8 No. 11 Westlaw Journal Insurance Bad Faith 2

Westlaw Journal Insurance Bad Faith
*1 October 2, 2012

Commentary

THE SUPREME COURT'S RULING ON THE AFFORDABLE CARE ACT: THE DEBATE CONTINUES

Lori Ann Buza, Esq., Saint Peter's College[aa1]

Copyright © 2012 Thomson Reuters .

Saint Peter's College law professor and attorney Lori Ann Buza, of Kirsten Scheurer Branigan PC, explores some of the major issues surrounding the Patient Protection and Affordable Care Act, its history, and the constitutionality of its provisions, as decided by the U.S. Supreme Court in a landmark decision.

On June 28 the U.S. Supreme Court issued its opinion on the hotly debated Patient Protection and Affordable Care Act [1] passed by Congress and signed into law by President Obama in 2010. In a 5-4 decision, the court upheld virtually all of the law's primary provisions. [2]

Chief Justice John Roberts' majority opinion guided readers through legal precedent and analysis worthy of continuing debate and discussion. Though Chief Justice Roberts was joined by four justices in the outcome, and the remaining four justices joined in dissent, there were several different viewpoints adopted by the justices within the four different written opinions, comprising nearly 200 pages.

The Affordable Care Act is a complex, lengthy piece of legislation, containing 10 titles and hundreds of provisions, two of which are the main subjects of contention: the individual mandate and Medicaid expansion. [3]

Simply put, the individual mandate requires most Americans to maintain "minimum essential" health insurance coverage, meaning that for those individuals who do not otherwise receive health insurance through an employer or government program, the means of satisfying the requirement would be to purchase insurance from a private company. [4]

Those Americans who do not comply (or are otherwise exempt) [5] would have to pay a "penalty" to the Internal Revenue Service along with his or her taxes, assessed and collected in the same manner as tax penalties. [6]

As for the Medicaid expansion, the Affordable Care Act would expand the scope of the current Medicaid program, increasing the number of people the states must cover. [7] In addition to assistance for pregnant women, children, needy families, the blind, the elderly and the disabled, by 2014 the ACA would expand Medicaid coverage to all adults with incomes up to 133 percent of the federal poverty level, whereas now most states only cover adults with children and considerably lower income levels. [8]

Though the ACA would increase federal funding to cover the states' costs in expanding Medicaid coverage, under the language of the law, if a state did not comply with the expansion, it could lose not only the additional funding, but all of its federal Medicaid funding. [9]

Legal challenges

***2** On the very day that Obama signed the Affordable Care Act into law March 23, 2010, 12 states joined Florida in a lawsuit alleging that provisions of the statute exceeded Congress' powers under the U.S. Constitution. [10] Thirteen additional states, the National Federation of Independent Business and several individuals also joined the suit. [11]

The U.S. District Court for the Northern District of Florida determined Congress did not have the constitutional power to enact the individual mandate provision in the ACA and that the individual mandate provision was not severable from the law, and, accordingly, it struck down the entire statute. [12]

On appeal, the 11th U.S. Circuit Court of Appeals affirmed the holding that the individual mandate was unconstitutional, but ruled that the provision was severable from the ACA and therefore left the other provisions of the law intact. [13]

Further, the court rejected the argument that the Medicaid expansion provision exceeded Congress' constitutional powers. [14]

The Supreme Court granted *certiorari* [15] to review the 11th Circuit's decisions on both the individual mandate and the Medicaid expansion provisions. Further, the high court appointed *amicus curiae* [16] to argue the issues concerning the severability of those provisions from the ACA and also whether the Anti-Injunction Act, 26 U.S.C. § 7421, barred the current challenges to the individual mandate due to ripeness. [17]

The primary legal issues decided by the Supreme Court were:

- Whether the Anti-Injunction Act barred the challenge to the individual mandate.
- If it did not, whether the individual mandate exceeded Congress' constitutional authority under either its commerce power or its taxing and spending powers.
- Whether the Medicaid provision exceeded Congress' constitutional authority.
- If any of the provisions of the ACA were declared to be invalid, whether they would be severable from the law, or whether the entire statute would have to be struck down.

