Health Law Alert: Supreme Court Upholds Affordable Care Act

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On June 28, in a much-anticipated decision, the Supreme Court upheld the Patient Protection and Affordable Care Act (ACA). Specifically, the Court held that the two challenged provisions of the ACA, which require most Americans to buy health insurance by 2014 and expand the scope of Medicaid, are valid exercises of Congress's power under the Constitution's taxing and spending clauses. The decision marks a strong victory for health reform but leaves open questions about ACA's Medicaid expansion and will undoubtedly serve as political fuel for the November elections, with opponents vowing to seek repeal. With the law settled for now, the efforts of states, providers, insurers, and employers to respond to the ACA, should move forward uninterrupted.

The Court's opinion in National Federation of *Independent Business v. Sebelius* can be found here: http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf.

The Court's decision and its ramifications will be one of the topics discussed at Gray Plant Mooty's 16th Annual Health Law Conference held at the Earle Brown Heritage Center in Brooklyn Center on July 19th from 8:00 a.m. - 3:30 p.m.

THE INDIVIDUAL MANDATE AND MEDICAID EXPANSION UNDER THE ACA

The ACA establishes a so-called "individual mandate" that requires most Americans to purchase "minimum essential" health insurance by 2014 or make a "shared responsibility payment." The payment shall be no less than several hundred dollars per year and no more than the annual premium for specified health insurance coverage and shall be collected by the IRS as part of the tax return process.

The ACA also significantly expands the Medicaid program. Under the Act, eligibility for Medicaid expands to cover those with incomes up to 133 percent of the federal poverty line (or $25,390 for a family of three). The ACA provides states that agree to participate in the expansion with additional federal Medicaid funds. As originally envisioned, states that choose to opt out of the expansion would be penalized by losing all of their federal Medicaid funding, including their existing Medicaid funding.

THE DECISION

Immediately after the ACA was signed into law in 2010, states and individuals challenged the Act on the

grounds that both the individual mandate and the Medicaid expansion provisions were unconstitutional.

The Supreme Court decided three central questions:

- Did the federal Anti-Injunction Act bar consideration of the challenge to the individual mandate until after the first of the shared responsibility payments are assessed in 2014?
- If the challenge to the individual mandate was not barred by the Anti-Injunction Act, was the individual mandate a constitutional exercise of either Congress's power to regulate interstate commerce or its power to raise and collect taxes?
- Was the ACA's expansion of Medicaid and contemplated withdrawal of all Medicaid funds from states that opt out of the expansion so coercive as to exceed Congress's spending power?

The Court held that: (1) the Anti-Injunction Act did not bar the challenge to the individual mandate; (2) the mandate was a valid exercise of Congress's taxing power; and (3) the expansion of the Medicaid population was a valid exercise of Congress's spending power but that the federal government is prohibited from withholding existing Medicaid funds for non-compliance with the expansion requirements.

The Anti-Injunction Act

As a threshold matter, the Court addressed whether the federal Anti-Injunction Act—which bars lawsuits opposing taxes until after the taxes are assessed and paid—prevented the Court from considering the challenge to the individual mandate until after the first of the shared responsibility payments are assessed in 2014. The specific question before the Court was whether the shared responsibility payment was a "tax" or a "penalty."

In the only unanimous opinion in the case, the Court held that the shared responsibility payment is a "penalty" for purposes of the Anti-Injunction Act because Congress decided to label the exaction a "penalty" rather than a "tax" and that there was "no immediate reason to think that a statute applying to 'any tax' would apply to a 'penalty.' Chief Justice Roberts, who authored the opinion, noted that Congress can manipulate the scope of the Anti-Injunction Act with such labels.

The Individual Mandate

Having determined that the Court could consider the challenge to the individual mandate, Justices Roberts, Scalia, Kennedy, Thomas, and Alito rejected the government's primary argument and held that the mandate was not a valid exercise of Congress's authority to regulate interstate commerce under the Commerce Clause of the Constitution. Writing on his own, the Chief Justice acknowledged that a cost-shifting problem occurs when the uninsured rely on the medical system to obtain care they cannot afford but concluded that the mandate "compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." "The language of the Constitution" wrote Justice Roberts "reflects the natural understanding that the power to regulate [interstate commerce] assumes there

is already something to be regulated," and that "Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product."

