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Wither Or Whither Healthcare Reform?

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On June 28, 2012, the United States Supreme Court largely upheld the constitutionality of the Patient Protection and Affordable Care Act of 2010 (the ACA). The keystone of the ACA is the required extension of health insurance to 30 million uninsured Americans. Crucial to funding this expansion in coverage is the ACA's requirement that individuals purchase insurance from health insurance exchanges created by the law. The Court held this "individual mandate" constitutional under Congress's power to levy taxes – as opposed to its authority under the Commerce Clause, as argued by the federal government. The Court also determined that the ACA's expanded definition of individuals eligible for benefits under the Medicaid program is constitutional; however, the Court fundamentally altered the penalty structure for a state's failure to implement the expansion. With the exception of the Court's opinion addressing Medicaid, the ACA remains in full effect following its ruling.

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The impact of the ruling will be a major topic for the November elections, state legislatures, health systems, concerned (and conscientiously objecting) religious organizations and ultimately kitchen tables around the country. Whatever the angle, though, absent some other fundamental shift in law and politics, the ACA is here to stay, and regardless of one's perspective about its wisdom, the question now is – where to next?

This article briefly notes the key reasoning of the Court and discusses potential effects of the Court's opinion.

The Individual Mandate Survives As A Tax

The individual mandate for a person to maintain a "minimum essential" level of health insurance was upheld as a valid exercise of Congress's power under the Taxing and Spending Clause of the Constitution. Failure by an individual to comply with the requirement will result in assessment of a "penalty" (the greater of $95 or one percent of an individual's income in 2014, rising to the greater of $695 or two percent in 2016 and thereafter) payable by the individual with the filing of an annual tax return and "assessed and collected in the same manner" as a tax penalty by the Internal Revenue Service.

The federal government contended that compelling the purchase of health insurance was necessary to expand health insurance coverage to millions of Americans currently without access to such coverage. If Congress can regulate both the healthcare and health insurance markets under the Commerce Clause, the federal government argued, then Congress may also regulate the timing of entry to those markets. However, the Court disagreed with the government, reasoning instead that the Commerce Clause regulates commercial activity solely. The regulation of commercial inactivity – in this case an individual's choice not to purchase health insurance and resulting failure to enter the commercial marketplace of health insurance – is beyond the scope of the Commerce Clause and thus impermissible. Chief Justice Roberts commented that "[t]he 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." However, the mandate survived as a valid exercise of Congress's taxing power because "[o]ur precedent demonstrates that Congress had the power to impose the [penalty] under the taxing power, and that [it] need not be read to do more than impose a tax. This is sufficient to sustain it."

The Expansion Of Medicaid Is Determined To Be Coercive To The States

The Court also considered the issue of whether the ACA's expansion of Medicaid eligibility was an unconstitutional federal infringement on state legislative authority – specifically, whether Congress could require

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the states to comply with the law's new requirements for eligibility for Medicaid or risk losing the entirety of their Medicaid funding. Specifically, the ACA requires states to expand their Medicaid programs in various ways, including mandating coverage for all individuals under 65 years of age who have incomes below 133 percent of the federal poverty line and providing "essential benefit packages" to new Medicaid recipients. States not complying with the expansion were at risk of losing all federal Medicaid funds, including funds provided under the current iteration of the program.

While the Supreme Court has previously ruled that spending incentives are generally permissible, it has also stated that there may be a point where "pressure turns to compulsion" and thus such incentives become unconstitutional. The states challenging the ACA argued that the statute coerces them, without meaningful alternatives, to accept congressional obligations in exchange for federal funds. The primary point was that 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 upheld the ACA's expansion of Medicaid, with several key modifications. Although the Court found that the statute's threat to the states of the loss of existing Medicaid funding was unconstitutionally coercive, it held the coercion 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 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.

