IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA (PENSACOLA)

STATE OF FLORIDA etc., et al,	)	
Plaintiffs,	)	Case No. 3:10-cv-0091-RV-EMT
vs.	)	
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN RESOURCES et al.,	)	
Defendants.	)	

PRO SE MOTION BY ROBERT P. SMITH, JR. TO RECONSIDER THE COURT'S DENIAL (DOC. 37, 4/23/2010) OF SMITH'S FRCP 24(a) MOTION DOCS. 23 & 30) TO INTERVENE AS PARTY DEFENDANT; and, alternatively, SMITH's RENEWED FRCP R. 24(a) MOTION TO INTERVENE [including supporting Memorandum, N. D. Fla. Loc. R. 7.1(a)]

In light of the Department of Justice (DOJ) filing a MOTION TO DISMISS (Doc. 55) that neither objects to venue in the Pensacola Division nor moves for transfer to the Tallahassee Division, thus jeopardizing SMITH's protected venue interest, 28 USC. sec. 1406(a) (b), and repudiating the representation vouchsafed to Movant by Court ORDER (Doc. 37 text and fn. 3 p. 4) denying his MOTION TO INTERVENE (Doc. 23); and

in light of Plaintiffs filing an AMENDED COMPLAINT (Doc. 42) exacerbating that venue defect by relying on a new plaintiff (Mary Brown, resident in the Panama City Division) who like plaintiff McCollum (resident Tallahassee Division) is a nonresident of the Pensacola Division (Doc. 42 para. 27 p. 8), *contra* 28 USC secs. 1391(e) and 1406(a),

Movant ROBERT P. SMITH, JR, (1) moves the Court to reconsider its ORDER (Doc. 37) as to SMITH's Motion, and alternatively (2) renews on the updated record and pre-existing law his MOTION TO INTERVENE (Doc. 23), and shows unto the Court:

Standards for consideration of these two Motions

(1). The ***Motion for Reconsideration*** invokes the inherent power of any federal court to reconsider its own non-final order, not rendered inaccessible by appeal or a final judgment, for clear error of fact or law and to prevent a miscarriage of justice. The governing discipline is not res judicata or stare decisis but law of the case, which is rooted in history rather than in any particular FRCP, and "as now most commonly understood, [holds] it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." White, J., for the Court in *Arizona v. California*, 460 U.S 605, 618 n. 3, 103 S. Ct. 1382, 1391 n. 9, 75 L.Ed.2d 318 (1983); *accord, Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 2178, 100 L.Ed.2d 811 (1988) ('clearly wrong' for a federal court, so convinced, to deny relief; and "a district court's adherence to law of the case cannot insulate an issue from appellate review."). *See also* from nearby district courts *Equity Hernando Woods, Inc. v. United States,* 910 F. Supp. 574 (M. D. Fla. 1995) (Kovachevich, J.) ("Courts have recognized three grounds justifying reconsideration . . . and (3) the need to correct a clear error or manifest injustice"); and *Medley v. Westpoint Stevens, Inc.*, 162 F.R.D. 697, 699 (M. D. Ala. 1995) (Albritton, J.) (eschewing reconsideration on new evidence that "could have been submitted" before earlier ruling).

The clear errors and manifest injustice in the ORDER of which reconsideration is sought are set out below in the **Supporting Memorandum**.

(2). The alternative ***Motion to Intervene*** renews on the now-existing record the prior MOTION if for any reason the two later-filed documents aggravating the original venue-choice defect, viz. the AMENDED COMPLAINT (Doc. 42 filed

5/14/2010) and DOJ's MOTION TO DISMISS (Doc. 55 filed 6/16/2010), are not cognizable on reconsideration of the Court's ORDER (Doc. 37) nunc pro tunc the date of its filing, 4/23/2010. The renewed MOTION TO INTERVENE is subject to de novo consideration based on the same four-fold criteria of, e.g., *Sierra Club v. Leavitt*, 488 F.3d 909 (11th Cir. 2007), that were acknowledged and argued in SMITH's MOTION TO INTERVENE (Doc. 23 para.1 p. 1) and his SUPPLEMENTAL MEMORANDUM (Doc. 30 filed 4/16/2010). See also *Clark v. Putnam County*, 168 F.3d 458, 561 (11th Cir. 1999), cited ORDER p 4 fn. 3.

