The Supreme Court’s Historic Decision

on

The Affordable Care Act


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July 26, 2012
AGENDA

- Decision Overview
- Impact on Select Stakeholders
- Political Aftermath
- Forecast for 2012
  - Lame Duck Session
  - Fiscal Cliff
  - Further Developments in Health Policy
SUPREME COURT CHALLENGE

- In Nov. 2011, Supreme Court agreed to consider constitutionality of two major provisions of the ACA: the individual mandate and the Medicaid expansion

DECISION DAY: JUNE 28, 2012

- Justices, 5-4, with Chief John Roberts joining the majority, largely uphold Affordable Care Act, finding mandate a constitutional exercise of Congress’ taxing power, and the Medicaid expansion valid but optional for states.
  - Roberts writes for the Court that mandate is not a valid exercise of the Commerce Clause
- Majority: Kagan, Sotomayor, Breyer, Ginsberg, Roberts
- Dissent: Thomas, Alito, Scalia, Kennedy (would have struck law in toto)
  - “We possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is nor our job to protect the people from the consequences of their political choices.”
FLASHBACK: SEPTEMBER 29, 2005

U.S. Senate, 11:31 A.M.
On the Nomination (Confirmation John G. Roberts, Jr., of Maryland to be the Chief Justice of the United States)

YEAs: 78
NAYs: 22 (Including Obama, Biden, Clinton)
INDIVIDUAL MANDATE

- **Background**
  - Minimum essential coverage provision of the ACA, requires most people to maintain a minimum level of coverage in each month beginning in 2014
  - Financial penalty if individual mandate not satisfied (some exemptions)
  - Congressional authors of the ACA believe that without the individual mandate, the exchanges and private insurance market reforms would not work effectively
    - Adverse selection effect of healthy people choosing to forego insurance

- **Plaintiff Argument**
  - Plaintiffs argue that individual mandate is not a valid exercise of Congress’s legislative powers, including its powers to regulate commerce and to levy taxes

- **Administration Position**
  - Individual mandate is a constitutional exercise of Congress’s legislative powers (i.e., Commerce Clause, the Necessary and Proper Clause, and the Taxing Power)
MANDATE OUTCOME

- A majority held the individual mandate is not a valid exercise of Congress’ power under the Commerce Clause and the Necessary and Proper Clause; however, the majority opinion concludes that the individual mandate may be upheld as within Congress’ power under its taxing authorities.
- Basic rationale: mandate may be upheld as a tax because it (1) looks like a tax (a penalty paid to the IRS); and (2) courts are required to give statutes the benefit of the doubt to find they are constitutional.
- Significant win for the Obama Administration, significant endpoint for further expansive authority of Congress under the Commerce Clause.
MEDICAID EXPANSION

- Medicaid Expansion
  - The ACA expands eligibility for Medicaid benefits by requiring that participating states cover nearly all people under age 65 with household incomes at or below 133% FPL beginning in January, 2014
  - Federal government will cover 100% of the states’ costs of the coverage expansion beginning in 2014, gradually decreasing to 90% in 2020 and thereafter
  - CBO estimates Medicaid expansion will cover an estimated million uninsured, low-income Americans
- Plaintiff Argument
  - Plaintiffs argue Medicaid expansion is an unconstitutional exercise of Congress’s Spending Clause power because it improperly coerces the states to participate in Medicaid
- Administration Position
  - Medicaid expansion is a constitutional exercise of Congress’s legislative powers
MEDICAID OUTCOME

- Most complicated part of opinion, with varying array of Justices differing on the Constitutionality of provisions
- States accept Medicaid funding with a variety of conditions attached. The most controversial aspect of the law’s Medicaid expansion appeared to be the threat that if a state chooses not to expand Medicaid according to Congress’ dictates under the ACA, the Congress could take away *all* of that state’s Medicaid funding, including funding unrelated to the expansionary scheme. The court found this to be unconstitutionally coercive.

> “Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”

- Decision essentially makes Medicaid expansion optional for states
NEW ANALYSIS RELEASED 7/23

- CBO and JCT now estimate that the insurance coverage provisions of the ACA will create a net reduction in overall cost of $84 billion.

- The projected net savings to the federal government resulting from the Supreme Court’s decision arise because the reductions in spending from lower Medicaid enrollment are expected to more than offset the increase in costs from greater participation in Exchanges.

