

Firm Provides Analysis of U.S. Supreme Court Ruling on Federal Health Care Law

July 9, 2012

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On June 28, the U.S. Supreme Court issued its ruling on President Barack Obama's signature health care reform law, the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148 (ACA).

The Supreme Court resolved constitutional challenges to two provisions of the ACA - the individual mandate and Medicaid expansion. The court, with Chief Justice John Roberts writing for the majority, held that the individual mandate was constitutional as an exercise of Congress' taxing power, and that the Medicaid expansion was constitutional, with the exception of the ACA's provisions that would revoke funding to states that chose not to expand its Medicaid eligibility requirements. *Nat'l Fed'n of Indep. Bus. v Sebelius*, No. 11-393, 2012 WL 2427810 (U.S. June 28, 2012).

Role of the Federal Government

Prior to beginning the analysis of the constitutionality of the two challenged provisions, Chief Justice Roberts' opinion discussed the importance of federalism, repeatedly acknowledging that the federal government possesses only limited powers, and that the states and the people retain the remainder.

In addition, Chief Justice Roberts focused on the court's reticence to issue policy opinions and to invalidate acts of our nation's elected leaders. Chief Justice Roberts stated that policy judgments are left to our elected leaders, "who can be thrown out of office if the people disagree with them." *Id.* at *8.

Anti-Injunction Act Does Not Preclude a Decision on the Merits

After his emphasis of those "basic principles," Chief Justice Roberts began his substantive analysis. However, prior to examining the merits of the two challenged provisions, he ensured that the Supreme Court's authority to do so was not barred by the Anti-Injunction Act. The Anti-Injunction Act prohibits

lawsuits “for the purpose of restraining the assessment or collection of any tax...” 26 U.S.C. Section 7421 (a). Under the Anti-Injunction Act, taxes can normally be challenged only after they are paid by suing for a refund. See *Enochs v Williams Packing & Nav. Co.*, 370 U.S. 1, 7-8 (1962). Chief Justice Roberts concluded that the ACA does not require that the penalty for failure to comply with the individual mandate be treated as a tax for the purposes of the Anti-Injunction Act, and, therefore, the Supreme Court could proceed on the merits.

Individual Mandate is a Constitutional Exercise of Congress' Taxing Power

The first provision scrutinized the individual mandate, which requires most Americans to maintain “minimum essential” health insurance coverage. Beginning in 2014, individuals who do not comply with this mandate are required to make a “[s]hared responsibility payment” to the federal government. The ACA describes this payment as a “penalty.” While somewhat convoluted, the basic calculation of this payment will be based upon familiar factors, such as taxable income, number of dependents and joint filing status. *Sebelius*, 2012 WL 2427810, at *24.

The requirement to pay this “penalty” is found in the Internal Revenue Code and enforced by the IRS, which must assess and collect the “penalty” in the same manner as taxes. For the majority of Americans, this “penalty” will be far less than the price of health insurance, and by statute, can never be more.

The government argued two alternate theories in support of the constitutionality of the individual mandate - that Congress had the power to enact the mandate under the Commerce Clause and that the ACA was a valid exercise of Congress' power to tax.

Commerce Clause

Chief Justice Roberts, joined by Justices Samuel Alito, Anthony Kennedy, Antonin Scalia and Clarence Thomas, found that the Commerce Clause did not grant Congress the power to enact the individual mandate. According to Chief Justice Roberts:

The individual mandate . . . does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. *Id.* at *16.

Necessary and Proper Clause

Likewise, Chief Justice Roberts, joined by Justices Alito, Kennedy, Scalia and Thomas, rejected the government's argument that Congress was vested with the power to enact the individual mandate under the Necessary and Proper Clause. The government argued that the individual mandate was a "necessary and proper" component of the ACA's insurance reforms.

Chief Justice Roberts noted that while the Necessary and Proper Clause vests Congress with the authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," it does not license the exercise of any "great and substantive independent power[s]" beyond those specifically enumerated in the Constitution. *McCulloch v Maryland*, 17 U.S. 316, 411 (1819). Therefore, Chief Justice Roberts concluded that sustaining the individual mandate under the Necessary and Proper Clause would create a "substantial expansion of federal authority." *Sebelius*, 2012 WL 2427810, at *22.