Facts and Law pertinent to the two Motions

1. The action (Complaint Doc. 1) was brought in the Northern District of Florida, Pensacola Division, where no plaintiff was or is resident. The only original Florida resident plaintiff was Florida Attorney General Bill McCollum, who by Florida Statute 16.02 "shall reside at the seat of government," which by Fla. Const. Art II Sec 2 "shall be the City of Tallahassee, in Leon County," within the Tallahassee Division. See the texts of those laws in photographic Attachment 1 hereto.

2. Northern District of Florida Local Rule 3.1(A) amended eff. 1/1/2004 (the last two prior general revisions were signed by then Chief Judge Roger Vinson for all the judges) provides, in language unchanged for at least ten years (emph. added):

> "The district shall be divided into four (4) divisions [(1) *Pensacola* (2) *Panama City* (3) *Tallahassee* & (4) *Gainesville Divisions*]. All civil cases ***in which venue properly lies in a division of the district . . . shall be filed in that division and shall remain pending in that division*** until final disposition unless transferred to another division by order of the court."

3. 28 USC sec 1391(e)(3), relied on for venue justification by both the COMPLAINT (Doc 1 para. 11) and AMENDED COMPLAINT (Doc. 42 para. 5), does not in terms specify that actions against U.S. agencies acting under color of law ***shall be brought in the division*** of the district where the plaintiff resides, but rather, "may, unless otherwise provided by law, be brought in any judicial district in which . . . (3) the plaintiff resides if nor real property is involved in the action." But 28 USC sec. 1406(a) requires, "as [is] otherwise provided by" N. D. Fla. Loc. R. 3.1(A), that (emph. added):

> "(a) The district court of a district in which is filed a case laying venue in the ***wrong division*** or district shall dismiss, or it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

4. SMITH's MOTION TO INTERVENE with tendered ANSWER, Doc. 23 citing Fla. N. D. Loc. R 3.1(A) at MOTION p. 6, was docketed before 8:30 a.m. on April 14, and was promptly noticed to the Chambers of Judge Vinson before the scheduling conference met at 9:00 a.m.(see minute entry between Docs. 23 and 24). The MOTION paras. 1, 4(a) and 5(b) averred "Movant seeks comprehensive party status" (see also p. 6 MEMORANDUM and tendered ANSWER, Doc. 23). It argued further, p. 1, that

> "the basis for his Rule (24)(a) Motion most clearly satisfying all four criteria for intervention, e.g., *Sierra Club v. Leavitt*, 488 F.3d 909 (11th Cir. 2007), is Movant's purpose to contest the filing of this action in the Pensacola Division rather than in the Tallahassee Division . . . .;

The MOTION argued further that SMITH's protected interest in the case had already been impeded and impaired by the improper venue choice:

[para 4(a)] "Movant's interest is in sustaining the Act and participating in its defense, in Tallahassee. The Attorney General's inexplicable (except as forum-shopping for a favorable political climate) choice to tile [file] in Pensacola rather than Tallahassee impacts Movant's interest significantly. For example, movant's Tallahassee residence is 15 minutes drive from the Tallahassee federal courthouse, but four hour's drive from the Pensacola courthouse. Movant will be unable to attend the recently scheduled scheduling conference before the Court . . . due to previously scheduled cataract eye surgery [on the day before]. . . ";

and the MOTION argued that DOJ's refusal to advise SMITH of whether it would contest plaintiffs' improper choice of venue gave strong reason to doubt DOJ's willingness and ability to represent SMITH's said interest (emph. added):

[para.5(e)] " Repeated conversations with Ms. Rivera [DOJ spokes-person] resulted in Movant eventually being advised . . . that . . . ***Movant should not expect to learn from DOJ its plan to defend the case ("work product")*** and should not expect reciprocal consultation with DOJ counsel . . . ."