- With about 6 million fewer people being covered by Medicaid but only about 3 million more receiving subsidies through Exchanges and about 3 million more people being uninsured, and because the average savings for each person who becomes uninsured are greater than the average costs for each person who receives Exchange subsidies, the projected decrease in total federal spending on Medicaid is larger than the anticipated increase in total Exchange subsidy spending.

- Source: Congressional Budget Office [www.cbo.gov](http://www.cbo.gov)
FEDERAL ANTI-INJUNCTION ACT (“AIA”)

- Federal Anti-Injunction Act
  - Very complex law, part of the Internal Revenue Code
  - AIA bars lawsuits that seek to restrain the assessment or collection of a tax
  - To challenge the imposition of federal taxes in the courts, individuals must first pay the tax and then seek to have the tax refunded or raise arguments about the invalidity
  - Issue before the Court turns on whether the ACA’s monetary sanction for failure to comply with the individual mandate is considered to meet legal definition of “tax” or penalty” under AIA

*Before reaching the constitutionality issues, the Court must decide whether the federal AIA prevents courts from deciding lawsuits about the ACA at this time*
The mandate is a “tax” for constitutional purposes because it has the features of a tax. It is not a tax for purposes of the AIA, because Congress chose not to call it a tax, and when it comes to federal statutes, Congress is responsible for characterizing things.

“It is true that Congress cannot change whether an exaction is a tax or a penalty for constitutional purposes simply by describing it as one of the other …. The AIA and the ACA, however, are creatures of Congress’ own creation. How they relate to each other is up to Congress, and the best evidence of Congress’ intent is statutory text.”
### LOWER COURT DECISIONS

**Summary of Circuit Courts of Appeals Decisions in ACA Litigation**

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*SOURCE: Kaiser Family Foundation, 2011.*
Law upheld as constitutional with the caveats outlined below

1. The Individual Mandate (Requirement that virtually all individuals must have minimum essential coverage) was challenged on the basis of Congress’ commerce power. The surprise decision declared while the individual mandate was not constitutional under the commerce clause, it decided that the individual mandate is a constitutional exercise of Congress’ power to tax, therefore the mandate is upheld.

2. Medicaid Expansion was challenged on the basis of the requirement being an unfunded mandate for the states. Again, a surprise decision that said the Medicaid expansion is unconstitutionally coercive of states, because states did not have adequate notice to voluntarily consent and the Secretary could potentially withhold all of a state’s existing federal Medicaid funds for non-compliance. However, the full decision found that absent the Secretary’s enforcement authority (withholding all existing Medicaid funds for non-compliance) that the Medicaid expansion was constitutional. Essentially, the Medicaid expansion is optional.
AGENCIES MOVE FORWARD!

Regardless of Election Outcomes and Supreme Court Decision, Agencies Move Forward With ACA Implementation

- HEALTH INSURANCE EXCHANGES
- HEALTH INSURANCE PREMIUM TAX CREDIT
- INDEPENDENT PAYMENT ADVISORY BOARD ("IPAB")
- ACCOUNTABLE CARE ORGANIZATIONS ("ACOs")
- INSURANCE REFORMS
- DUAL ELIGIBLE DEMONSTRATION INTEGRATION PROJECTS
- IMPROVEMENTS IN PART D COVERAGE
- “PRODUCTIVITY ADJUSTMENTS” AND OTHER PROVIDER CUTS
- INDUSTRY TAXES AND FEES
SCOTUS DECISION: NEXT STEPS

- House votes for 33rd time to repeal the ACA: Passes with large vote along party lines – action in the Senate is not expected
- Governors must decide:
  - Whether to expand their Medicaid programs to 133% of poverty level beginning in 2014
  - Whether to set up a state health insurance exchange, decision due by November 16, 2012
- Confusion around Medicaid decision and its full implications will require further CMS guidance, although expect further action to clarify in the Congress, and potentially in other courts
Where the States Stand
What are the States Saying about ACA Medicaid Expansion?

Note: Based on literature review as of 7/10/12. All policies subject to change without notice.
SCOTUS DECISION: MEDICAID ISSUES TO BE RESOLVED

The Court decision raises many unresolved questions for Medicaid including:

- ACA provides 100% federal funds for the Medicaid expansion in 2014 through 2016, declining to 90% by 2020 and thereafter: will states decline the significant federal funding available to comply with expansion?

- Under the terms of the ACA, most individuals with incomes under 100% FPL are ineligible for subsidies to purchase coverage in the Exchanges, what if any coverage options will be available to the Medicaid expansion population in states that do not comply with expansion, and how and where will the costs of their health care be absorbed?