Chief Justice Roberts made a point to mention that the court's job was not to consider "whether the act embodies sound policies," but only to decide whether "Congress has the power under the Constitution to enact the challenged provisions." [18]

Indeed, he said: "[T]he court does not express any opinion on the wisdom of the Affordable Care Act. ... Under the Constitution, that judgment is reserved to the people." [19] As is appropriate, the court's role was limited solely to policing the boundaries of the government's powers in its enactment and enforcement of the ACA. [20]

Anti-Injunction Act

As for the first issue of ripeness, the court decided that the Anti-Injunction Act did not bar the suit. [21] Generally, the Anti-Injunction Act bars litigation to enjoin or otherwise obstruct the collection of taxes and ordinarily permits challenges to the assessment or collection of any taxes only after the taxes are paid, by way of suit for a refund of taxes already paid. [22]

***3** Because the challenge before the court pertained to a future assessment of "penalties" under the individual mandate provision (not to commence until 2014), the question presented was whether the Anti-Injunction Act was applicable and, accordingly, would bar the challenge.

WestlawNext © 2013 Thomson Reuters. No claim to original U.S. Government Works.

The majority opinion explained that the Anti-Injunction Act would not be considered here because Congress labeled the consequence for failure to comply with the individual mandate as a "penalty," not a "tax," and, as such, Congress' intent must not have been to include this provision of the ACA as subject to the Anti-Injunction Act. [23]

The court cites the specific language in the ACA that "penalties are to be assessed and collected in the same manner as taxes" as indicative of the distinction in the language Congress used to describe "taxes" versus the "penalties" to be imposed. [24]

The court stated, however, that Congress' labeling the assessment as a penalty, and not a tax, only has implications as to the application of the Anti-Injunction Act, and not as to whether the exaction is *actually* a "tax" or "penalty" for constitutional purposes, as discussed in the merits of the case. [25]

Individual mandate

With respect to the merits of the case, and whether the Supreme Court should strike down the Affordable Care Act or any of its provisions, the court explained that it should only do so if "the lack of constitutional authority to pass [the] act in question is *clearly demonstrated*." [26]

Yet, it recognized the balance it must make in that "there can be no question that it is the responsibility of this court to enforce the limits on federal power by striking down acts of Congress that transgress [its] limits." [27]

In its examination of Congress' authority, or its lack thereof concerning the issue of the individual mandate, the court considered whether Congress had the authority to enact that provision under the commerce clause, [28] the 'necessary and proper' clause, [29] *and/or* the taxing and spending clause. [30]

No authority under the Commerce Clause

As for the argument that Congress had the power to enact the individual mandate pursuant to the commerce clause and the necessary and proper clause, the government contended that Congress was permitted to require individuals to buy health insurance because if they did not, it would affect interstate commerce as well as undercut the ACA's other reforms. [31]

Those reforms included the "guaranteed issue" and "community rating" provisions, which prohibit insurance companies from denying coverage to individuals with pre-existing conditions or charging unhealthy individuals higher premiums than healthy individuals. [32]

***4** First, the government said the "failure to purchase insurance has a substantial and deleterious effect on interstate commerce by creating [a] cost-shifting problem." [33] The "problem" was explained as follows: Everyone will eventually need health care at some point and often cannot predict when they will need it, yet hospitals are by law required to provide some degree of care to these individuals even if they do not have insurance or an ability to pay. [34]

Thus, much of the cost for these individuals is shifted to insurers with higher rates, and insurers then passed on those costs to their policyholders to recoup. [35]

Forcing more healthy individuals (whose premiums would on average be higher than their health care expenses) into the pool of insureds would prevent the cost-shift that currently occurs, and insurers would subsidize the costs of covering the unhealthy individuals and people with pre-existing conditions that the ACA's reforms would require them to accept. [36]

Chief Justice Roberts disagreed with the government's argument, [37] explaining that the commerce clause pertains to the power to regulate commerce, which presupposes the existence of commercial activity to be regulated. [38]

"The 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," the chief justice wrote. "Construing the commerce clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority." [39]

Chief Justice Roberts expressed the court's unwillingness to "compel" individuals to act as the government would have them act (here, dictate that primarily young, healthy individuals buy insurance), even if the failure of those individuals to act might not be good for them, or good for society, or even if those failures have a substantial effect on interstate commerce. [40]

He likened Congress' desire to have all individuals buy insurance to a theory that Congress require everyone buy vegetables in order to address the diet problem, improve nutrition and reduce health care costs. [41] Under this view, these are simply not behaviors Congress can dictate pursuant to the commerce clause. [42]

Though Congress has a vast power to regulate much of what Americans do as it relates to interstate commerce, it should not also have the license to regulate what Americans do *not* do, even if that inactivity may affect interstate commerce, Chief Justice Roberts said. [43]

"The commerce clause is not a general license to regulate an individual from *cradle to grave*, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the states," Chief Justice Roberts wrote. [44]

***5** Further, he dismissed the notion that the individual mandate is authorized under the necessary and proper clause. "Even if the individual mandate is 'necessary' to the act's insurance reforms," he said, "such an expansion of the federal power is not a 'proper' means for making those reforms effective." [45]

Authority under the taxing power

Chief Justice Roberts did, however, agree with the government's alternative argument that Congress had the authority to enact the individual mandate pursuant to its power to "lay and collect taxes." [46] Under this theory, the individual mandate would be interpreted as simply a trigger for a tax as opposed to a command by Congress to buy insurance.