5. The Court's scheduling conference proceeded with no notice taken (except by the Clerk's docketing and notice to Chambers) of SMITH's MOTION and tendered ANSWER (Doc. 23). Then followed a Minute Entry of that conference (Doc. 24), the FINAL SCHEDULING ORDER (Doc. 26 April 14), and SMITH's SUPPLEMENTAL MEMORANDUM OF LAW (Doc. 30 April 16), arguing (emph. in the original omitted; new emph. supplied):

DOJ's "***evident failure [at the scheduling conference]. . . even to call to the Court's attention . . . that Movant had served his Motion to Intervene on counsel 36 hours earlier . . . and the Clerk had docketed his Motion that morning before 8:30 a.m.***, proves without doubt that Movant was disadvantaged by the matter proceeding without resolution of the venue issue, and the Department of Justice was unwilling or unable to represent Movant's interests effectively . . . ." .

6. On April 23 the COURT entered the subject ORDER (Doc. 37 at fn.3 p. 4) denying SMITH's MOTION after ***patently mischaracterizing*** SMITH's above-quoted submission as (emphasis added):

> "He [SMITH] contends that ***the defendants' failure to challenge venue*** during the recent Rule 16 conference 'proves without doubt' that defendants are 'unwilling or unable to represent Movant's interest effectively.'"

Surely the Court recognizes the difference between SMITH arguing DOJ his putative "representative" ought to have said, *"Your Honor, I call to your attention SMITH's MOTION TO INTERVENE, served two days ago and now docketed and NOTICED to Your Honor, which perhaps Smith wishes to have considered this morning,"* and the COURT's false translation, *"Your Honor, the United States parties now move the Court to dismiss the action or transfer it to the Jacksonville Division, as required by law."*

The COURT thus set up a flimsy straw man and proceeded to knock him down (ORDER Doc. 37 fn. 3 p. 4), stating:

"On the contrary, the fact that [DOJ] defense counsel did not raise a particular legal argument . . . at a Rule 16 scheduling conference and before any responsive pleading has been filed merely indicates that counsel was following the Rules of Civil Procedure."

These ***plain errors of fact*** contributed mightily to ***plain errors of law*** in the same ORDER:

(a) Holding, Doc. 37 text at p. 4:

"Nor has he [SMITH] shown that the very competent attorneys representing the federal government will inadequately represent those [SMITH's] interests;" and

(b) Holding, Doc. 37 fn. 3 p. 4, that the DOJ's failure to call attention to SMITH's MOTION TO INTERVENE "merely indicates that counsel was following the Rules of Civil Procedure," and that the issue would not properly be addressed until the hearing on DOJ's anticipated Motion to Dismiss in September, more than five months after the case was filed, Scheduling Order Doc. 26;

(c) Holding by implication, fn. 3 p 4, that SMITH, because he seeks the same ultimate objective as the DOJ (a final judgment sustaining the Act in question), has no diverging and protectable interest in the action being brought and maintained in the forum of proper venue; and

(d) Plainly misinterpreting *Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999), which declares the presumption of adequate representation "weak" and the requirement "'satisfied if the applicant shows that representation of his interest "may be" inadequate, and the burden of making that showing should be treated as minimal.'" 168

F.3d at 461, quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972), and reversing the district court's denial of intervention to six individuals who showed "a sufficient divergence of interest" between themselves and the putative representatives.

7. On May 14 Plaintiffs filed their AMENDED COMPLAINT (Doc. 42) on the timeline set by the Scheduling Order. The Amended Complaint added only one Florida resident party plaintiff, MARY BROWN. [The California corporation NFIB (Doc. 42 para. 26), regardless of where its members reside, is a resident of California only. *Flowers Ind., Inc. v. F.T.C.*, 835 F.2d 775 (11th Cir. 19870.] BROWN alleges (Doc. 42 para. 27 p. 8) she is a citizen and resident of Florida and "is self-employed, operating Brown & Dockery, Inc., an automobile repair facility in Panama City, Florida. The Amended Complaint does not allege her county of residence, but corporate filings of Brown & Dockery, Inc., a nonparty of which BROWN is an Offficer and Director, show her to reside at 9219 Indian Bluff Road, Youngstown FL 32466, located in Bay County, in the Panama City Division, which **Mapquest** verifies. See attachments 3 and 4 hereto. Even if Brown were a Pensacola Division resident, she was not "joined" in "any such action" qualifying as "brought" in McCOLLUM's residence venue by N.D. Fla. Loc. R 3.1(A) and 28 USC sec. 1406(a), and the last sentence of sec. 1391(e) (e.a.):

> "Additional persons may be joined as parties to ***any such action*** [one "brought" in a venue of qualifying residence] in accordance with the Federal Rules of Civil Procedure ***and with any other venue requirements*** as would be applicable if the United States or one of its officers, employees, or agencies were not a party."