Taxing and Spending Power

However, in a surprising move from the conservative Chief Justice, Roberts declared that Congress had the authority to enact the individual mandate under its enumerated power to lay and collect taxes. U.S. Const. art. I, § 8, cl. 1. (joined by Justices Stephen Breyer, Ruth Ginsberg, Elena Kagan and Sonia Sotomayor). Chief Justice Roberts emphasized the Supreme Court's prior ruling that every reasonable construction of a statute must be resorted to, to save a statute from unconstitutionality. *Sebelius*, 2012 WL 2427810, at *2; quoting *Hooper v California*, 155 U.S. 648, 657 (1895).

With this principal in mind, Chief Justice Roberts read the ACA as establishing a condition (not owning health insurance), which triggers a tax that requires payment to the IRS. Thus, the individual mandate treats the decision to not buy health insurance as just one more "thing" the government taxes. *Sebelius*, 2012 WL 2427810, at *23.

While Chief Justice Roberts found Congress' label of the shared payment as a "penalty" determinative for the Anti-Injunction Act purposes, he held that the label does not determine whether the payment may be viewed as an exercise of Congress' taxing power. *Id.* at *24. Chief Justice Roberts held that: "[o]ur precedent demonstrates that Congress had the power to impose the exaction in [the individual mandate] under the taxing power, and that [the individual mandate] need not be read to do more than impose a tax." *Id.* at *26. Chief Justice Roberts concluded that Congress' taxing power "is sufficient to sustain [the individual mandate]." *Id.*

Coercive Language of Medicaid Expansion is Stricken, Remainder of Medicaid Expansion Remains

The Supreme Court also scrutinized the ACA's expanded scope of the Medicaid program. The ACA increases federal funding to states that provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level. Many states now cover only individuals with a much lower income and do not cover childless adults at all. However, the ACA also called for revocation of all federal Medicaid funds from states that chose not to expand their Medicaid coverage in accordance with the ACA.

Chief Justice Roberts, joined by Justices Sotomayor, Ginsberg, Kagan and Breyer, held that Congress could offer funds under the ACA to expand the availability of health care, and to require that states accepting those funds comply with the conditions of their use. However, Chief Justice Roberts wrote that Congress "is not free . . . to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding." *Id.* at *37. The court, therefore, held that the Medicaid expansion was unconstitutional, noting that threatening states with loss of such a large portion of their funding is "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." *Id.* at *3.

Next, Chief Justice Roberts cited the severability clause found in the chapter of the United States Code that contains the Medicaid expansion. That severability clause states that the invalidity of one provisions of the ACA does not affect the remainder of the ACA. Therefore, Chief Justice Roberts, relying on Congress' intent, held that the federal government is precluded from threatening to revoke existing Medicaid funding, but may offer the states grants and require the states to comply with accompanying conditions (as long as the states have a genuine choice whether to accept the offer). *Id.* at *38.

In the conclusion of his opinion, Chief Justice Roberts again emphasized that the federal government is one of limited powers, and that any judgment regarding the wisdom of the ACA is left to the people.

Notes of Interest

Chief Justice Roberts, an oft-considered "reliably conservative" member of the Supreme Court upheld the most controversial portion, the individual mandate, of President Obama's massive health care reform. Had Chief Justice Roberts sided with the conservative minority (Justices Alito, Kennedy, Scalia and Thomas), the individual mandate would have failed as exceeding Congress' power under the Commerce Clause, and the ACA would have been declared invalid in its entirety. *Id.* at *106 (joint dissent, stating: "[t]he fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth, instead, our judgment today has disregarded it . . . we would find the Act invalid in its entirety.").

While Chief Justice Roberts ultimately sided with the more liberal members of the court, his opinion is laced with strong conservative ideals regarding the very limited role of the federal government.

In addition, Chief Justice Roberts consistently declined to offer his opinion on the soundness of the ACA's policy, and referred its critics to the democratic process, where they can speak with their vote and "throw" our nation's elected leaders "out of office." *Id.* at *8. Notably, Chief Justice Roberts stated that it is not the Supreme Court's job to "protect people from the consequences of their political choices." *Id.*

Business Implications

Individual Mandate

The most controversial provision of the ACA, the individual mandate, will take effect in 2014, when most Americans ineligible for Medicaid will be required to carry health insurance or pay the "tax" penalty discussed above. The monthly penalty is the greater of one-twelfth of a specified dollar penalty or a specified percentage of gross income in excess of specified thresholds. The maximum penalty will be an amount equal to the national average premium for bronze-level exchange plans for families of the same size.

