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Supreme Court Rules on Affordable Health Care Act: Upholds Individual Mandate and Limits Scope of Medicaid Expansion

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In a heavily anticipated landmark ruling, the Supreme Court has upheld the constitutionality of the so-called "individual mandate" of the Affordable Care Act – i.e., the requirement that those not insured privately, through their employer or through a governmental program, must either purchase minimum essential health insurance coverage or pay a "penalty" for failing to do so. The majority opinion was authored by Chief Justice Roberts and joined in part by Justices Breyer, Ginsburg, Kagan and Sotomayor.

Like the four dissenting Justices (Scalia, Thomas, Kennedy and Alito), Chief Justice Roberts concluded that the individual mandate exceeded the "outer bounds" of Congress' regulatory authority under the Commerce Clause because the mandate essentially regulates economic "inactivity" – i.e., the failure to purchase insurance. Nonetheless, a five-member majority sustained the individual mandate as a legitimate exercise of Congress' Article I "Taxing Clause" powers. Under this rationale, Congress is entitled to "encourage" the purchase of a product that it could not mandate through the imposition of a reasonable tax.

Applying longstanding rules of constitutional "avoidance" (i.e., that the Court must "save" a federal law from unconstitutionality on any reasonable ground available), the majority found that the mandate passes muster when construed under Congress' taxing authority as a measure that effectively "encourages," rather than absolutely "commands," a desired conduct (i.e., the purchase of health insurance coverage). As examples, the opinion references accepted use of taxes to discourage cigarette use and foreign product purchases, and of tax incentives to encourage purchases of homes. Although the payments in lieu of purchasing health insurance were (for obvious political reasons) "labeled" a penalty by Congress, the five-member majority applied a form-over-substance analytical approach and found the payment to be a tax for a variety of reasons. These included the fact that the payments are collected by the IRS, the "penalty" does not turn on any "mens rea" (intent) requirement, is graduated and subject to exemptions based on income, and is not punitive because the maximum penalty was less than the cost of purchasing insurance.

Four Justices (Ginsburg, Breyer, Sotomayor and Kagan) also would have upheld the mandate based on the Commerce Clause in view of the enormous economic impact on commerce attributable to "cost shifting" by the uninsured to the insured. This equated to uninsureds generating $100 billion in annual unpaid medical expenses, which causes the average price of family health care insurance for those who do pay for it to increase by approximately $1,000 per year.

In what many legal scholars will regard as an unexpected twist, a plurality – including, Justices Roberts, Breyer, and Kagan in combination with the four dissenters – agreed that the so-called Medicaid expansion is unconstitutional under the Spending Clause, at least "as applied." The Medicaid expansion mandates eligibility for Medicaid coverage for all citizens with income levels of up to 133 percent of the federal poverty level (FPL). Justice Roberts categorized the mandated expansion as "transforming [Medicaid] into a program to meet the needs of the entire nonelderly population" and something akin to "a comprehensive national plan to provide universal health insurance coverage."

Under the prevailing approach formulated by the Chief Justice, the Medicaid expansion is deemed unconstitutional "as applied" – that is, to the extent the ACA authorizes the Secretary of HHS to "coerce" states into expanding Medicaid coverage by withholding all funding for pre-existing categories of categorically and medically needy recipients should they decline to cover the (approximately 16 million) newly eligible needy persons covered by the ACA. The opinion observes that this provision of the ACA would force states to expand coverage under pain of losing trillions

of dollars of pre-expansion coverage funding (or about 20 percent of a state's average total budget).

Significantly, however, the majority sustained the Medicaid expansion to the extent states elect, voluntarily, to expand their medical assistance programs to the full extent envisioned under the ACA. The decision also seems to leave open whether Congress could impose a less stringent penalty (for example, a 5 percent reduction in federal matching rates for non-expansion populations) for states that reject expanded Medicaid coverage.

The four dissenters not only would have rejected the individual mandate on Commerce Clause grounds, but also would have refused to uphold it as a tax because Congress "labeled" the payment in lieu of taxes as a "penalty." The dissent also would have invalidated the entire ACA on the rationale that the remainder of the Act was not "severable" from the individual mandate and Medicaid expansion provisions.

As a consequence of today's ruling, the individual mandate will remain the law, as will the ACA's insurance reforms and hundreds of other changes to federal law – including, for example, enhancements of the False Claims Act, the funding of Accountable Care Organizations and establishment of the Medicare and Medicaid Innovation Center, increased Medicaid payments for primary care services, and a gradual reduction of various Medicare payments for hospitals. Unless Congress repeals or drastically amends the law, this also means that children can continue to receive coverage under family health plans until they turn 26, that persons with disabilities and pre-existing medical conditions will no longer be fodder for coverage denials, that insurers must use "community ratings," may not impose lifetime coverage limits, and must allow "external appeals" for claims denials. In addition, the new insurance exchanges and subsidies for those unable to afford health insurance will become effective January 2014.

On the Medicaid side, states that wish to provide medical assistance coverage to their poor but non-categorically needy (elderly, pregnant and disabled) citizens will be able to do so and receive 100 percent (and later 90 percent) federal funding for such expanded coverage. So, for example, a state like Pennsylvania would be free to cover needy adult males historically enrolled in "state-only" general assistance programs, and have those services fully paid for with federal funds. On the other hand, states that choose not to offer federally funded medical assistance to all of their neediest citizens for philosophical or administrative reasons will be free to decline federal funding and refuse to do so – at the likely expense of other more civic minded states offering more generous coverage (which will likely attract "lower income" residents from "non-expansion" states).

Finally, in what might be viewed as a "hidden gem" for the pundits, Chief Justice Roberts' opinion observes what the Court's "liberal branch" presumed – that the states retain broader authority under their "police powers" than the federal government can exercise under the commerce clause. In other words, the majority opinion implicitly acknowledges that the states, if not the Federal government, remain free to "mandate" universal coverage – thus indirectly endorsing "RomneyCare" in Massachusetts as well as "ObamaCare" on the national level!

Please contact Mark H. Gallant (at 215.665.4136 or mgallant@cozen.com) or any of the attorneys in the Cozen O'Connor Health Law Practice Group if you have any questionsabout the Supreme Court's decision or the Affordable Care Act.