8. By adding BROWN, who resides nearer to but not *in* the Pensacola Division, McCOLLUM et al. simply blush with acknowledgement of the original venue defect and offer a halfhearted attempt to cure it. Truth is, McCOLLUM and plaintiff HENRY McMASTER, ATTORNEY GENERAL who sues for SOUTH CAROLINA, asserted to N*ew York Times*, published May 11 pp. A10-A11 (attachment 2, p. A11 middle column), "The lawsuit could have been filed anywhere." That quote was unattributed, but the context indicates McMASTER:

> "'We thought with the judges [in the Pensacola Division], we'd do as well there as anywhere else,' Mr. McMaster said.'"

McMASTER added an obligatory "But it's the strength of the case we're counting on." *The Times* noted the flagrant forum-shopping that McMASTER bragged on:

> "The state's Northern District includes a courthouse in Tallahassee, six blocks from Mr. McCollum's office. But Mr. McCollum instead filed the case 200 miles away in Pensacola, bypassing a Tallahassee judge who was named by President Bill Clinton and ensuring that the judge would be a Republican appointee."

9. On June 16, 2010, the DOJ filed its MOTION TO DISMISS (Doc. 55), which neither moves the Court for dismissal nor moves for transfer to the Tallahassee Divison, on account of improper venue. DOJ does not in fact "represent," but indeed jeopardizes, SMITH's interest in the case. 28 USC sec. 1406(b):

> (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

MEMORANDUM SUPPORTING MOTIONS TO RECONSIDER or TO INTERVENE
N. D. Fla. Loc. R. 7.1(a)

The Record abundantly establishes the stated legal grounds (*supra* pp. 2, 3, with authorities set forth) for the Court granting either SMITH's MOTION TO RECONSIDER or his alternatively renewed MOTION TO INTERVENE (supra p. 1). There was clear error of both fact and law in the Court's ORDER denying SMITH intervention (Doc 37 p. 4); and the justice of the cause, moreover the dignity of this Court, require that intervention be granted and that the case dismissed or transferred to the Tallahassee Division on the existing record (including SMITH's ANSWER tendered April 14, 2010, scanned into the record as part of SMITH's Doc. 23), or an Order be issued to other parties to Show Cause why that should not be done forthwith.

A. Clear Errors of Fact in the Court's Order .

MOVANT has specified above, paras. 4, 5, and 6 pp. 4-7, the Court's clear ***errors of fact*** in supposing by its ORDER (Doc. 37 p. 4) that SMITH had not argued and shown his satisfaction of "all four" of the acknowledged criteria for intervention, including – in addition to the timeliness of his Motion and his "interest" as a citizen and resident, which the Court has acknowledged – both the impeding and impairment of his interest by the case proceeding in his absence as a party, and the DOJ's unwillingness or inability to represent SMITH's interest adequately.

SMITH's prior MOTION plainly argued and (to the extent the Record then permitted) demonstrated the contrary, albeit in more summary terms than the forgoing (not expecting then that the Court would so underestimate his showing, and anticipating a further opportunity as Intervenor to brief venue, MOTION Doc 23 at p. 6). The Court

clearly misapprehended, as matters of fact, those arguments and the substantial showing made in their support.

Now the DOJ, SMTH's ostensible representative absent intervention, has all but waived the venue defect by omitting that objection from its intervening MOTION TO DISMISS. *Supra* para. 9 p. 9.

What clearer or more prejudicial error of fact in the ORDER fn. 3 could possibly be imagined?

B. Clear Errors of Law in the Court's Order.

Again, the foregoing paras. 2, 5 and 6, pp. 5-8, show that the Court clearly erred as a matter of law in dismissing out of hand the substantial argument and evidence SMITH demonstrated in his MOTION to intervene, Doc. 23.

Perhaps the most painfully-inflicted error of law in the Court's ORDER was its misplaced reliance on the 11th Circuit precedent in *Clark v. Putnam*, which as demonstrated above, para. 6(d) at pp. 6-7, reversed a district court that had denied intervention to individuals situated as SMITH is, with "a sufficient divergence of interest" from the putative party-representative to justify intervention.

