



### The Health Care Litigation: What Women Could Lose

In 2010, Congress passed the landmark Patient Protection and Affordable Care Act, known as the “Affordable Care Act” or “ACA.” The ACA is intended to achieve near-universal health insurance coverage, slow the growth of health care costs and insurance premiums, and end an array of insurance practices that have prevented individuals from obtaining health insurance and health care. One of the ACA’s primary goals is to improve women’s health and address the discrimination women have faced in the health insurance market—disadvantages and discrimination that often lead women to bear significant costs or go without health care altogether.

Opponents of the law have brought various lawsuits claiming that Congress lacked authority to pass the ACA but it is well-settled that the Commerce Clause of the Constitution allows Congress to make laws addressing national economic problems.<sup>1</sup> The ACA addresses a national breakdown in the health insurance market that has resulted in widespread denials of coverage, limited access to health care, and increased health care costs. By addressing the economic impacts of the discrimination that women face in the health insurance market, it also falls within a long tradition of civil rights laws falling well within Congress’s authority under the Commerce Clause.

#### The ACA Ends Insurer Practices That Hurt Women

The breakdown of the insurance and health services market that Congress seeks to address through the ACA has a particularly acute effect on women’s health and economic security, because women are more likely to face cost-related barriers to accessing health care.<sup>2</sup> The ACA ends discriminatory practices in the insurance industry and will make insurance and health care more accessible and more affordable for women. For example, the ACA:

- *Bans pre-existing condition exclusions*—Insurers in the individual market have routinely denied coverage for so-called “preexisting conditions” that exclusively or primarily affect women. The ACA prohibits this practice, and requires insurers to sell insurance to anyone who wants to buy coverage (known as “guaranteed issue”). For example, insurers have deemed women to have a preexisting condition if they previously gave birth by Caesarean section;<sup>3</sup> are pregnant at the time they seek coverage;<sup>4</sup> survived domestic violence and received treatment related to abuse;<sup>5</sup> and received medical treatment after sexual assault.<sup>6</sup>
- *Bans gender rating*—The ACA prohibits insurers’ widespread practice of charging women higher premiums than they charge men of the same age,<sup>7</sup> including regularly charging female nonsmokers more than male smokers.<sup>8</sup>
- *Prohibits sex discrimination*—For the first time, the ACA prohibits sex discrimination in federal health programs, health programs receiving federal dollars, and other programs, including the health insurance exchanges.<sup>9</sup> Insurers receiving federal funds are also covered by this provision.
- *Makes comprehensive health insurance more available and affordable*—The ACA provides no-cost and subsidized health insurance to those who lack affordable employer health insurance, which will particularly help women, who are poorer than men on average.<sup>10</sup> Medicaid eligibility will be expanded, with up to 8.2 million low-income women newly covered by 2014.<sup>11</sup>

- *Guarantees maternity coverage for all*—The majority of individual market insurance plans (87 percent in 2009) do not cover maternity care,<sup>12</sup> but under the ACA maternity care is an “essential health benefit” that plans must cover.<sup>13</sup>
- *Ensures new plans cover recommended preventive care, including Pap tests and mammograms, without copayments*—The ACA will provide access to life-saving screenings that many women now forego due to cost.<sup>14</sup>
- *Protects nursing mothers*—The ACA makes it easier for working mothers to continue breastfeeding,<sup>15</sup> thereby making the extensive benefits of breastfeeding more widely available to mothers and children.<sup>16</sup> Employers with more than 50 employees must provide a reasonable break time and place for nursing mothers to express breast milk.

These are just a few ways the ACA will help women access affordable, comprehensive health care coverage – and health care. If opponents of the law are successful in their legal challenge, women stand to lose all this – and more.

### **In Enacting the ACA, Congress Acted Well Within Its Constitutional Authority**

Congress’s goal in passing the ACA was to address a national economic crisis in health care, with a particular focus on how this crisis impacts women. Supreme Court precedent establishes, without a doubt, that Congress acted within Commerce Clause powers in enacting this economic legislation that also forwards important antidiscrimination goals.

