

PUBLICATION

Executive Summary: The Impact of the Supreme Court Decision on Health Reform

June 28, 2012

The Supreme Court released its much anticipated ruling on the Patient Protection and Affordable Care Act (ACA) this morning. In the 193-page opinion, Chief Justice Roberts wrote the majority opinion and upheld the law, though not without limitation. The Court addressed the following issues in its opinion:

Individual Mandate. The most controversial provision of the ACA was the individual mandate which requires almost all Americans to have health insurance by 2014 or pay a penalty (the Individual Mandate). As a constitutional premise, the Court ruled that Congress cannot force a U.S. citizen to engage in commerce by requiring the purchase of health insurance. In contrast, under its taxing power, Congress can tax those who do not purchase health insurance because the failure to have health insurance is not made unlawful. It simply triggers the penalty. The effect is to uphold the Individual Mandate as a tax. Chief Justice Roberts wrote the majority opinion upholding the Individual Mandate as constitutional based on Congress' taxing power. Justices Ginsburg, Breyer, Sotomayor and Kagan sided with Chief Justice Roberts finding that the Individual Mandate should be upheld, but based on a broader interpretation of Congress' power to regulate commerce. Justices Scalia, Kennedy, Thomas and Alito rejected all arguments that the Individual Mandate is constitutional.

Medicaid Mandate. Under the ACA, the federal government offers each state federal dollars to expand Medicaid coverage to 133 percent of the federal poverty level and would withhold all federal Medicaid funds for the state if a state refused to comply with the expansion. The Court held that Congress can significantly expand the Medicaid program as stated in the ACA. However, Congress cannot withhold existing Medicaid Federal Medical Assistance Percentages (FMAP) funding, the anticipated federal dollars for Medicaid that states expect and rely upon, as a penalty if a state does not agree to the expansion. Seven Justices held that the Medicaid expansion is unconstitutional, and five Justices held that the Medicaid expansion penalty is severable from the rest of the ACA. Today's ruling provides states with an option to participate in the Medicaid expansion and removes the penalty if they decide not to expand their Medicaid programs. We expect many Republican-controlled states will consider opting out of the ACA Medicaid expansion.

Severability. Severability of the Individual Mandate is not an issue because the mandate is upheld. However, severability does apply to the Medicaid mandate and the authority to withhold existing Medicaid funding is severed as unconstitutional.

Anti-Injunction Act. Although the Individual Mandate is salvaged as a "tax," the Court found the Anti-Injunction Act is not found to be applicable to the law. Justice Roberts distinguishes Congress' treatment of the shared responsibility payment as a penalty which is controlling for statutory purposes (such as applicability of the Anti-Injunction Act to the ACA), but is not controlling for constitutional purposes. That is, the Court found that it is reasonable to treat the penalty as a tax for purposes of determining the scope of Congress' authority, which is a constitutional determination, but they will allow Congress to determine whether provision is a penalty or a tax for purposes of determining the scope of the Anti-Injunction Act.

While the upholding of the law provides a path for continued implementation of the ACA's provisions, the Supreme Court's decision sets the stage for a political debate that will continue well into the November election

season. Republicans in Congress are likely to move forward with repeal efforts and the focus now turns from the judicial realm to the political realm as the marketplace begins to digest the impact of today's ruling.

IMPACT OF THE SUPREME COURT DECISION ON HEALTH REFORM

Today's opinion will have a significant impact on various stakeholders in the health care industry.

Work Place & Employers

Since the law was upheld, employers should proceed with implementation of the ACA related to work place requirements. These include:

- Special employer issues, such as mammography coverage, reproductive care coverage and special time and space for breast feeding remain in effect
- Indoor tanning excise tax remains in effect
- Food store caloric listing requirement remains in effect

Employers with health insurance plans should also continue implementation efforts specific to employer-sponsored health insurance. The requirements include:

- Providing dependent coverage for children (whether or not married) until the child turns 26
- No preexisting condition exclusion on enrollees who are under 19 years of age
- No establishment of lifetime limits on the dollar value of "essential health benefits" for any participant or beneficiary
- Over-the-counter medications (except for insulin) remain ineligible for reimbursement under health savings accounts, Archer MSAs, or health flexible spending accounts
- Annual salary reduction contributions to health flexible spending accounts are limited to \$2,500

Penalties for failure to comply with any of the ACA mandates could subject an employer to an excise tax of \$100 per day per person to whom the failure relates. ERISA's civil enforcement rules also may apply to violations of this provision.

For more information on the ACA's impact on employers, click [here](#).

