

Alert!

MINTZ LEVIN
Mintz Levin Cohn Ferris Glowsky and Popeo PC

ML
STRATEGIES

Mintz Levin Health Law | Mintz Levin Employee Benefits | ML Strategies

JUNE 28, 2012

Supreme Court Health Care Ruling: Preliminary Analysis & Implications Going Forward

BY GARY E. BACHER, ALDEN J. BIANCHI, STEPHEN M. WEINER, ALEXANDER HECHT, ROY M. ALBERT,
AND JOSHUA BOOTH

Summary

The Supreme Court today largely upheld the challenged provisions of the Affordable Care Act (ACA). However, its legal rationale, particularly in relation to the individual mandate, diverged from the main focus of the briefs and oral arguments which had focused on questions related to the scope of Congressional authority under the Commerce Clause.

The mandate requiring that most Americans maintain “minimum essential” health insurance coverage was upheld. Although it can be pointed out that a majority of the Court found that the provision was not a valid exercise of Congress’s Commerce Clause power (with potential implications for future cases), it determined that, constitutionally, the mandate can be treated as imposing a tax on those who do not have health insurance coverage and is within Congress’s taxing power.

In the end, the law’s Medicaid expansion was upheld, with some important modifications the implications of which deserve careful consideration. Although the Court found that ACA’s threatening states with the loss of their existing Medicaid funding was unconstitutionally coercive, it held this could be fully remedied by precluding the federal government from exercising its statutory right to withdraw existing funds for failure to comply with the Act’s requirements in the expansion. In essence, the Court found that it was legitimate for Congress to expand the program and to make the receipt of *new* funds conditional upon the states’ accepting of the program’s new conditions. However, the Court found that it was inappropriate for Congress to make the receipt of existing Medicaid funds conditional upon states’ acceptance of the new conditions.

[The opinion of the Court](#) was written and delivered by Chief Justice John Roberts. Justice Ginsburg wrote a separate opinion — primarily concurring but also dissenting to portions of the Chief Justice’s opinion. Justices Kennedy, Alito, Scalia, and Thomas joined in a dissenting opinion.

Individual Mandate

The Issue

The ACA requires people to obtain health care insurance coverage by 2014 or face a financial penalty.¹ Opponents of the ACA have argued that the Constitution does not give Congress the authority to enact such a requirement. The government has argued that Congress has the authority to impose this requirement under two separate Constitutional clauses — the Constitution’s “Commerce Clause” and its power to “Tax and Spend” for the “general welfare.”

Commerce Clause Analysis

Although ultimately deciding the issue based on the taxing power, the Chief Justice's opinion does address the Commerce Clause issue.

The Commerce Clause gives to Congress the authority to regulate "interstate commerce." The Supreme Court has previously ruled that Congress can regulate a broad range of activities, even activities that are not "interstate" themselves, that have an effect on interstate commerce. Opponents of the ACA, however, argued that the individual mandate goes too far. The authority to regulate interstate commerce does not include the authority to compel individuals not engaged in interstate commerce to do so.

The Chief Justice, as well as dissenting Justices Scalia, Kennedy, Thomas, and Alito, agreed with this analysis. Chief Justice Roberts's opinion notes that "the power to *regulate* commerce presupposes the existence of commercial activity to be regulated."² Roberts also noted that the ACA mandate does not regulate existing activity, but "instead compels individuals to *become* active in commerce,"³ which Congress does not have the authority to do.

Justices Ginsburg, Breyer, Sotomayor, and Kagan argued in a concurring opinion that, contrary to the Chief Justice's analysis, the mandate is within Congress' Commerce Clause power.⁴

Taxing Clause Analysis

The government also argued that the penalty under the mandate is structured as a tax, and thus falls within Congress's broad power to tax individuals. None of the lower courts that ruled on this issue agreed with the government's position, largely because the language of the ACA suggests Congress did not see it as a "tax" but as an obligation with a penalty attached. The Court, however, ruled that the penalty could be construed as a tax.

The Court faced an interesting initial hurdle in making this determination — the Tax Anti-Injunction Act. The Anti-Injunction Act (AIA)⁵ prohibits federal courts from hearing cases regarding the collection of taxes until a tax has actually been assessed. Thus, to be able to first hear the case and then to come to this conclusion, the Court had to reconcile what on the surface seemed to be two contradictory ideas — that the penalty is both a tax and not a tax.