The focus under this interpretation would be on the fact that the only real consequence of the individual mandate is that individuals who did not comply with the law would have a tax imposed upon them, payable to the IRS. [47]

The court admitted that this reading of the ACA is certainly not the most natural one, as the language of the statute does not label the consequence of failure to purchase insurance as a tax, but as a "penalty," and it clearly states that individuals "shall" maintain health insurance. [48]

Yet, the court said the language in the ACA should be given "every reasonable construction ... in order to save [the] statute from unconstitutionality." [49]

WestlawNext © 2013 Thomson Reuters. No claim to original U.S. Government Works.

Chief Justice Roberts reminded his readers of the court's responsibility: "The rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." [50]

Unlike the analysis applied to the first issue concerning the Anti-Injunction Act, the court explained that the *label* of a "penalty" in the ACA rather than a "tax" doesn't dictate whether Congress actually had the constitutional authority to impose such an exaction under the tax clause of the Constitution. [51] It cited an earlier decision, *United States v. Sotelo*, which stated, "In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." [52]

On one hand, the court cited previous Supreme Court decisions in which, though Congress labeled an exaction as a "penalty," "surcharge" or "fee" in a particular statute, that exercise of power by Congress was upheld as proper pursuant to its taxing power. [53]

On the other hand, the court cited a case in which, though the statute actually did label an exaction as a tax, it was found to not be authorized by Congress' taxing power. [54]

***6** In the decision, the court interpreted the consequence to noncompliance with the individual mandate as a "tax," and held that Congress was authorized to impose such a tax for several reasons.

First, it noted that the penalty for most Americans would be much less than the actual price of the insurance, so those affected could elect to pay the penalty rather than purchase the insurance. [55] In fact, the court cited the Congressional Budget Office estimate that 4 million people each year would likely choose to pay the IRS rather than buy insurance. [56]

Second, the individual mandate contained no *scienter* requirement, which is generally referred to as a knowing intent to deceive. [57]

Third, the payment is collected solely by the IRS through the normal means of taxation and, the ACA doesn't dictate that payments be limited to willful violations, as is the case of typical penalties for unlawful acts. [58]

The court said that, consistent with the individual mandate, "Congress' authority under the taxing power is limited to requiring an individual to pay money into the federal Treasury, no more." [59]

Moreover, the court explained that even though the payment was admittedly designed to influence conduct -- the purchase of health insurance -- such design is "nothing new" for Congress and does not affect the validity of Congress' constitutional authority to tax under the taxing clause. [60]

Finally, the court held that the "direct tax clause" of the Constitution, which provides that direct taxes be apportioned so that each state pay in proportion to its population, does not apply here. [61]

It found that the individual mandate tax was not a direct tax or capitation and therefore not subject to apportionment among the states. [62]

Medicaid provision exceeded Congress' authority

As for the Medicaid expansion in the ACA, the court held that it exceeds Congress' authority under the spending clause of the Constitution. [63] The clause grants Congress the power "to pay the debts and provide for the ... general welfare." [64]

The ACA would have permitted the secretary of the U.S. Department of Health and Human Services to penalize states that do not expand their Medicaid coverage as required by the statute by withholding *all* Medicaid payments to those states. [65]

The court disagreed with the government's assertion that the Medicaid expansion was just a modification to the existing program and that it should be upheld under the very language of the Medicaid provisions themselves, which permit Congress to "alter, amend or repeal any provision." [66]

Instead, the court found that it was certainly much more -- a dramatic *transformation* -- by expanding the existing program originally designed to care for the neediest into universal health coverage. [67]

*7 Further, that the ACA conditioned the states' receipt of all Medicaid funding on compliance with the expansion; it was "much more than 'relatively mild encouragement' -- it is a *gun to the head*." [68]

The court said: "Congress may use its power to create incentives for states to act in accordance with federal policies. But when 'pressure turns into compulsion,' ... the legislation runs contrary to our system of federalism." [69]

It summed up this issue by stating:

> 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 condition 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. [70]

Therefore, pursuant to the court's holding, states would have a genuine choice as to whether to participate in the new Medicaid expansion without threat of losing existing funding.

