywhere. But several lawyers involved said they wanted the first review to rest with the United States Court of Appeals for the 11th Circuit, a generally conservative bench that handles cases from Florida.

The state’s Northern District includes a courthouse in Tallahassee, six blocks from Mr. McCollum’s office. But Mr. McCollum instead filed the case 200 miles away in Pensacola, bypassing a Tallahassee judge who was named by President [Bill Clinton](#) and ensuring that the judge would be a Republican appointee.

“We thought with the judges, we’d do as well there as anywhere else,” Mr. McMaster said. “But it’s the strength of the case we’re counting on.”

The suit lodges three related claims against the health law.

It challenges the federal government’s vast expansion of [Medicaid](#) as “an unprecedented encroachment on the sovereignty of states.” The Justice Department plans to counter that states do not have to participate in Medicaid, according to sources familiar with its thinking. But the states argue that their health care systems have grown so dependent on Medicaid that withdrawing would be catastrophic.

A second count attacks the tax penalty on the uninsured, saying it is an illegal direct tax, and not an allowable excise tax on goods or services.

But the central challenge concerns the Supreme Court’s interpretation of the Commerce Clause, as expressed in four decisions handed down over 63 years. If the court interprets the clause broadly, as it did in two seminal cases on the subject, the health insurance mandate is likely to survive.

In those two cases, [Wickard v. Filburn](#) in 1942 and [Gonzales v. Raich](#) in 2005, the court ruled that Congress’s regulatory authority was so extensive that it could even prevent growers from cultivating crops for personal use because of the cumulative impact on the market.

But twice in the last 15 years, the court has invalidated laws that used the Commerce Clause to justify the regulation of noneconomic activity, like restrictions on carrying guns near schools. The constitutionality of the individual mandate, therefore, may rest on whether the justices can be convinced that decisions not to obtain insurance substantially affect interstate commerce.

Lawyers for the government will contend that, because of the cost-shifting nature of health insurance, people who do not obtain coverage inevitably affect the pricing and availability of policies for everyone else. That, they will argue, is enough to satisfy the Supreme Court’s test.

But to Mr. Rivkin, the acceptance of that argument would herald an era without limits.

“Every decision you can make as a human being has an economic footprint — whether to procreate, whether to marry,” he said. “To say that is enough for your behavior to be regulated transforms the Commerce Clause into an infinitely capacious font of power, whose exercise is only restricted by the Bill of Rights.”