That the DOJ could not be relied on to represent SMITH's particularized interest in the case is conclusively shown by its conspicuous omission of any venue objection from DOJ's MOTION TO DISMISS.

The legal significance of DOJ's silence at the scheduling conference, and of its neglect or willful withholding of a venue objection, is abundantly clear. SMITH's MOTION correctly assessed DOJ's unreliability; the COURT grievously erred as a matter of laws in assuming something else.

C. Justice of the Case Requires Intervention be Reconsidered and Granted.

At the risk of laboring the obvious, there are now ten (10) lawyers of record, plus an undisclosed number of *amici* (see the Court's Order Doc. 50) on plaintiffs' side of the case. Messrs. Rivkind and Casey of the Washington Beltway office of a prestigious national law firm, hired by McCOLLUM at Florida taxpayer expense, have now filed formal appearances (Docs. 47, 48) and apparently have taken over as lead counsel for the State plaintiffs; at least they are listed as primary for the State plaintiffs on the online docket sheet. McCOLLUM told the *New York Times* that Rivkind's and Casey's *Wall Street Journal* opinion piece, Sept. 2009, inspired and informed his gathering his litigation cohort, see Attachment 2 at NYT A10, A11.[1]

Rivkind and Casey thus join in this flagrant forum-shopping. See *Albritton v. C.I.R.*, 37 F.3d 183 (5th Cir. 1994). ***Is there not room here for a dissenting voice?***

Rivkind's and Casey's article asserted factual issues [2] on the merits that are not alleged in either the COMPLAINT or AMENDED COMPLAINT, thus making SMITH's tendered ANSWER (Doc. 23) especially germane, given that that the Scheduling Order abruptly assumed that the case would be decided on DOJ's motion to dismiss or plaintiffs' motion for summary judgment. Doc. 26 p. 2, modified Doc. 50 p. 3.

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[1] "Mr. McCollum . . . said he first became fixated on the constitutionality of the [insurance] mandate last September, after reading a column in The Wall Street Journal by David B. Rivkind, Jr. and Lee A. Casey . . . ."

[2] "Certainly some insured use emergency rooms in lieu of primary care physicians, but the majority are young Americans who do forgo insurance precisely because they do not expect to need much medical care. ***When they do, these uninsured pay full freight, thereby actually subsidizing insured Americans.***" (e.a.). Rivkind and Casey, "Mandatory Insurance is Unconstitutional,"The Wall Street Journal, Sept.18, 2009, p. A23; last accessed online 6/28/2010 by Googling "Rivkind and Casey" or *http://online.wsj.com.articleSB10000142052920-451857441662310932480.htm#*

Respectfully submitted,

Robert P. Smith, Jr., pro se Movant
2007 Lee Avenue Tallahassee FL 32308

(850) 284-1604

Certificate of Service

I DO CERTIFY that a copy hereof was furnished this June 28, 2010 by hand delivery of a complete copy to Asst. Att'y Blaine H. Winship, Office of the Attorney General, The Capitol Ste PL -01, Tallahassee, Attorney for State plaintiffs other than TEXAS; by overnight courier delivery to David Boris Rivkin, Jr., and Lee Alfred Casey of Baker & Hostetler LLP, Washington, Attorneys for all State plaintiffs and certain others; and by e-mail attachment (without exhibits 1, 2 and 3) and first-class U. S. mail (complete), at their addresses of record, to all other attorneys for plaintiffs; and by overnight courier delivery (complete) Brian G. Kennedy and Eric B. Beckenhauer, DOJ Attorneys for the United States defendants, Washington.

STATE OF FLORIDA

COUNTY OF LEON

Personally appeared before me on this June 28, 2010, Robert P. Smith, Jr., who being sworn says the statements of fact in the foregoing document are true.

Notary Public
My commssion expires:

RACHEL C. FENLON
Commission DD 735545
Expires November 18, 2011
Bonded Thru Troy Fain Insurance 800-385-7019

Constitution of the State of Florida as Revised in 1968 and Subsequently Amended: Article II

ARTICLE II

GENERAL PROVISIONS

SECTION 1. State boundaries.