- Can a state phase-in expansion beyond 2014 or could a state do a limited expansion?

- ACA required Maintenance of Effort on eligibility until 2014: how is this impacted?

- ACA DSH payment reductions to begin in 2014 were tied to status of anticipated drop in uninsured as Medicaid expansion kicked in: what happens in opt out states?
STAKEHOLDER IMPACTS – IN GENERAL

- In general, greater clarity, certainty and increased stability
- Tremendous implementation challenges for state and federal agencies
- Ongoing litigation around discrete parts of ACA
  - Challenges to IPAB
  - Challenges to Congressional authority to limit physician-owned hospitals
  - Challenges to regulations requiring provision of contraceptives
HOSPITALS AND PROVIDERS

- Implementation of delivery system reforms continue
- In 2014, some hospital providers may see the benefits of coverage expansion in more privately insured patients
- Depending on state’s choices on Medicaid, hospital providers may see a more limited reduction in the uninsured patients they see
  - May impact DSH hospitals, which accepted a reduction in Medicare and Medicaid DSH payment in return for increases in coverage
- Scheduled Medicare cuts and “productivity adjustments” continue
DRUG AND DEVICE MANUFACTURERS

- Allows implementation of key ACA provisions impacting drug and device manufacturers to go forward
- Closing the Part D “donut hole”
- Definition of average manufacturer price
- FDA and CMS implementation of follow on biologics authority
- CMS implementation of Physician Payments Sunshine Act
- 2.3% Device tax effective 1/1/13
- Pharmaceutical fee effective 1/1/11
- Indoor tanning tax effective 1/1/10
EMPLOYERS/PLAN SPONSORS

- “Business as usual” for employers and group health plans in efforts to implement ACA requirements
- Fees to find PCORI and temporary reinsurance program soon effective
- Employer calculus re retaining vs. dropping coverage a case by case analysis
- Awaiting formal guidance on how part time employees will be defined, and final regulation and guidance governing Essential Health Benefit requirements
HEALTH INSURANCE ISSUERS

- Continued implementation of ACA’s reform requirements, including medical loss ratio payments to be paid by August 1, 2012
- Preparing for further reforms in 2014, elimination of pre-existing condition, guaranteed issue, modified community rating
- Preparation for both state and federally facilitated Exchanges
- Health insurance tax effective 1/1/14
- 40% Cadillac tax for high value health plans effective 1/1/18
Election 2012: Will Dems Run on or Away from ACA
Election 2012: How will Romney Handle His Support of the Massachusetts Law
POST ELECTION:...AND ANOTHER DEBT LIMIT EXTENSION

Debt-Ceiling Pileup

The federal government will hit the debt ceiling at the end of the year, just as the country is expected to reach the so-called fiscal cliff of expiring tax provisions and spending cuts.

Partisan gridlock makes it unlikely that Washington will address the debt ceiling before the November elections. The timing is uncertain, but the government is on track to hit the statutory debt limit in December. Treasury could take “extraordinary measures,” as it did last summer, to keep the government running until perhaps mid-March.

Federal debt limit: $16.394 trillion

*Solid line shows actual; dashed line shows estimate.

Key due dates:
- April 1: Social Security
- Supplemental Security Income benefits
- April 1 and 15: Active and retired military pay
- April 10: Social Security benefits

Graphic by: Peter Bell and Catherine Hollander
Sources: Treasury Department; staff reporting
FY 2013 BUDGET: WHAT’S HAPPENED

- The President’s FY 2013 budget proposal and the House-passed Ryan budget resolution both proposed changes and cuts that could significantly impact health care providers.

- While both documents remain more message documents than legislative vehicles, they do outline what deficit reduction measures might be considered later this year for SGR offsets, debt limit extension or reprioritizing of the sequester.

- Status of budget documents:
  - President’s FY 2013 budget unanimously rejected by both chambers.
  - House-passed Ryan FY 2013 budget resolution rejected by Senate.
WHAT’S ON THE TABLE AND SOURCE

- **Bad debt** (despite Feb. action, further cuts still and option) and **IME cuts**: President’s budget & Bowles/Simpson

- **Outpatient E & M**: Ryan 2012 budget; MedPAC recommendation

- **Rural providers** – reduce CAH payments or eliminate category & end extenders: Bowles/Simpson and Ryan 2012 budget

- **Post acute** – cuts to IRF and SNFs: President’s 2012 budget

- **Home Health and Imaging** cuts: President’s 2013 budget, Bowles/Simpson, and Ryan budget

