

A Drooping Crown of Daisies

A Plan for Nullifying President Obama's Crowning Achievement

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act into law. On that same day dozens of states, corporations and law firms announced their intentions to challenge the new law, known to most Americans as simply "the health care bill," on the basis of the tenth amendment. Most of those challenges are focused on the individual mandate for health insurance, and there is a very strong possibility that they will be successful at removing that particular clause and that clause alone from the text of the new law, but the law as a whole will still remain in effect. There is, however, an alternative approach which may be used to nullify this law in its entirety.

While the health care bill was being debated in the Senate, the American Medical Association sent a letter to majority leader Harry Reid in which they requested that section 1333 be removed from the bill. The Association saw that particular section as a threat to the entire bill because it included a provision for states to opt out of a single, particular portion of the new law. Unfortunately for them, and to the great relief of this author, the Democrats neglected to heed this advice; and a very important loophole now exists in this section by which a savvy state legislature can negate the effect of the entire law.

Section 1333 of the health care bill is labeled as "Provisions Relating to Offering of Plans in More Than One State." Subsection (a) of this section explains that "2 or more States may enter into an agreement under which 1 or more qualified health plans could be offered in the individual markets in all such states." It further states that "A State may not enter into an agreement under this subsection unless the State enacts a law after the date of the enactment of this title that specifically authorizes the State to enter into such agreements." This simply means that, under this bill, insurance providers will be permitted to sell plans across state lines if, and only if, the state legislatures vote to permit the interstate sale of health insurance.

Subsection (b) of section 1333 deals with the offering of nationwide plans. This subsection states that an insurance provider "may offer the nationwide qualified health plan... in more than 1 State." The opt-out clause which the American Medical Association wanted removed is also located in this subsection. It reads: "A State may, by specific reference in a law enacted after the date of the enactment of this title, provide that this subsection shall not apply to that State." In other words, insurance providers can provide a nationwide plan in every state except in those states that vote to opt out of the nationwide plan.

This ability of the states to block the sale of interstate health insurance plans within their borders is the greatest threat that could ever be brought against this bill. The only justification that the Democrats can give for the Constitutionality of this bill is found in a combination of the "necessary and proper" clause with the "commerce" clause of our nations Supreme Law. The first clause states that Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." One of the foregoing powers referenced here is found in the "commerce" clause which states that Congress has the right "to regulate Commerce with foreign Nations, and among the several States." Together, these two clauses grant Congress the authority to interfere with and even control any company or industry which conducts business across state lines. This reasoning has been used by the Democrats to justify government intrusions ever since Roosevelt's New Deal, but section 1333 of the Health care bill provides the states with an airtight defense against this tactic.

Prior to the passage of this law, the health insurance industry was prohibited from conducting any business across state lines. This means that there was not any health insurance commerce which occurred “among the several States” and that, therefore, meant that the “commerce” clause did not apply to the health insurance industry. In order to validate any application of this clause, the Democrats had to create conditions under which interstate sales of health insurance would be possible.

This brings us back to section 1333 and the crucial role that this section should have in any attempt to repeal the health care bill. This section provides two methods by which health insurance companies can sell their plans across state lines. The first method of a multi-state agreement can only be utilized if the states specifically vote to allow it. The second option of a nationwide insurance plan is automatically available to insurance companies except in those states which specifically vote to opt out of the nationwide plan.

These are the only provisions in this Bill which could generate interstate commerce in the health insurance industry. This means that if the legislature of the State of Alabama (or any other state) were to vote to opt out of the nationwide plan and if they were never to vote for an interstate insurance plan, then the federal government would be prohibited by the tenth amendment from regulating the health insurance industry of the State of Alabama. Any attempt to do so would be without Constitutional authority and would be doomed to failure in the courts. This approach could so effectively nullify this new law that historians would view President Obama’s crowning achievement as nothing more than a chain of dead daisies drooping upon his ears.