Litigation By Objecting Religious Institutions Will Continue

Awaiting the Court's decision regarding the individual mandate were the dozens of religious organizations that had sued the federal government because they conscientiously object to funding or providing certain aspects of health benefit plans to their employees or students. While there is a "religious employer" exemption in the federal rules implementing the ACA, that exemption excludes any religious organization that primarily serves the public. Excluded from the scope of the rule's exemption, the plaintiff religious organizations claimed that requiring them as employers and educational institutions to provide a standardized set of benefits that includes contraception and other family planning services violated the Religion Clause of the First Amendment and the Religious Freedom Restoration Act of 1993. If the Court held the ACA to be unconstitutional in its entirety, these lawsuits would have been moot. As matters currently stand, the lawsuits remain as perhaps the only avenue for relief for those objecting based on conscience.

The litigation between religious entities and the government is complex and important for establishing the boundaries between church and state, not only for the administration of the ACA, but also for determining how far the government can go in limiting the exemptions of religious groups from general laws. If the government prevails, depending on the rationale used by the courts, in the future the government might, by generally applicable rules, decide how much religious activity should (not must) be accommodated. In other words, if there is no legal basis to object to these kinds of laws in principle, all questions of religious exemption will be resolved in the legislatures and agencies and become issues of political clout, not constitutional right. On the other hand, if the religious groups prevail, the administration of obligations under the ACA would be made much more complex and expensive, and it could restrict the government's ability to regulate in what it believes is the public interest. It is not our task to debate the merits of the various claims and defenses. Rather, we note these cases as a further complication in the larger landscape in which the question of "what next" will be answered.

The Future

The resulting effect of the Court's decision on private industry will likely be relatively minor. The ACA has been in place for more than two years – providers and payers heeding the ACA's call for reform and action began their compliance initiatives some time ago. The most powerful result of the Court's ruling is the removal of uncertainty and doubt regarding the future of the statute for both providers and payers, as well as the regulatory agencies charged with drafting, implementing and enforcing rules related to the ACA. Those who may have taken a "wait and see" attitude to the ACA now have some catching up to do. Implementation efforts by all parties will likely redouble – particularly with respect to a state's implementation of insurance exchanges in 2014. The focus will remain on clinical integration, devising financial models that share risk while rewarding high-quality outcomes and the march away from fee-for-service medicine, while the number of required rules yet to be promulgated will continue to dwindle.

Aside from the religious organizations' lawsuits seeking exemption from the ACA's benefit program requirements, many are already arguing that the November elections of the president, the entire House of Representatives and a third of the Senate will be a referendum on healthcare reform generally, and the ACA in particular. Certainly the rhetorical lines are already drawn. A particularly sensitive issue for charities concerned about the impact of the ACA will be how those charities, as tax-exempt entities, advocate for or against ACA provisions affecting their operations in the election cycle. The Internal Revenue Code permits "insubstantial lobbying" by tax-exempt organizations, which means focusing on the merits of various issues in the public debate. However, the code prohibits "intervention" by tax-exempt entities for or against candidates for election. Potential penalties for intervention by a tax-exempt organization include loss of tax-exempt status. Thus, tax-exempt entities must be careful when advocating their positions regarding the ACA and ensure that their efforts do not stray into the area of intervention.

One must also consider whether the ACA's popular provisions – such as health insurance coverage for young adults under age 26 under their parents' plans and the abolition of the exclusion from coverage for individuals with pre-existing conditions – have already been taken into account in private markets. An interesting question is whether an elected body would seek to repeal these provisions entirely and risk a potential voter backlash or instead tinker with the mechanisms designed to curtail increasing costs.

One thing is certain – there is great uncertainty as to whether all states will opt to expand eligibility for Medicaid. Healthcare providers and suppliers may continue to be faced with uninsured, low-income patients and the problems of uncompensated care, despite an overall expansion in coverage among the American population through the state-run health insurance exchanges. Should this occur, large segments of the low-income population will remain uninsured in 2014 – which will stand in stark contrast to one of the philosophical keystones of the ACA, the access to affordable health insurance by most citizens. This issue will persist for state legislatures and will require a multifaceted effort to address squarely.

Whether the country's political momentum is left or right, forward or backward, it certainly is not standing still. All of the issues remaining after the Supreme Court's ruling on the ACA require continued study and diligence, careful planning and skillful advocacy.