SECTION 2. Seat of government.–The seat of government shall be the of Tallahassee, in Leon County, where the offices of the governor, lieutenant governor, cabinet members and the supreme court shall be maintained and the sessions of the legislature shall be held; provided t in time of invasion or grave emergency, the governor by proclamation for the period of the emergency transfer the seat of government to anc place.

The 2009 Florida Statutes

Title IV	Chapter 16	View Entire Chapte
EXECUTIVE BRANCH	ATTORNEY GENERAL	

16.01 Residence, office, and duties of Attorney General.--The Attorney General:

(1) Shall reside at the seat of government and shall keep his or her office in the capitol.

(1)

The New York Times

Florida Suit Rated Best As Challenge To Care Law

By KEVIN SACK

As they constructed the requirement that Americans have health insurance, Democrats in Congress took pains to make their bill as constitutionally impregnable as possible.

But despite the health care law's elaborate scaffolding, attorneys general and governors from 20 states, all but one of them Republicans, have now joined as confident litigants in a bid to topple its central pillar. In the process, they hope to present the Supreme Court with a landmark opportunity to define the limits of federal authority, perhaps for generations.

In the seven weeks since the legislation passed, at least a dozen lawsuits have been filed in federal courts to challenge it, according to the Justice Department. But the case that could carry the most weight, and may be on the fastest track in the most advantageous venue, is the one filed in Pensacola, Fla., by state officials, just minutes after President Obama signed the bill.

Some legal scholars, including some who normally lean to the left, believe the states have identified the law's weak spot and devised a credible theory for eviscerating it.

The power of their argument lies in questioning whether Congress can regulate inactivity — in this case by levying a tax penalty on those who do not obtain health insurance. If so, they ask, what would theoretically prevent the government from mandating all manner of acts in the national interest, say regular exercise or buying an American car?

Other experts, however, dismiss the Florida lawsuit as a politically motivated lark at taxpayer expense, and argue that the insurance mandate falls comfortably within Supreme Court precedents. The states, they say, may not even withstand a challenge to their standing to bring the suit, since they are only indirectly affected by the mandate.

questions whether Congress can regulate inactivity.

The focus of the litigation is the 16-word clause in Article 1, Section 8 of the Constitution that allows Congress to regulate interstate commerce, a provision the court has interpreted broadly but not without boundaries. The lead plaintiff, Attorney General Bill McCollum of Florida, who is running for the Republican nomination for governor, argues that the new law's historic reach presents the courts with fresh circumstances.

"In the last 50 years or so," Mr. McCollum said, "other than Brown v. Board, I think the constitutional precedents here will have a greater impact on more people than maybe anything else the court has decided."

Jonathan Turley, who teaches at George Washington University Law School, said that if forced to bet, he would predict that the courts would uphold the health care law. But Mr. Turley said that the federal government's case was far from open-and-shut, and that he found the arguments against the mandate compelling.

"There are few cases in the history of the court system that have a more significant assertion of authority by the government," said Mr. Turley, a civil libertarian who acknowledged being strange bedfellows with the conservative theorists behind the lawsuit. "This case, more than any other, may give the court sticker shock in terms of its impact on federalism."

Mr. McCollum, 65, said he first became fixated on the constitutionality of the mandate last September, after reading a column in The Wall Street Journal by two Washington lawyers, David B. Rivkin Jr. and Lee A. Casey, of the white-shoe firm Baker Hostetler. Mr. McCollum had worked for the firm after retiring from the House of Representatives in 2001, but said he had never collaborated with the men and knew them only well enough to say hello in the hallway.

Mr. Rivkin, 53, and Mr. Casey, 52, who have worked together since meeting in the Reagan Justice Department, had been warning in columns since the early

Continued on Page A11

(2)

Florida Suit on Care Law Is Rated High

From Page A10

1990s that a health insurance mandate would extend Congress's power to regulating Americans "merely because you exist."

The lawsuit grew out of regular conference calls among a group of attorneys general who were threatening to challenge the so-called Cornhusker Kickback, a provision favoring a single state, Nebraska, that ultimately was dropped from the bill.

