



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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Mr. Ted Nickel, Commissioner  
Office of the Commissioner of Insurance  
125 South Webster Street  
Post Office Box 7873  
Madison, Wisconsin 53707-7873

Dear Commissioner Nickel:

I am responding to your letter of September 28, 2011, which asks whether the passage of 2011 Assembly Bill 210 (A.B. 210) would adversely impact Wisconsin's ongoing court challenge to the 2010 Patient Protection and Affordable Care Act (PPACA). It is the Department of Justice's view that it would not.

As you are aware, the State of Wisconsin is one of 26 plaintiff states in *State of Florida, et al. v. U.S. Department of Health and Human Services, et al.*, Case No. 10-CV-91, Northern District of Florida (Pensacola). The action was originally filed by the original plaintiff states on March 23, 2010. Upon taking office, Governor Walker authorized the Attorney General to join this litigation on behalf of the State of Wisconsin. Wisconsin joined the suit on January 19, 2011, when the District Court allowed a Second Amended Complaint to be filed.

The Second Amended Complaint challenged two main features of the Act: (1) the "individual mandate," which provides that, beginning in 2014, U.S. residents must purchase government approved health insurance or face a tax penalty; and (2) conversion of Medicaid into a federally-imposed universal healthcare regime.

On January 31, 2011, District Court Judge Roger Vincent issued a decision granting summary judgment to the states. He concluded that the "individual mandate" portion of the PPACA was not within Congress' powers under the Commerce Clause of the United States Constitution and further concluded that the individual mandate was not severable from the remainder of the health care law, thus making the entire PPACA invalid. *State of Florida, et al. v. U.S. Dept. of Health and Human Services*, 780 F.Supp.2d 1256 (N.D. Fla. 2011). However, in a subsequent order, he stayed his ruling as to severability pending appeal. *State of Florida, et al. v. U.S. Dept. of Health and Human Services*, 780 F.Supp.2d 1307 (N.D. Fla. 2011). Judge Vincent found against the challenging states on the Medicaid issue.

On August 12, 2011, the Eleventh Circuit Court of Appeals affirmed Judge Vincent's decision that the individual mandate was unconstitutional, but concluded that it could be severed from the remainder of the PPACA. It also affirmed Judge Vincent's conclusion on the Medicaid

issue. *State of Florida, et al. v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11<sup>th</sup> Cir. 2011). Both sides have now asked the Supreme Court to review the Eleventh Circuit decision. It is anticipated that the Supreme Court will grant the petition and decide the case in the Spring or Summer of 2012.

Thus, the current status of Wisconsin's legal challenge is that the individual mandate has been held unconstitutional, but the remainder of the PPACA has been upheld and is binding on the states. The 26 plaintiff states are asking the United States Supreme Court to invalidate the entire PPACA, thus relieving the States and the public from any of its provisions. However, it will likely be several months before any final decision is issued. In the meantime, there are deadlines and milestones in the PPACA that have been or will be reached.

Given the context of the litigation, and the issues that are being considered, there is nothing unusual or unexpected about state legislation, such as A.B. 210, that is intended to implement or address portions of the PPACA. Many other states are in the same position as Wisconsin and we expect many of them will take similar action.

It is the Department of Justice's view that the passage of A.B. 210 into law will not have any impact on the State's likelihood of prevailing in the Supreme Court. While it is possible that some members of the public will view the passage of A.B. 210 as a compromise or concession to the PPACA, that is not our view. But most importantly to your question, the passage of A.B. 210 will not, in our opinion, have any bearing on the Supreme Court's consideration of the important legal issues in the case.

There is one additional consideration to keep in mind. If Wisconsin passes legislation in response to, or because of the PPACA, that legislation will remain the law of this state even if the PPACA is invalidated in its entirety *unless* the state legislature has clearly indicated state law is repealed or sunset under such circumstances. Therefore, it would be appropriate for the legislature to consider automatic repealer provisions that would be triggered by a final judgment in the federal challenge should the legislature wish for A.B. 210's provisions to be contingent upon the constitutionality of the PPACA.

Finally, this correspondence is not intended to support or oppose A.B. 230 or the underlying policy issues under legislative consideration. On those questions, the Department takes no position.

This letter is not a formal or informal opinion of the Wisconsin Attorney General.

Sincerely,



Kevin M. St. John  
Deputy Attorney General

KMS/SPM: pss

cc: ✓ Dan Schwartzer, Deputy Commissioner of Insurance  
Steven P. Means