The Court resolved this difficulty by distinguishing what constitutes a tax for AIA purposes from what constitutes a tax for Constitutional purposes, as was discussed in the oral arguments on the AIA. For the AIA, Congress's language in creating the penalty is important. The ACA describes the shared responsibility payment as a "penalty" rather than a "tax." The Court notes that "while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power."⁶

In ruling that, for Constitutional purposes, the mandate could be characterized as a tax, the Court drew attention to precedent emphasizing judicial restraint when faced with invalidating a statute, striking a chord similar to that announced in a decision on juvenile sentencing announced earlier in the week. The Court cited the proposition that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."⁷ The question, then, was not whether Congress intended the penalty to be a considered a tax, but whether construing it as a tax was a "reasonable" construction.

The Court found that, given this standard, the payment may, for Constitutional purposes, be treated as a tax. The Court noted several significant points: the payment is not so high that individuals have no real choice but to comply; the payment is not limited to willful violations; and the payment is collected by the IRS through the normal means of taxation.⁸

Justices Scalia, Kennedy, Thomas, and Alito disagreed with the rest of the Court on this point, arguing instead that there is a clear distinction between a tax and a penalty. Even if the government *could* have

imposed the minimum-coverage provision as a tax, it did not do so in this case, and the Court should not read that intent into the Act.⁹

Medicaid Expansion

While the individual mandate has generally received more attention, the issue regarding the Act's Medicaid expansion has potentially far-reaching implications for states, and the Court's decision will require further and continued consideration in order to fully understand the potential implications.

The Issue

The ACA requires States to expand their Medicaid programs by 2014 in various ways, including mandating coverage for all individuals under 65 years of age who have incomes below 133% of the federal poverty line and providing "essential benefit packages" to new Medicaid recipients. States not complying with the expansion risk losing all federal Medicaid funds. The challengers argued that this expansion unconstitutionally coerces the states.

The Constitution does not allow the federal government to require or "commandeer" state governments to take specific actions.¹⁰ Congress can, however, make the receipt of federal funds conditional upon a state's complying with certain conditions, and thus indirectly incentivize certain actions. The Medicaid program has effectively worked in this way. A state operates its Medicaid program and receives federal matching funds, provided its program operates in accordance with federal guidelines such as those relating to whom the state must cover and what services must be provided.

While the Supreme Court has previously ruled that, in general, such spending incentives are allowed, it has also stated that there may be a point where "pressure turns to compulsion" and thus becomes unconstitutional.¹¹ The states challenging the Act argued that the ACA coerces them, without meaningful choice, to accept Congressional obligations in exchange for federal funds. Medicaid has become such an essential part of each state's health program, and federal funding is so significant in relation to state budgets, that states cannot, practically speaking, opt out.

The Court's Analysis

Seven members of the Court agreed with the challengers' basic premise, holding that the threat of eliminating even existing federal matching funds if a state did not participate in the expansion was coercive upon the states. "The threatened loss of over 10% of a State's overall budget ... leaves the States with no real option but to acquiesce in the Medicaid expansion."¹²

The Court did not, however, invalidate the Medicaid expansion entirely. Rather, a majority of the Court agreed on a remedy, finding that the constitutional violation was fully remedied by precluding the federal government from withdrawing existing Medicaid funds for failure to comply with the requirements set out in the expansion.¹³ Consequently, it appears that the federal government can still condition the receipt of the new funding provided in the ACA with acceptance of the new conditions. However, it cannot "withdraw existing Medicaid funds for failure to comply with expansion requirements."¹⁴ Importantly, Chief Justice Roberts also wrote that "[t]oday's holding does not affect the continued application of § 1396c [regarding the withdrawal of funds] to the existing Medicaid program."¹⁵

Justices Ginsburg and Sotomayor dissented from this portion of the opinion, arguing that the Medicaid expansion was constitutional, even when tied to existing Medicaid funds. Justice Ginsburg argued that the Medicaid expansion was comparable to previous Medicaid amendments and should not be treated differently. Justice Roberts responded that, although previous legislative enactments amended the Medicaid program, the Medicaid expansion under the ACA "accomplishes a shift in kind, not merely degree" and has become "no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage." In the end, however, Justices Ginsburg and Sotomayor seemed to agree with the remedy given the majority view

and the Chief Justice's conclusion that the Medicaid Act's severability clause determines the appropriate remedy.

