



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. The law begins to remedy the economic impact of the discrimination that women have long faced in the health insurance market.

Opponents of the law have brought multiple lawsuits claiming that Congress lacked authority to pass the ACA, two of which are now before the Supreme Court. But it is well-settled that the Constitution allows Congress to make laws addressing national economic problems and to design federal spending programs like Medicaid to assist those in need. The ACA addresses a national breakdown in the health insurance market that has denied coverage to many, limited access to health care, and increased health care costs. The Supreme Court should respect its own well-established precedent and affirm the constitutionality of the ACA.

The ACA Ends Insurer Practices That Hurt Women

Congress's goal in passing the ACA was to address a national economic crisis in health care, with a particular focus on making insurance and health care more accessible and more affordable for women. As Speaker Pelosi stated on the night the House approved the legislation, "It's personal for women. After we pass this bill, being a woman will no longer be a preexisting medical condition." For example, the ACA:

- *Bans pre-existing condition exclusions*—Insurers in the individual market have routinely denied coverage for "preexisting conditions" that exclusively or primarily affect women. For example, insurers have deemed women to have a preexisting condition if they previously gave birth by Caesarean section;[1] are pregnant at the time they seek coverage;[2] survived domestic violence and received treatment related to abuse;[3] or received medical treatment after sexual assault.[4] The ACA prohibits this practice, and requires insurers to sell insurance to anyone who wants to buy coverage (known as "guaranteed issue").
- *Bans gender rating*—The ACA prohibits insurers' widespread practice of charging women higher premiums than they charge men of the same age, including regularly charging female nonsmokers more than male smokers.[5]
- *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. Insurers receiving federal funds are covered by this provision.[6]

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- *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. Medicaid eligibility will be expanded, with up to 8.2 million low-income women newly covered by 2014.[7]
- *Guarantees maternity coverage for all*—The majority of individual market insurance plans (87 percent in 2009) do not cover maternity care, but under the ACA maternity care is an "essential health benefit" that plans must cover.[8]
- *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.[9]
- *Protects nursing mothers*—The ACA requires employers with more than 50 employees to provide a breaks and a private place for nursing mothers to express breast milk, thereby making the extensive benefits of breastfeeding more widely available to mothers and children.[10]

Opponents of the law argue that the entire ACA should be struck down. If they are successful, women stand to lose all this – and more.

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

Congress has the authority to require individuals to buy health insurance to remedy a crisis in health insurance markets. A primary focus of the constitutional challenges to the ACA is the individual responsibility provision—which requires all individuals (unless exempt) to obtain health insurance by 2014, with subsidies available for millions of low- and moderate-income people. 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 these insurance reforms to succeed. Otherwise, some people would likely forego insurance coverage until they get sick, sharply driving up the costs of insurance for all when they eventually seek care.

There's no question the Commerce Clause of the Constitution gives Congress the power to pass laws regulating commercial markets, including the insurance industry.[11] Those challenging the individual responsibility provision argue that Congress nevertheless cannot require individuals to participate in the insurance market if they choose not to. But civil rights cases show otherwise. As the D.C. Circuit Court stated in upholding the individual responsibility provision, while it "is an encroachment on individual liberty, . . .it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race."[12] Over forty years ago, 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.[13]

Just as the refusal to rent a hotel room to a person of color is a decision about *how* and *when* to participate in the market for lodging, rather than a decision about *whether* to participate in that market, in reality the choice not to purchase health insurance is 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—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.[14] Congress has the authority to regulate a choice that has such a direct and substantial economic impact.

The ACA follows in a tradition of civil rights laws squarely within Congress's power. As Congress recognized in passing the ACA, women in particular face obstacles to 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, are more likely to forego preventative care due to cost, are more likely to be underinsured, and are more likely to report problems paying medical bills.[15] The insurance market's failure to meet women's needs has significant consequences for the larger economy.

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, when hotels, restaurants, and other businesses refuse to serve customers on the basis of race, this discrimination limits the amount of goods and services that businesses sell, limits the ability of people of color to travel and to spend money related to traveling, and otherwise distorts markets.[16] That Congress was seeking to promote women's health, remove discriminatory barriers to women's participation in the health insurance market, and address the economic impact of discrimination enhances its constitutional authority to pass the ACA.