The complaint initially was filed by attorneys general from 13 states, with Mr. McCollum's name listed first, like John Hancock's. Seven other states have since committed to join, some after bitter disagreements between governors and attorneys general from opposing parties. Virginia, which pre-emptively enacted a law intended to nullify a federal insurance mandate, has filed a separate lawsuit.

The states have hired Mr. Rivkin and Mr. Casey as outside counsel under a contract that restricts their fees to $50,000 this year. The lawyers agreed to reduce their hourly rate to $250, from $950, a practice Mr. Rivkin said was standard for public-sector clients.

Four of the attorneys general named as plaintiffs are running for governor. Attorney General Henry McMaster of South Carolina, who faces a competitive Republican primary for governor in June, is broadcasting a television advertisement about the litigation in which he vows to "protect the sovereignty of South Carolina." Mr. McCollum's campaign Web site features a petition in support of his lawsuit to "stop Obamacare."

The Justice Department said it would "vigorously defend" the cases. "We are confident that this statute is constitutional and that we will prevail," said Tracy Schmaler, a department spokeswoman.

Congressional bill writers took steps to immunize the law against constitutional challenge. They asserted in the text that the insurance mandate "substantially affects interstate commerce," the Supreme Court's standard for regulation under the Commerce Clause. They labeled the penalty on those who do not obtain coverage an "excise tax," because such taxes enjoy substantial constitutional protection. Supportive analyses by prominent law professors were read into the Congressional Record.

MICHAEL SPOONEYBARGER FOR THE NEW YORK TIMES

Attorney General Bill McCollum of Florida, center, is the lead plaintiff in a challenge to the health care law. Mr. McCollum, a candidate for governor, campaigned recently in Pensacola.

Nonetheless, there is a broad assumption that the health care law will earn Supreme Court review, although it could take two years or more to get there. The judge in Pensacola, Roger Vinson, has scheduled oral arguments for Sept. 14 on the Justice Department's anticipated motion to dismiss the case. With no real facts to try, those legal arguments would effectively serve as a trial.

The lawsuit could have been filed anywhere. But several lawyers involved said they wanted the first review to rest with the United States Court of Appeals for the 11th Circuit, a generally conservative bench that handles cases from Florida.

The state's Northern District includes a courthouse in Tallahassee, six blocks from Mr. McCollum's office. But Mr. McCollum instead filed the case 200 miles away in Pensacola, bypassing a Tallahassee judge who was named by President Bill Clinton and ensuring that the judge would be a Republican appointee.

"We thought with the judges, we'd do as well there as anywhere else," Mr. McMaster said. "But it's the strength of the case we're counting on."

The suit lodges three related claims against the health law.

It challenges the federal government's vast expansion of Medicaid as "an unprecedented encroachment on the sovereignty of states." The Justice Department plans to counter that states do not have to participate in Medicaid, according to sources familiar with its thinking. But the states argue that their health care systems have grown so dependent on Medicaid that withdrawing would be catastrophic.

A second count attacks the tax penalty on the uninsured, saying it is an illegal direct tax, and not an allowable excise tax on goods or services.

But the central challenge concerns the Supreme Court's interpretation of the Commerce Clause, as expressed in four decisions handed down over 63 years. If the court interprets the clause broadly, as it did in two seminal cases on the subject, the health insurance mandate is likely to survive.

In those two cases, Wickard v. Filburn in 1942 and Gonzales v. Raich in 2005, the court ruled that Congress's regulatory authority was so extensive that it could even prevent growers from cultivating crops for personal use because of the cumulative impact on the market.

But twice in the last 15 years, the court has invalidated laws that used the Commerce Clause to justify the regulation of noneconomic activity, like restrictions on carrying guns near schools. The constitutionality of the individual mandate, therefore, may rest on whether the justices can be convinced that decisions not to obtain insurance substantially affect interstate commerce.

Lawyers for the government will contend that, because of the cost-shifting nature of health insurance, people who do not obtain coverage inevitably affect the pricing and availability of policies for everyone else. That, they will argue, is enough to satisfy the Supreme Court's test.

But to Mr. Rivkin, the acceptance of that argument would herald an era without limits.

"Every decision you can make as a human being has an economic footprint — whether to procreate, whether to marry," he said. "To say that is enough for your behavior to be regulated transforms the Commerce Clause into an infinitely capacious font of power, whose exercise is only restricted by the Bill of Rights."