For 2014, the monthly penalty will be the greater of one-twelfth of \$95 for individuals or \$285 per family or one percent of gross income. The ACA specifies increases to those dollar amounts and percentages through 2016. Thereafter, they are indexed for inflation. 2015 is the earliest the IRS could levy fines for nonpayment of the penalty/tax.

The individual mandate was expected to increase, by approximately 10 million, the number of Americans with insurance coverage. That number may be reduced inasmuch as the Supreme Court's ruling makes it easier for states to opt out of the Medicaid expansion.

Insurers

Insurers also are impacted by the Supreme Court's decision. Starting in 2014, the ACA requires insurers to sell coverage to everyone, regardless of their medical history, including pre-existing conditions, and restricts how much they may vary premiums based on age.

Small Employers

Beginning in 2014, employers with fewer than 50 full-time equivalent employees (FTEs) (small employers) that provide health insurance with "minimum essential coverage" to their employees will be eligible for a tax credit of up to 50 percent of the employer's cost of the coverage. For these purposes, an FTE is defined as an individual employed 30 or more hours per week.

Additionally, small employers will have the option to purchase affordable plans through state-based Small Business Health Options Program Exchanges (shop exchanges). The shop exchanges will

operate as a virtual marketplace, where small businesses can pool and spread their risk while reducing administrative costs.

Large Employers

Beginning in 2014, employers with more than 50 FTEs (large employers) must offer affordable “minimum essential coverage” to their employees or pay penalties or fines. For these purposes, an FTE is defined as an individual employed 30 or more hours per week.

No Coverage. If a large employer elects to not offer a health plan that provides “minimum essential coverage” and at least one of its full-time employees who is not eligible for Medicaid obtains coverage through an exchange and qualifies for a premium tax credit under the ACA, the employer must pay a penalty. In 2014, the monthly penalty would be the number of full-time employees minus 30 times one-twelfth of \$2,000. The penalty is adjusted by a premium adjustment for subsequent years.

Unaffordable Coverage or Coverage Without Minimum Value. If an employer has more than 50 FTEs offers health coverage that is not affordable or does not offer minimum value, and at least one of its full-time employees who is not eligible for Medicaid obtains coverage through an exchange and qualifies for a premium tax credit under the ACA, the employer must pay a penalty. A plan is deemed unaffordable if the employee’s required contribution for single-person coverage exceeds 9.5 percent of the employee’s household income, and is deemed to not provide minimum value if the employer’s offered plan pays for less than 60 percent of covered expenses.

In 2014, the employer’s monthly penalty is one-twelfth of \$3,000, with a total monthly penalty capped at an amount equal to the employer’s total number of full-time employees minus 30 times one-twelfth of \$2,000. The penalty is adjusted by a premium adjustment for subsequent years.

Also starting in 2014, employers with more than 200 employees that offer enrollment in one or more health-benefit plans will be required to automatically enroll new full-time employees into health benefit plans, although employees may opt out of such plans. In addition, the automatic enrollment must include adequate notice to employees of their right to opt out of the coverage.

Additional Changes

Beginning in 2013, employers must provide certain notices to employees, including the existence of health insurance exchanges, potential eligibility for federal assistance if the employer’s health plan is “unaffordable” and the possibility of losing an employer contribution to coverage if the employee purchases health insurance through an exchange.

Beginning in 2018, a 40 percent excise tax will be imposed on employer-sponsored, high-cost or so-called “Cadillac” plans, including self-funded plans. The tax will be assessed against the cost of the plan in excess of specified dollar caps, beginning at \$10,200 for single coverage and \$27,500 for family coverage.

Conclusion

With the Supreme Court decision, the impacts of the ACA are no longer theoretical. Businesses of all types should be planning for the effects of those impacts on their bottom lines, as well as developing policies and procedures to ensure legal compliance with the ACA. Employers must evaluate both whether to offer or to continue to offer health insurance to their employees and the most cost effective manner in which to provide “minimum essential coverage.” In making their decisions, employers will have to consider not only the cost of compliance with the ACA’s requirements, but also their ability to recruit and retain personnel.

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