Hospitals and Hospital Systems

Today's ruling was generally positive for hospitals and health systems. By upholding the constitutionality of the Individual Mandate, the ACA will likely result in more insured persons. The Individual Mandate requires adults to purchase health insurance or pay a tax for not doing so. This has the potential to increase hospital revenues since more people will be covered by Medicaid or private insurance. However, the Court's invalidation of the Medicaid mandate penalty clause may result in a checkerboard of results. Many states, particularly those who were plaintiffs in this case, may be unwilling to expand Medicaid to the extent required by the ACA.

Certain health care services, most likely emergency room and urgent care, may see a spike in utilization as patients perceive greater access to health care services and begin to seek care for conditions that have gone untreated. Utilization of hospital services may also increase if physicians decline to accept new patients under lower reimbursement rates.

Other items of note:

- Medicare market basket cuts of 2010 will remain in effect
- The Center for Medicare and Medicaid Innovation program grants and awards are unaffected
- IRS community benefit reports remain
- Value-based billing commencing in October 2012 remains
- Hospital readmissions penalties, effective 2012, remain
- Hospital acquired infection reimbursement reductions, effective 2015, remain
- Accountable Care Organizations remain
- The highly controversial Independent Payment Advisory Board will also remain
- Medicare/Medicaid disproportionate share hospital (DSH) payments remain as federal law, including the reductions in Medicaid DSH payments, but state Medicaid mandate substantially affected
- Bundling payment pilot program remains
- Transparency programs and initiatives remain

Hospitals and health systems are set to experience more than \$400 billion in reimbursement cuts in the coming years under the ACA. While the increase in the number of insured patients should help offset some of those cuts, hospitals should continue cost-containment and reduction efforts as the belt continues to tighten.

The ACA rule that limits physician-owned hospitals from starting or expanding will continue in effect. The law reportedly halted the opening of 100 new physician-owned hospitals and froze \$4 billion worth of construction projects.

For more information on the Stark Law and Physician Ownership Changes under the ACA, click [here](#).

Health Insurance Companies

Health insurance companies are likely to receive today's ruling as a positive development. With the upholding of the Individual Mandate, the ACA will likely increase the number of insured individuals by 15 to 20 million in the coming years, many under private health insurance through the health insurance exchanges.

Provisions of the ACA specific to health insurance companies will be unaffected, including:

- Requirement to cover dependent children up to age 26 remains
- Medical loss ratio requirements and rebates remain (including \$1.1 billion underway)
- Health Insurance Exchanges, Small Business Health Options Programs (SHOPs) and Consumer Oriented and Operated Plan (CO-OPs) remain
- Community ratings for insurers remain in effect
- Review of premium rate increases remain in effect
- Guaranteed issue remains in effect
- Essential health benefits will remain regulated
- High risk pools will remain in effect

Recent consolidation activity in the payor market is likely to continue based on today's ruling.

For more information on the health insurance exchanges, click [here](#).

For more information on the ACA's impact on Medicare Advantage plans, click [here](#).

Physicians and Health Care Providers

The ACA ruling also has an impact on physicians and health care providers. Most significantly, physician reimbursement cuts in future years remain uncertain. The Sustainable Growth Rate (SGR) formula is not addressed in the ACA and is not affected by today's ruling. Physician reimbursement under the SGR formula is set to be cut by 25 percent at the end of 2012 unless further Congressional action is taken. Congress is expected to act to keep rates frozen for the foreseeable future.

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For more information on the impact of the ACA on physicians and health care providers, click [here](#).

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Medical Device Companies

An increase in the number of insured patients will likely mean better prospects for medical device sales. Provisions of the ACA affecting medical device companies will continue, including:

- Excise tax remains
- Independent Payment Advisory Board (IPAB), effective 2012, remains
- Transparency and Physician Payment Sunshine provisions remain
- Enhanced compliance and enforcement will continue

Pharmaceutical Companies

Pharmaceutical companies should continue moving towards compliance with the ACA provisions. Of note for pharmaceutical companies

- Senior prescription drug costs, where drug companies absorb the "donut hole" of Part D plans, remain. \$3.7 billion has already been absorbed by drug companies
- Prescription against government pharmaceutical pricing remains
- Reimportation issues are not affected

CMS Center for Medicare and Medicaid Innovation

Major funding for innovation and implementation of health care reforms that is being administered by the Centers for Medicare and Medicaid Services remains intact, as does other funding supporting reform activities such as the Prevention Fund, Patient-Centered Outcomes Research and workforce initiatives.

For more information on the ACA ruling and its potential impact on your business, please contact your Baker Donelson attorney or a member of our [Health Law & Public Policy Department](#).