Supreme Court Upholds ACA’s Individual Mandate, But Strikes Down Provision Forcing States to Accept Medicaid Expansion

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This morning, in the final decision of its 2012 term, the United States Supreme Court upheld the individual mandate of the Affordable Care Act (ACA). Chief Justice Roberts read the narrow 5-4 decision finding the so-called mandate a valid exercise of Congress’ enumerated power to tax under the Federal Constitution. The decision also upheld ACA’s expanded Medicaid eligibility provisions, but struck down a provision that would have permitted the federal government to coerce the states into accepting the new coverage requirements.

**Individual Mandate**

The narrow opinion reviewed the historical position of the Court as an institution that evaluated the sources of Congressional authority without evaluating the wisdom or soundness of the policy behind particular legislation, and further cautioned that under the Court’s precedents “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” Nonetheless, the Court also recognized that deference does not mean abdication: “there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.”

Having provided that context, the Court then concisely rejected, as most commentators expected it would, the contention that the mandate should be treated as an impermissible “tax” under the Anti-Injunction Act. The Court believed that ACA’s text demonstrated that Congress intended the penalty to be assessed and collected using the same methodology as a tax, but did not intend the penalty to be a tax.

The Court next addressed each of the three alternative enumerated powers under the Federal Constitution offered by the Federal Government as a source of power for Congress’ adoption of the individual mandate. As we have explained in prior blog entries, the mandate (also known as the “shared responsibility payment”) requires non-exempted individuals to pay a penalty to the IRS if they can afford health care coverage but fail to obtain it. While the mandate itself takes effect when the state health care exchanges become operational in 2014, the penalty first applies in 2016.

The Government contended that three enumerated powers in the Federal Constitution could each serve as a separate source for Congress' power to enact the mandate: the Commerce Clause (which
has received the most “play” in the media), the Necessary and Proper Clause, and the Taxing Power. Although the Court did not find the mandate a valid exercise of Congress’ powers under the Commerce Clause or the “Necessary and Proper” Clause, it did find that, under the power to tax, Congress could provide for a “penalty” to be assessed starting in 2016 in the same manner as a tax upon those non-exempted individuals who fail to obtain health care coverage starting in 2014.

The Court observed that the individual mandate sought to reduce the problem of costly health care (perhaps exacerbated by such reforms as the elimination of pre-existing conditions and prohibiting the charging of higher premiums for costly conditions) by shifting individuals from uninsured and thus more expensive emergency care to insured primary and preventative care. Nonetheless, the Court rejected the Government’s argument that the Commerce Clause could serve as a source for the individual mandate.

Looking to the language of the clause and its past interpretations of the clause, the opinion concluded that the Commerce Clause could regulate the activities in commerce, including those whose activities take place in interstate commerce only in conjunction with the activities of others, but could not regulate “doing nothing.” The majority opinion of the Court found that the mandate did not regulate existing commercial activity, but would force individuals to become active in commerce on the ground that their failure to do so affected interstate commerce. The Court feared that construing the Commerce Clause to permit Congress to regulate individuals who were “doing nothing” would “open a new and potentially vast domain to congressional authority.” Unlike the wheat farmer and the marijuana growers in the cases cited by the Court as the most Court’s most expansive decisions under the Commerce Clause, who at least engaged in preexisting activity by growing wheat or marijuana, uninsured individuals do not engage in such pre-existing commercial activity, a distinction which the Court felt would not be lost upon the Framers of the Constitution, whom the Court termed “practical statesmen.”

For the same reasons, the Court also concluded that it could not uphold the individual mandate under the Necessary and Proper Clause authorizing Congress to pass laws to effect its enumerated powers. Again, the Court proved unwilling, in the narrow majority opinion, to permit Congress to regulate individuals who did not engage in pre-existing commercial activity; thus, the mandate could not be deemed a “proper” exercise of Congressional authority under the Necessary and Proper Clause.

Turning then to the taxing power as the third alternative constitutional source for Congress’ authority to enact the individual mandate, the Court drew a distinction between a tax for purposes of the Anti-Injunction Act and a tax for purposes of the taxing power afforded Congress under the Federal Constitution. Conceding that the “most natural” reading of the individual mandate might be as an exercise of power under the Commerce Clause, the Court accepted a second characterization of the mandate as a tax hike upon individuals who declined to purchase health care coverage. Under that “fairly reasonable” characterization (the test of its prior precedents), the Court opined that Congress
did have constitutional authority under its taxing power to provide for a penalty for choosing not to purchase health care coverage.

**Medicaid Expansion**

ACA also provides for an expansion of Medicaid eligibility for certain persons seeking assistance in obtaining medical care: pregnant women, children, the blind, the disabled, needy families and the elderly. For example, ACA increases the income threshold for those seeking Medicaid above that which some states recognize, thereby increasing the number of individuals who qualify for Medicaid.

The Court also upheld the Medicaid expansion provisions but only on a cooperative basis. The Court concluded that, under the Spending Clause of the Federal Constitution, Congress cannot engage in “economic dragooning” by empowering the Secretary of Health & Human Services to withhold all existing Medicaid funds, and not merely federal funding for the new coverage requirements, from states that did not agree to the expansions of coverage. In so holding, the Court reasoned that the Spending Clause only accorded the Federal Government the power to establish cooperative federal-state programs. Threatening a state with the loss of over 10% of its budget by threatening to withhold all existing Medicaid funds from states that did not wish to engage in the Medicaid expansion amounted to coercion of the states, rather than the cooperation envisioned by the Framers of the Constitution as they created the American system of federalism.

Over 27 states participated in the case from the Eleventh Circuit attacking the coercive aspect of the Medicaid expansion provisions.

**Observations:**

Despite the attention paid to its highly anticipated decision, the Court itself recognized that individuals could and would satisfy the individual mandate through health care coverage provided by their employers or the government. Many, if not most, third-party administrators (TPAs) and insurers for national employers and/or national health care plans have experience with providing documentation of health care coverage to employees with employer-provided health care coverage. When the Massachusetts penalty provision took effect, for example, TPAs and insurers provided HC 1099s to covered employers with self-insured or insured plans for distribution to their Massachusetts employees. The HC 1099s described the employees’ health care plans and group numbers, and the employees then completed a single half page of their state income tax forms with that information, thereby avoiding any penalty.

For those employers who do not offer health care to their employees, and for uninsured individuals, the state health care exchanges will offer a variety of options of coverage, with levels of benefits and coverages keyed to premium costs. More than half of the states have already provided preliminary designs for their health care exchanges, which must be in place to offer health care coverage in 2014.
Employers will need further guidance as they work towards implementing ACA’s provisions, especially those relating to the 2014 employer “shared responsibility” provisions and the implementation of the state health care exchanges. Particularly pressing will be the need for guidance on premium subsidies. These and other issues will be addressed in forthcoming entries in our Schiff Hardin ERISA Litigation and Benefits Blog.

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