Congress has the authority to expand Medicaid coverage. In addition, a group of states has argued that it is unconstitutional for Congress to expand Medicaid eligibility under the ACA. While every state participates in Medicaid, no state must do so. Each state can decide either to accept federal funding to operate and design its own Medicaid program within the parameters set by the federal government, or to turn down that funding and create a totally different program, or no program at all, to provide health insurance to low-income individuals. But the states challenging the Medicaid expansion argue that because it is politically difficult to turn down Medicaid funding, the ACA's expansion of Medicaid unconstitutionally coerces the states to spend more on the program. The Supreme Court has time and again held that the Constitution allows Congress to impose conditions on federal funding to states. Such conditions are common, and range from rules about how to operate programs like Medicaid to Title IX's requirement that state universities accepting federal money not discriminate on the basis of sex. If the Medicaid expansion is unconstitutional, many such rules could be at risk.

The ACA and the Supreme Court

So far, four Courts of Appeals have considered the ACA. Two have held that the individual responsibility provision is constitutional,[17] one has held that the individual responsibility provision cannot be challenged until it goes into effect in 2014, [18] and one has held that the provision is unconstitutional.[19] The only Court of Appeals to consider the Medicaid expansion found it constitutional.[20] The Supreme Court will now decide whether to respect the decades of precedent supporting the constitutionality of the ACA or rewrite constitutional law. Should the Court hold that the ACA violates the Constitution, it would not only have dire consequences for those whose health and lives depend on the rights and protections provided by the ACA, but could undermine other laws important to women, including antidiscrimination laws.

[1] *See, e.g.*, Denise Grady, *After Caesareans, Some See Higher Insurance Cost*, N.Y. Times (June 1, 2008), *available at* http://www.nytimes.com/2008/06/01/health/01insure.html?pagewanted=1&r=2. Denials of coverage for previous Caesarean section births have a broad impact on women, as nearly one third of all births in the United States are by Caesarean section. *See* Faye Menacker and Brady Hamilton, *Recent Trends in Cesarean Delivery in the United States*, NCHS Data Brief No. 35 (March 2010), *available at* http://www.cdc.gov/nchs/data/databriefs/db35.pdf.

[2] For example, a 2010 investigation of pre-existing condition denials by the four largest private for-profit health insurers in the country (Aetna, Humana, UnitedHealth Group, and WellPoint) found that all four identified pregnancy as a health condition resulting in automatic denial of coverage. Chairmen Henry A. Waxman and Bart Stupak, 111th Congress, *Memorandum to Members of the Committee on Energy and Commerce Re: Maternity Coverage in the Individual Health Insurance Market* 3-4 (October 12, 2010), *available at* http://democrats.energycommerce.house.gov/Press_111/20101012/Memo.Maternity.Coverage.Individual.Market.2010.10.12.pdf.

[3] *See* Jenny Gold, *Domestic Abuse Victims Struggle With Another Blow: Difficulty Getting Health Insurance*, Kaiser Health News (October 7, 2009), *available at* http://www.kaiserhealthnews.org/Stories/2009/October/07/Domestic-Abuse.aspx. During debate as Congress considered passage of the ACA , Representative Betty McCollum recounted the story of an attorney who received medical treatment after a domestic violence incident and was later denied insurance coverage due to her prior treatment. 156 Cong. Record H1659 (daily ed. March 19, 2010) (statement of Rep. McCollum).

[4] *See* Danielle Ivory, *Rape Victim's Choice: Risk AIDS or Health Insurance?*, Huffington Post (March 18, 2010), *available at* http://www.huffingtonpost.com/2009/10/21/insurance-companies-rape-n_328708.html.