Writing on his own, the Chief Justice then stressed that the Court must resort to "every reasonable construction" of a statute's meaning to avoid having to strike down the statute on constitutional grounds. He then turned to the government's alternative argument that the individual mandate was a valid exercise of Congress's authority to raise and collect taxes under the Taxing Clause. He wrote that the mandate "looks like a tax in many respects." For example, the payment is collected by the IRS as part of annual filings, is determined based on standard tax factors, and raises revenue for the government. Moreover, he noted that the payment is less like a penalty and more like a tax because it will often be less costly for an individual to make the shared responsibility payment than to pay insurance premiums and unlike most penalties, will be assessed regardless of an individual's intent. In light of these factors, a majority of the Court (Roberts, Ginsburg, Breyer, Kagan, and Sotomayor) held that the mandate can be viewed as a tax rather than a penalty, and as such, that the mandate was a valid exercise of Congress's authority "[t]o lay and collect Taxes."

Medicaid Expansion

No opinion regarding the Medicaid expansion garnered a majority of the Court. The controlling opinion, authored by Chief Justice Roberts and joined by Justices Breyer and Kagan, recognized that "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds," but while Congress can place conditions on the use of certain federal funds, these conditions may not "take the form of threats to terminate other significant independent grants." The three justices held that the financial inducement in the ACA's Medicaid expansion was a "gun to the head," not simply encouragement. Central to this holding was the determination that the Medicaid expansion should be considered a separate program from the existing Medicaid program, rather than a simple "modification." According to the Chief Justice, Congress had transformed Medicaid from "a program to care for the neediest among us" into "an element of a comprehensive national plan to provide universal health insurance coverage." Six other Justices agreed with Justice Robert's decision that the financial inducement was an inappropriate use of Congress' spending powers and thus was unconstitutional.

Having decided that the inducement was unconstitutional, Justices Scalia, Kennedy, Thomas, and Alito would have struck down the entire Medicaid expansion and the entire ACA. Justice Roberts concluded however, that the unconstitutionality could be remedied by enjoining the federal government from making good on its threat to pull all funding for states that refuse to comply with the expansion. Therefore, states that opt out of the Medicaid expansion will not receive the additional funds available under the ACA but will not lose existing federal Medicaid funding.

WHAT NEXT?

Despite the Court's divided opinion, the law is now settled. For states, providers, and insurers that were taking a wait-and-see approach to ACA implementation, the Supreme Court's decision will and should trigger a quick increase in implementation activity. Employers too must ramp up for 2014, when the ACA requires that most employers provide health insurance to full-time employees or face a penalty. The removal of most uncertainty surrounding the ACA should also mean that those investors that have been taking a wait-and-see approach will now seek out opportunities to place their capital in health care-related investments.

While the Supreme Court decision addressed only two aspects of the ACA, the ACA contains many significant changes to the legal landscape of the health care industry, including provisions that:

- prevent insurance companies from denying coverage for pre-existing conditions;
- require employers with more than 50 employees to provide minimum coverage;
- require most individuals to obtain health insurance by 2014 or pay a penalty;
- provide incentives to form Accountable Care Organizations;
- enact strict performance and quality standards for hospitals under Medicare; and
- tax drug, device, and medical supply products and require manufacturers to disclose payments to teaching hospitals and physicians.

Uncertainty remains, however, regarding whether the November elections will give opponents of the ACA the requisite votes to repeal the law. At minimum, the Supreme Court's decision will provide significant political fodder over the next several months. Also, uncertainty remains with respect to the ACA's Medicaid expansion. California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Washington, and Vermont are all participating in the expansion and Arkansas and Oregon are likely to participate. Florida, Louisiana, Mississippi, South Carolina, and Wisconsin will not be participating in the expansion and Missouri, Nebraska, Nevada, and Texas are unlikely to participate. It is still unknown what the remaining states will do.

If you have any questions about the Supreme Court's decision, please contact Jeremy Johnson (jeremy.johnson@lathropgpm.com, 612.632.3035) or Jesse Berg (jesse.berg@lathropgpm.com, 612.632.3374).