

The Significance of the Severability Clause

Background

A severability clause may be added to legislation which is both large in size and scope as an insurance policy in the event a provision in the law is found to be unconstitutional. However, a severability clause does not guarantee the remainder of the law will become fully enforceable if a specific provision is found unconstitutional and removed. It's up to the court's discretion to deem the remainder of the sections able to stand on their own or nullify the entire statute.

The absence of the severability clause in the Patient Protection and Affordable Care Act (PPACA) had drawn an array of speculation. However, in what some have seen as an oversight in the quick drafting of the legislation or conversely, a carefully thought out exclusion, the lack of a severability clause in the PPACA has invaded courtrooms and legislative arguments on the outcome of the law should one of its provisions be struck down.

Drafting Error

A leading theory on the omission of the severability clause was a mere drafting error; left out while the Senate quickly passed the bill on Christmas Eve in 2009. Previous versions of the bill which had passed through the House contained a severability clause. When the Senate version was drafted it lacked the clause; however many assumed it could be added during the conference process which traditionally takes place between the two chambers. Instead of taking the bill to conference to finalize the text, the Senate opted to use a process called reconciliation to quickly pass their version, void a severability clause, into law.

Deliberate Omission

Others argue a more deliberate and strategic reasoning to why the PPACA lacks a severability clause. Some speculate its absence indicated every piece of the law - specifically the individual mandate - was necessary to ensure the law as a whole would work. The linchpin of the law rests in the individual mandate and to sever that out would also require the Justices to begin to take out other insurance reform provisions. The drafters understood the complex law would crumble, as well as lose its supporters, without the individual mandate. Therefore, they were willing to risk the fate of the whole law on the constitutionality of the individual mandate. Others argued that by including a severability clause into PPACA, it would have sent a signal to the courts that there may have been doubts about certain sections of the law.

As PPACA has worked its way through various courts there has only been one judge to determine the lack of a severability clause caused the whole law to become null and void.

Judge Roger Vinson heard the case *Florida v. Health and Human Services* which was brought by 26 state attorney generals, the National Federation of Independent Business and several private citizens. On October 14, 2010 he issued his decision which he stated, “The lack of a severability clause in this case is significant because one had been included in an earlier version of the Act, but it was removed in the bill that subsequently became law...In other words, the severability clause was intentionally left out of the Act.”

Since this decision was handed down, the 11th Circuit Court reviewed the case and agreed the individual mandate was unconstitutional; however, they did not go as far as to say the entire law must be stricken. The next step will be for the case as well as others that question the constitutionality of PPACA to be heard before the Supreme Court this March. It will be up to the Justices to not only determine the law’s constitutionality, but also its fate due to the lack of a severability clause.

The States’ Opinion

Although the states’ would prefer the entire law is struck down due to lack of severability, they will argue the Justices should review each individual provision and determine on a piece by piece basis if it could be enacted without a minimum coverage provision. The states hope to show through this analysis that the provisions are inseverable due to the burden associated with removing specific pieces.

The Federal Government’s Opinion

The federal government argues that the guaranteed-issue and community-rating provisions are intertwined directly with the minimum coverage provision. In the 11th Circuit Court in Florida the justices separated out the individual mandate from the other insurance provisions and allowed the others to stand void of the mandate. In the filing by the administration, they now argue that should the individual mandate be severed, community-rating and guaranteed-issue should also fall. This codependent relationship emphasizes the intricate balances found in the law between each of its provisions.

Why this is Important

The decision on severability is arguably one of the most important the Justices will be facing. The mandate and insurance provisions have a large impact on the entire market and one’s existence without the other has shown to cause negative market effects.