Justices Scalia, Kennedy, Thomas, and Alito agreed that the Medicaid expansion was unconstitutional. However, they disagreed with the remedy and would have instead invalidated the expansion in its entirety.

The ACA and "Severability"

The Issue

One issue that loomed in the case was what would happen to the rest of the ACA if the Court found either the individual mandate or the Medicaid expansion to be unconstitutional. The Court could have potentially stricken other portions of the Act, or even the entire Act, as unseverable from the unconstitutional provisions. However, because the Court found the mandate to be supported as a tax it did not need to reach the issue of severability as it concerns the mandate.

Implications of the Ruling

- There are a range of implications associated with the Court's decision. Importantly, we are likely to see renewed focus on the implementation of the ACA, such as on the readiness of states in particular to operate exchanges beginning in 2014. It also helps to reinforce trends already under way toward innovative developments taking place in the health care payment and delivery system leading to better integrated care and a movement away from fee-for-service medicine.
- While the mandate was upheld and the law's provisions promising to expand coverage to millions remain intact, the ruling does not alleviate concerns that the mandate penalties (the greater of \$95 or 1% of taxable income in 2014) are relatively weak. This, combined with other ACA provisions, including 3:1 age band compression, adjusted community rating, and an annual fee on the health insurance sector, threatens to result in increased premiums, particularly for non-group coverage. Attention to these issues and how to address them is likely to remain an important topic of focus and attention.
- Understanding the implications of the Court's decision on Medicaid will require further analysis and consideration. One issue pertains to whether states will opt against expansion given the Court's decision. It is not clear what States will do as they will have to weigh the benefits of federal funding and increased coverage with the obligations set forth by the ACA. While the Court's ruling appears to provide states additional flexibility to choose whether to participate in the expansion, a range of factors will likely need to be taken into account. For example, it is possible that some individuals who would otherwise qualify for Medicaid under the expansion would, if the state chose to forego the expansion, instead qualify for premium tax credits funded entirely by the federal government — which a state might find advantageous. On the other hand, language in the ACA suggests that premium tax credits are not available to those with household incomes below 100% of the Federal Poverty Level. Consequently, were a state to opt against expansion and did not, for example, cover childless adults as part of its existing program, the poorest of those individuals would be ineligible for either Medicaid or the federal tax credits. In the end, therefore, the Court's decision on Medicaid expansion, coupled with the ending of Medicaid maintenance of effort requirements in 2014, could kick off a potential re-structuring of State Medicaid program eligibility requirements. Careful consideration of these issues will be important.

* * *

[Read the opinion of the Court here.](#)

* * *

Join a panel of Mintz Levin and ML Strategies professionals as they evaluate the overall implications of the Supreme Court's decision and its impact on the compliance obligations of employers, health insurers and providers, among others.

July 2, 2012
2:00 – 3:30 pm EST

[REGISTER »](#)

View Mintz Levin's Health Law attorneys.
Read and subscribe to *Health Law & Policy Matters* blog.

View Mintz Levin's Employee Benefits attorneys.
Read and subscribe to *Employment Matters* blog.

View ML Strategies professionals.

Endnotes

- ¹ ACA §1501(b), creating 26 U.S.C. 5000A.
- ² Roberts, C.J., p. 18.
- ³ Roberts, C.J., p. 20.
- ⁴ Ginsburg, J.
- ⁵ 26 U.S.C. §7421(a).
- ⁶ Roberts, C.J., p. 33.
- ⁷ Roberts, C.J., citing *Hooper v. California*, 155 U.S. 648, 657 (1895).
- ⁸ Roberts, C.J., p. 35-36.
- ⁹ Dissent, p. 17-18.
- ¹⁰ See Roberts, C.J., p. 47-48.
- ¹¹ Roberts, C.J., p. 47, citing *Steward Machine Co. v. Davis*, 301 U. S. 548, 590 (1937).
- ¹² Roberts, C.J., p. 52.
- ¹³ Roberts, C.J., p. 56; Ginsburg, J. p. 46.
- ¹⁴ Roberts, C.J., p. 56
- ¹⁵ *Id.*

Boston · London · Los Angeles · New York · San Diego · San Francisco · Stamford · Washington

www.mintz.com

Follow Us    

Copyright © 2012 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

2033-0612-NAT-HCR-MLS