FLORIDA DEPARTMENT OF STATE
DIVISION OF CORPORATIONS

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Detail by Entity Name

Florida Profit Corporation

BROWN & DOCKERY, INC.

Filing Information

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Annual Reports

Report Year	Filed Date
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2008	01/07/2008
2009	03/02/2009

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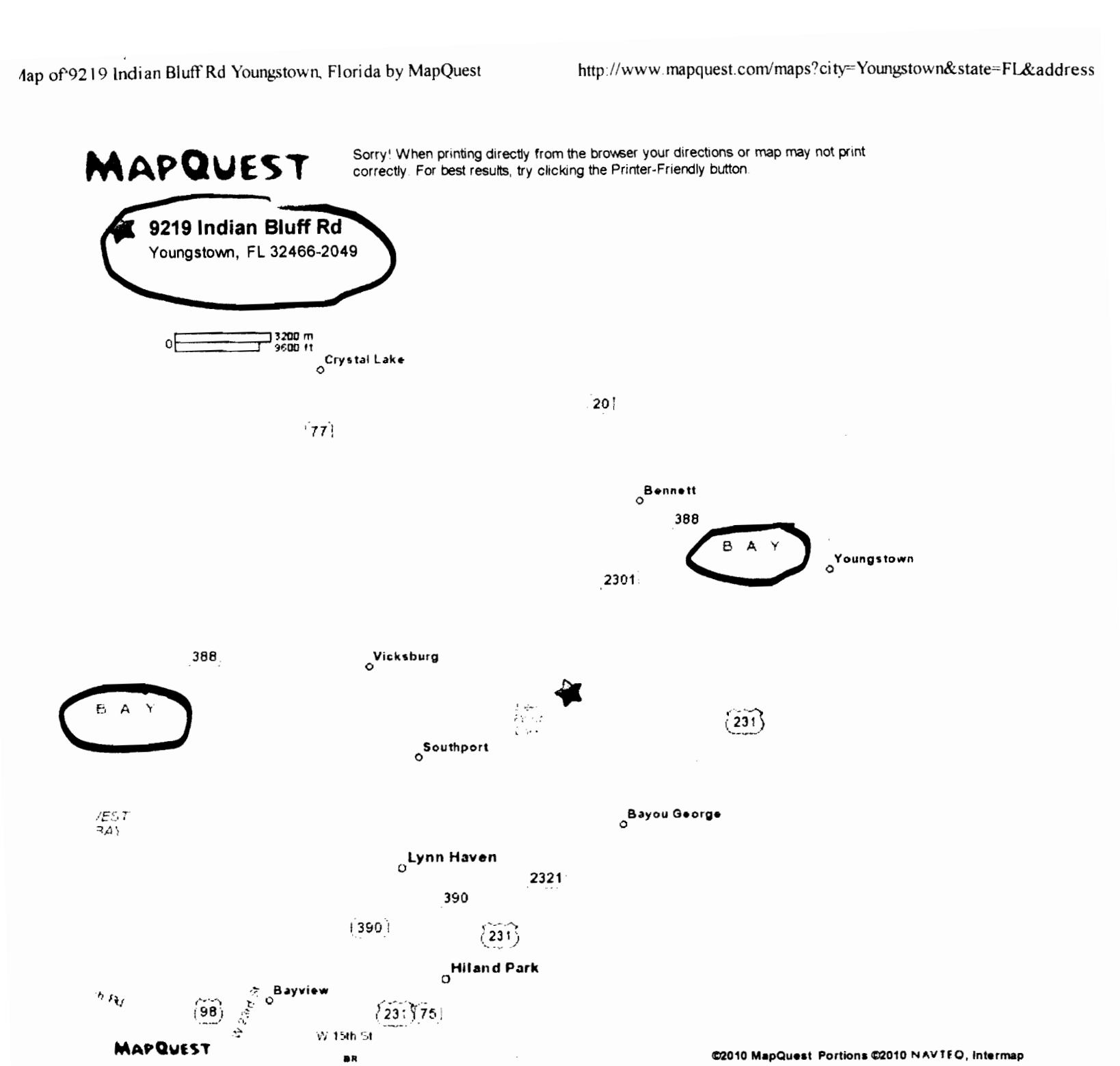

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