***Congress has the power to pass laws regulating the marketplace under the Commerce Clause.*** There’s no question that the Commerce Clause gives Congress the power to regulate the insurance industry and health care services as part of its authority to pass national economic legislation—the Supreme Court decided that question over 60 years ago.<sup>17</sup> That Congress was simultaneously seeking to remove discriminatory barriers to participation in the health insurance market faced by women only enhances this authority.

***Congress has the power to enact laws addressing discrimination under the Commerce Clause.*** The Supreme Court has long affirmed that the Commerce Clause gives Congress authority to address discrimination, because discrimination against women and other disadvantaged groups has a direct impact on how interstate markets operate. For example, in a seminal case, *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld Title II of the Civil Rights Act of the 1964, which prohibited racial discrimination by hotels and restaurants.<sup>18</sup> The Court emphasized that Congress had considered a large body of evidence showing that when hotels, restaurants, and other businesses refused to serve customers on the basis of race, it had a significant effect on commercial activities—and held that Congress therefore acted well within its Commerce Clause powers in enacting the anti-discrimination law.<sup>19</sup>

As Congress recognized in passing the ACA, women face significant disparities in access to insurance and health care that result in an acute economic impact. For example, women experience greater difficulties than men in obtaining health care,<sup>20</sup> women are more likely to forego preventative care due to cost,<sup>21</sup> women who are insured are more likely than men to be underinsured,<sup>22</sup> and more women report problems paying medical bills.<sup>23</sup> The insurance market’s failure to meet women’s needs had significant consequences for women—and for the larger economy, because the costs of health care for uninsured or underinsured women were passed on to third parties, resulting in increased health care and insurance costs for us all.<sup>24</sup>

***The Commerce Clause grants Congress the power to require individuals to buy health insurance as part of its efforts to remedy a crisis in health insurance markets and address patterns of discrimination.*** The constitutional challenges to the ACA focus on the individual responsibility provision—which requires all individuals (unless exempt) to obtain health insurance by 2014,<sup>25</sup> with subsidies available for millions of low and moderate income people.<sup>26</sup>

Congress designed the individual responsibility provision to work in tandem with the ban on preexisting condition exclusions and the requirement that all insurers must sell health insurance to anyone who wants to purchase it, recognizing that near-universal participation—which the individual responsibility provision is meant to achieve—is required for successful regulation of the health insurance market. Otherwise, some people would likely forego insurance coverage until they get sick or altogether, sharply driving up the costs of insurance and health care for all when they eventually seek care.

Those challenging the individual responsibility provision argue that Congress cannot require individuals to participate in the insurance market if they choose not to. But *Heart of Atlanta Motel* shows that such a requirement falls squarely within Congress's Commerce Clause power. In that case, the Court found that Congress had the authority to require hotel and restaurant owners to serve African-American customers—even if they did not want to.<sup>27</sup>

Those challenging the ACA argue that hotel owners have already decided to enter the marketplace, and thus can be regulated under the Commerce Clause, while those failing to buy health insurance have not. But the choice not to purchase insurance is, in reality, not a decision to forego participation in the health care market altogether. Instead, it is an economic choice about *how* and *when* to pay for the costs of health care<sup>28</sup>—given that all of us have health care needs at some point in our lives. In fact, health care costs of the uninsured are shouldered by society as a whole, at a cost of billions of dollars per year.<sup>29</sup>

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In enacting the ACA, Congress recognized that discrimination against women and other groups was a significant factor in the failure of the health insurance market and our health care system. If the law's opponents are successful with their legal challenges, women stand to lose a great deal as discussed above. But by regulating commerce in health insurance and health care, as the Constitution permits Congress to do, the law takes an important step forward for women's health and begins to remedy the economic impact of the discrimination that women have long faced in the health insurance market.

***For sources, see this factsheet on our website, at <http://www.nwlc.org/resource/health-care-litigation-what-women-could-lose> .***