Severability

Regarding whether the other provisions of the ACA would be affected by the limits imposed on the Medicaid expansion, the court considered what would be the likely *intent* of Congress concerning the same. [71]

The issue considered by the justices was "whether Congress would have wanted the rest of the act to stand, had it known that states would have a genuine choice whether to participate in the new Medicaid expansion. Unless it is 'evident' that the answer is no, we must leave the rest of the act intact." [72]

The court reasoned that it is clear Congress would want the remainder of the ACA to stand even though states would now be given a choice as to whether to expand their Medicaid coverage -- especially in light of the fact that many states may nonetheless elect to take such an option and receive that additional federal funding. [73]

In short, the court found that its holding regarding the limitations on the Medicaid provisions does not affect the remainder of ACA, which stands as constitutional. [74]

WestlawNext © 2013 Thomson Reuters. No claim to original U.S. Government Works.

Conclusion

In affirming in part and reversing in part the decision of the Court of Appeals below, [75] the Supreme Court clarified what portions of the Affordable Care Act were deemed constitutional and thereby valid.

The court upheld the individual mandate, pursuant to Congress' taxing power, not its commerce power. It deemed the Medicaid expansion a violation of the Constitution by threatening existing Medicaid funding. But it let stand the option for states to comply with the Medicaid expansion so long as they have the genuine choice to do.

The court also deemed the unconstitutional portion of the ACA severable from the statute, leaving the rest of the law intact as constitutional. [76], [77]

***8** It would be up to members of Congress and the people they represent to decide now whether to repeal or modify the ACA; that decision is beyond the court's reach.

In fact, Chief Justice Roberts noted in his written decision that the court "posses[es] 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 not our job to protect the people from the consequences of their political choices." [78]

This Supreme Court opinion will be considered one of the great, yet controversial, decisions discussed in the health industry, law schools and political arenas for many years to come -- irrespective of the fate of universal health care in the United States.

Footnotes

1 124 Stat. 119 (2010).

2 *Nat'l Fed'n of Indep. Bus. et al. v. Sebelius et al.*, 132 S. Ct. 2566 (June 28, 2012).

3 Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2010).

4 *Id.*

5 The individual mandate does not apply to individuals such as prisoners and undocumented aliens. *Id.* at § 5000A(d).

6 *Id.* at § 5000A(b)(1), (c), (g)(1).

7 *See* 26 U.S.C. § 5000A; 42 U.S.C. § 1396.

8 26 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

9 26 U.S.C. § 1396d(y)(1) and (c).

10 *State ex rel. Bondi v. U.S. Dep't of Health and Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. Jan. 31, 2011).

11 *See id.*

12 *Id.*

13 *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. Aug. 12, 2011).

14 *Id.* Additional courts of appeal heard the matter as well. The 4th Circuit held that the Anti-Injunction Act barred the plaintiffs from their challenge until after they paid the penalty required by the individual mandate. *Liberty Univ. v. Geithner*, 671 F.3d 391 (4th Cir. Sept. 8, 2011). The 6th Circuit and the D.C. Circuit both upheld the mandate as a valid exercise of Congress' constitutional authority

under the commerce clause. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. June 29, 2011); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. Nov. 8, 2011).

15 A writ of *certiorari* is a discretionary device that the U.S. Supreme Court uses in order to choose the cases it wishes to hear; *certiorari* is granted to those cases the Court elects to hear. See Black's Law Dictionary, Sixth Edition, West Publishing Co., 1990, citing, 28 U.S.C.A. § 1254.

16 Amicus curiae is a person not party to the action who has permission from the court to file a brief and argue a rationale before the court. See Black's Legal Dictionary Sixth Edition, West Publishing Co., 1990.

17 *See* 132 S. Ct. 2566, majority opinion at 11.

18 *Id.* at 2.

19 *Id.* at 59.

20 *See id.* at 2.

21 *See id.* at 11.

22 *Id.* at 12, citing *Enochs v. William Packing & Nav. Co.*, 370 U.S. 1, 7-8 (1962).

23 *See id.* at 13.

24 *Id.* at 15.

25 *See id.* at 12.

26 *Id.* at 6, citing *United States v. Harris*, 106 U.S. 629, 635 (1883) (emphasis added).

27 *Id.* at 6, citing *Marbury v. Madison*, 1 Cranch 137, 175-176 (1803).