- **Medicaid**:  
  - Phase down Medicaid provider taxes: President’s budget and Bowles/Simpson  
  - Rebase Medicaid DSH: President’s and Ryan budget  
  - Block Grant Medicaid: Ryan 2013 budget  
  - Cut Medicaid federal portion by 1/3: Ryan 2013 budget
LAME DUCK SESSION

*Note: Lame duck sessions are held after the election (November 6) but before the newly elected officials take office (Jan. 2013)

Additional Medicare/Medicaid cuts remain a threat largely for purposes of offsetting other spending priorities (e.g., doc fix) and re-prioritizing of defense and domestic sequester, or to enact additional deficit reduction (e.g. debt limit extension, due September 30 but could roll until December)

- The ‘doc fix’ package expires December 31, 2012, so a lame duck session will again go through a process of how long to delay the scheduled Medicare physician payment cut, and how to offset the cost of the delay (a 3-month delay costs about $15 billion)

- Tax cuts expire December 31st; Congress will consider extending all or a portion of the expiring tax cuts and will also need to decide whether to offset the cost of extension

- Looming January 1, 2013 effective date for sequester (across-the-board cuts in all domestic and defense programs, including Medicare provider payments, but excluding Medicaid payments and Medicare beneficiaries):
  - Growing Congressional support for reducing or eliminating the defense portion of the sequester, which could mean increasing cuts to domestic programs and Medicare providers
LIKELY OUTCOME OF LAME DUCK SESSION

- Nature and extent of session will depend on results: if GOP gains in House and Senate, look for temporary extensions of major expiring provisions into 2013, not permanent policy changes
  - Another “doc fix” – expect another short term extension, perhaps to March, 2013
  - Expiring tax cuts – expect short term extension to next Congress
  - Possible delay of sequestration and/or new deficit reduction package – November/December
SEQUESTRATION

- Created by Budget Control Act of 2011 (BCA)
  - Debt ceiling increased by $2.1 trillion
  - Discretionary spending capped FY 2012-2021 (reduced federal spending by $917 billion over 10 years)
  - Creation of Joint Select Committee on Deficit Reduction (Super Committee) to report package that reduces deficit by at least $1.5 trillion over 10 years
  - Spending reduction trigger (sequestration) of $1.2 trillion over 10 years if no Super Committee package
SEQUESTRATION

- Sequestration starts January 2, 2013
- Implemented through across-board-cuts to mandatory spending (with exceptions) and reduced discretionary spending caps through FY 2021
- Medicare and Medicaid: Medicaid is exempted, and Medicare beneficiary payments are exempted. Medicare providers payment cuts can not exceed 2% as a result of sequestration
- Impact on discretionary spending will be greater, estimate of 7.8% cut to FY 2013 discretionary spending, i.e. NIH, CDC, HRSA, and FDA
ATTEMPTING TO CHANGE THE SEQUESTER

- In order to prevent the Jan. 1st, 2013 sequester, the House passed on May 10 a bill to partially repeal and replace the scheduled $1.2 trillion in spending cuts set to begin in January, 2013.
- The bill seeks to shift the defense cuts to the domestic side of the budget, by repealing the sequester, and replacing it additional cuts in domestic programs.
- $155 billion in Medicare provider cuts: Ryan budgets in 2012 and 2013 both included maintaining ACA hospital cuts even if the bill is repealed.
- On Medicaid the package would block grant Medicaid, cut the federal portion of Medicaid by 1/3, cut Medicaid DSH, eliminate Medicaid Provider taxes, and cut SCHIP. It would increase Medicare cuts by $53 billion, but does not specify details.
- The bill also includes a medical malpractice package, including cap on damages, and 3-yr statute of limitations on claims.
- The Senate has stated it will not bring up the bill, and President has stated he would veto it.
**OTHER ISSUES IN THE PIPELINE**

- **Provider Bill of Rights**: Growing hospital unrest around excessive Medicare audits, short stay “observation day” audits lead the list: Marilyn Tavenner responds, Health Affairs report, and new AHA reaction
- **Reforming the SGR**: Baucus holds series of working hearings on how to reform; Bi-Partisan Legislation introduced to reform Medicare SGR Physician Payments – sponsored by Reps. Allyson Schwartz (D-PA) and Joe Heck (R-NV)
- **Physician Fee proposed rule** posted July 6
- **Outpatient PPS and Home Health proposed** rules posted July 6
2013: CONGRESS RETURNS

"OH GOOD! THE PLACE IS JUST HOW WE LEFT IT..."