[5] *See* Pub. L. No. 111-148, § 1201. At the time Congress considered the ACA, the overwhelming majority of states still permitted this discriminatory practice; in those states that permitted gender rating, 95 percent of surveyed best-selling plans charged a 40-year-old woman more than a 40-year-old man for identical coverage. See National Women's Law Center, *Still Nowhere to Turn: Insurance Companies Treat Women Like a Pre-Existing Condition* 5-6 (2009) [hereinafter *Still Nowhere to Turn*], *available at* http://www.nwlc.org/sites/default/files/pdfs/stillnowheretoturn.pdf. Almost none of these plans included maternity coverage, and thus health care costs associated with pregnancy and childbirth did not explain this gender rating. *Id.*

[6] *See* Pub. L. No. 111-148, § 1557. The ACA also prohibits discrimination based on race, national origin, age, and disability. *Id.*

[7] *See See* Elizabeth M. Patchias & Judy Waxman, National Women's Law Center, *Issue Brief: Women and Health Coverage: The Affordability Gap* 1, 5 (2007), *available at* http://www.commonwealthfund.org/usr_doc/1020_Patchias_women_hlt_coverage_affordability_gap.pdf (emphasizing that women are poorer on average than men, are more likely to hold low-wage or part-time jobs that do not offer employer-sponsored health benefits, and struggle more with medical bills or debt); Sara R. Collins et al., The Commonwealth Foundation, *Realizing Health Reform's Potential: Women and the Affordable Care Act of 2010* 2 (2010), *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2010/Jul/1429_Collins_Women_ACA_brief.pdf.

[8] Pub. L. No. 11-148, § 1302(b)(D). At the time Congress considered the ACA, the vast majority of individual market insurance plans did not include maternity coverage. *See Still Nowhere to Turn*, *supra* note 5, at 7 (reporting that a 2009 study of 3600 individual market plans around the United States found that only 13 percent of the plans included any coverage for maternity care). In some instances, women in the individual market had an option to purchase supplemental maternity benefits for an additional premium (known as a rider), but this coverage was often expensive and limited in scope. *See* National Women's Law Center, *Nowhere to Turn: How the Individual Health Insurance Market Fails Women* 11 (2008), *available at* http://www.nwlc.org/sites/default/files/pdfs/NWLCReport-NowhereToTurn-81309w.pdf (reporting, for example, that maternity riders in Kansas and New Hampshire cost over $1,100 per month in 2008).

[9] Pub. L. No. 111-148, § 2713(a)(4). Studies have shown that women are more likely than men to forego essential preventative services, such as cancer screenings, because of their high cost. *See, e.g.*, Steven Asch et al., *Who is At Greatest Risk for Receiving Poor-Quality Health Care?*, 354 New Eng. J. of Med. 1147-56 (2006).

[10] Pub. L. No. 11-148, § 4207. Evidence indicates that breastfeeding reduces the risk of type 2 diabetes, breast cancer, ovarian cancer and postpartum depression for mothers, and the risk of ear infections, diarrhea, lower respiratory infections, asthma, types 1 and 2 diabetes, obesity, childhood leukemia, and other conditions in children. *See* Stanley Ip et al., U.S. Department of Health and Human Services, Agency for Health Research and Quality, *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries* (April 2007*), available* at http://www.ahrq.gov/downloads/pub/evidence/pdf/brfout/brfout.pdf. .

[11] *See United States v. South-Eastern Underwriters' Ass'n*, 322 U.S. 533 (1944).

[12] *Seven-Sky v. Holder*, No. 11-5047, slip op. at 37 (D.C. Cir. Nov. 8, 2011).
[13] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243-44 (1964) .
[14] *See* Pub L. No. 111-148, §§ 1501(a)(2), 10106(a) (finding that "[t]he cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008").
[15] *See* Patchias & Waxman, *supra* note 7, at 4-5 (reporting that 68 percent of uninsured women, compared to 49 percent of uninsured men, have difficulty obtaining needed health care); *id.* at 4-5 (reporting that 16 percent of insured women, compared to 9 percent if insured men, are considered underinsured because of high out-of-pocket costs relative to income); *id.* at 5-6 (reporting that 38 percent of women, compared to 29 percent of men, report problems paying medical bills); Asch, *supra* note 9, at 1147-56 (describing women's greater propensity to forego preventative care because of cost).
[16] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 252-55, 257-58; *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964).
[17] *Seven-Sky v. Holder*, No. 11-5047, slip op. at 37 (D.C. Cir. Nov. 8, 2011); *Thomas More Law Center* v. *Obama*, 651 F.3d 529 (6th Cir. 2011).
[18] *Virginia* v. *Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Liberty University* v. *Geithner*, 2011 WL 3962915 (4th Cir. 2011).
[19] *Florida* v. *HHS*, 648 F.3d 1235 (11th Cir. 2011).
[20] *Id.*