28 U.S. Constitution, Art. I, § 8, cl. 3

29 U.S. Constitution, Art. 1, § 8, cl. 18.

30 U.S. Constitution, Art. 1, § 8, cl. 1.

31 132 S. Ct. 2566, majority opinion at 15.

32 *Id.* at 16.

33 *Id.*

34 *See id.*

35 *See id.*

36 *See id.* at 17.

37 Compare opinion of Justice Ruth Bader Ginsburg. Disagreeing with Chief Justice Roberts on this point, Justice Ginsburg said the commerce clause does authorize Congress to enact the minimum coverage provision of the individual mandate. 132 S. Ct. 2566, Ginsburg opinion at 2.

38 132 S. Ct. 2566, majority opinion at 18.

39 *Id.* at 20 (emphasis added).

40 *Id.* at 23.

41 *Id.*

WestlawNext © 2013 Thomson Reuters. No claim to original U.S. Government Works.

42 *See id.*

43 *Id.*

44 *Id.* at 26.

45 *Id.* at 30.

46 *See id.* at 39; U.S. Constitution, Art. 1 § 8, cl. 1.

47 *See id.* at 15.

48 *Id.* at 32, 33.

49 *Id.*, citing *Hooper v. California*, 155 U.S. 648, 657 (1895).

50 *Id.* at 31, citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (concurring opinion).

51 *Id.* at 12, 34.

52 *Id.*, citing *United States v. Sotelo*, 436 U.S. 268, 275 (1978) (internal quotation marks omitted).

53 *Id.* at 34. See *In the Matter of License Tax Cases*, 5 Wall. 462, 471 (1866), the court held that "federal licenses to sell liquor and lottery tickets -- for which the licensee had to pay a fee -- could be sustained as exercises of the taxing power." In *New York v. United States*, 505 U.S. 144, 171 (1992), the court "upheld as a tax a 'surcharge' on out-of state nuclear waste shipments, a portion of which was paid to the federal Treasury."

54 *Id.* at 34, citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38.

55 *See id.* at 35-36.

56 *Id.* at 37, citing Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act (Apr. 30, 2010), in Selected CBO Publications Related to Health Care Legislation, 2009-2010, p. 71 (rev. 2010).

57 *Id.* at 36. *See also* Black's Law Dictionary, 6th Ed., West Publishing Co., 1990.

58 *Id.*, citing 26 U.S.C. § 5000A(g)(2).

59 *Id.* at 43.

60 *Id.* at 36. The court cites federal and state cigarette taxes as an example; these taxes are designed not only for the government to raise more money, but to encourage people to quit smoking. *Id.* at 37. Yet the court reminds us that Congress' powers to influence conduct is "not without limits." It cites precedent wherein the court invalidated congressional regulation because it was regarded as in excess of federal authority. *Id.*, citing *United States v. Butler*, 297 U.S. 1 (1936); *Bailey*, 259 U.S. 20.

61 132 S. Ct. 2566, majority opinion at 40, citing U.S. Constitution, Article I, § 9, clause 4.

62 *See id.* at 40-41.

63 *See id.* at 55.

64 U.S. Constitution, Art. I, § 8, cl. 1.

65 26 U.S.C. § 5000A; 26 U.S.C. § 1396d(y)(1) and (c).

66 *See id.* at 53.

67 *Id.* at 53-54.

68 *Id.* at 51 (emphasis added).

WestlawNext © 2013 Thomson Reuters. No claim to original U.S. Government Works.

69 *Id.* at 47 (citation omitted).

70 *Id.*

71 *Id.* at 57.

72 *See id.*, citing *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932).

73 *See id.* at 58.

74 *Id.* at 59.

75 *Id.* at 58.

76 132 S. Ct. 2566, majority opinion at 58-59.

77 Compare Dissent of Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito. Disagreeing with the majority opinion, the dissenting justices would have found that the entire Affordable Care Act be deemed inoperable as they opined that both the individual mandate and the Medicaid expansion exceeded congressional authority and are unconstitutional. 132 S. Ct. 2566, dissenting opinion at 3-4.

78 *Id.* at 6.

aa1 Lori Ann Buza is an assistant professor and advisor of law at Saint Peter's College in Jersey City, N.J., where she teaches law and contracts, the Uniform Commercial Code, real and personal property, agency and business organizations, and legal contemporary issues. She also is a practicing attorney with Kirsten Scheurer Branigan PC in Nutley, N.J.

8 No. 11 WJIBF 2

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.