When the dust clears … The Supreme Court decision on health care reform

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OVERVIEW

The Decision

The Split: 5-4 Decision (Sort of)
The Mandate is Upheld
To Tax or Not to Tax – There is No Question!
Taxes vs. Mandates

Analysis

Pulling Out the IRS’ Claws
President Obama’s Take? It’s Complicated
Politics in Play
November Reversal? Not So Fast; and Not Necessarily for the Better!
What About Massachusetts?

Impact on Self Funding

Impact on Healthcare Costs

ACA Benefits Already In Place: No Change
ACA Provisions to Go Into Effect in 2014
Paying for ACA: New Taxes & Penalties

What Now?

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The Decision

The Split: 5-4 Decision (Sort of)

- Upheld the Mandate as a “Tax”, but not under the Commerce Clause
  - Chief Justice Roberts

- Upheld the Mandate under the Commerce Clause
  - Ruth Bader Ginsburg
  - Stephen Breyer
  - Sonia Sotomayor
  - Elena Kagan

- Dissenting Justices – Mandate Entirely Unconstitutional Regulates “Inactivity”
  - Antonin Scalia
  - Anthony Kennedy
  - Clarence Thomas
  - Samuel Alito
THE DECISION

The Mandate is Upheld

- **Government’s Logic**
  - People either purchase, or will purchase, healthcare
  - Failure to purchase insurance can have a substantial affect on interstate commerce
  - Congress authorized under the Commerce Clause to compel citizens to act

- **Court’s Response**
  - No existing commercial activity
  - Mandate compels individual activity in commerce by purchasing a product
  - People, for reasons of their own, often fail to do an infinite number of things...
    - Allowing mandate would create expansive power beyond the scope of the Commerce Clause
  - Can the government make us buy broccoli?
  - “Every reasonable construction” – but the law called it a penalty, not a tax?
The Decision

To Tax, or Not to Tax – There is No Question!

- Congress may “lay and collect Taxes” … “for the common defense and general welfare of the United States”
  - Government Argues: if mandate not upheld under the Commerce Power, “we should nonetheless uphold it as an exercise of Congress’ power to tax…”
  - “… the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.”

- The exaction imposes on those without health insurance what looks like a tax. If an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. The “[s]hared responsibility payment,” as the statute entitles it, is paid into the Treasury by “taxpayer[s]” when they file their tax returns.
THE DECISION

Taxes v. Mandates

- Requirement v. Encouragement

- Taxing power does not give Congress same degree of control over individual behavior.

- Individual mandate need not be read to declare that failing to purchase insurance is unlawful; to pay the tax is to comply with the law.

- Under Commerce Clause – Congress may command and impose criminal sanctions; but, under Taxing Power – no power to compel or punish those subject to the tax.

- Capitations are expressly contemplated by the Constitution
  - “… in this world, nothing can be said to be certain, except death and taxes”

  - See Benjamin Franklin to M. Le Roy (Nov. 13, 1789)
Pulling Out the IRS’ Claws

- Taxation—especially when motivated by a regulatory purpose—can impose severe burden. But individual has a choice – act, or pay.

- Penalties v. Taxes: this Court has explained that “if the concept of penalty means anything, it means punishment for an unlawful act or omission.” United States v. Reorganized CF&B Fabricators of Utah, Inc., 518 U. S. 213, 224 (1996); see also United States v. La Franca, 282 U. S. 568, 572 (1931).

- The IRS is charged with collection through the normal means of taxation—but is not allowed to levy criminal sanctions.
Pulling Out the IRS’ Claws

- According to MSNBC and CNN:
  - “The court noted that individuals may **choose not to comply** with the mandate, and can simply **refuse to pay the tax**.”

- NBC’s Pete Williams reported:
  - Roberts reasoned that “there’s **no real compulsion** here”
    - Those who choose not to pay
      - No jail time
      - No criminal or civil penalties under the Tax Code
      - No interest accrual for untimely payment
        - According to the congressional Joint Committee on Taxation
President Obama’s Take? It’s Complicated

- On appeal, the lower court …
  - “unanimously agreed that the individual mandate did not impose a tax, and thus could not be authorized by Congress’ power to lay and collect Taxes.”

- In an interview, the President seemed to agree …
  - Obama: “… for us to say that you’ve got to take responsibility to get health insurance is absolutely not a tax increase.”
  - Stephanopolous: “But you reject that it’s a tax increase?”
  - Obama: “I absolutely reject that notion.”
Politics in Play

- Roberts' Betrayal, or boon for the Republicans?
  - Roberts noted - he and the other justices “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 not our job to protect the people from the consequences of their political choices.”
  - Rallying cry for Republicans - criticized the high court’s reasoning and vowed to repeal the Affordable Care Act.
  - Romney Campaign raised $3.2 million in the hours after the decision was announced.

- 14% of Employers standing pat until November election
  - Based on poll of 4,000 employers by Towers Perrin
  - Logistics – instant reversal not realistic – Fred Hunt
Full Speed Ahead with Reform

- HHS – states can apply for funding for exchanges

- $850 Million to 34 States & District of Columbia for exchange establishment grants
What About Massachusetts?

- The 1st exchange – Congress does not restrict state power in this field
- Any and all powers and functions not specifically enumerated to the Federal Government in the constitution.

Ahead of the Cost Curve? Most Agree on the Ends, but Not the Means!

- Real cost reform in doubt after hospital lobbying
  - Luxury tax on high priced-providers
  - Restrictions on large group contract negotiations
- “A competitive health care industry is essential to controlling long-term cost growth. That’s why legislatures are currently considering a number of new transparency and accountability measures” – Senate President Therese Murray
Impact on Self-Funding

Impact on Health Care Costs?

- PriceWaterhouse Coopers: 7.5% Increase in 2014 with reform
- ACA = Focus on access, not cost
- Important Going Forward - Incentives
  - Wellness, Wellness, Wellness
  - Take advantage of ability to design plans
IMPACT ON SELF-FUNDING

- Laws requires hospitals to give certain care regardless of ability to pay
- Costs? -- Hospitals → Insurers (Higher Rates) → Policy Holders (Higher Premiums)
- No premiums for self-funded employers - who do they pass the cost onto?
  - The Court clearly missed the boat on how the current system impacts self-funded plans (55% of the market)
- Requiring healthy lives to buy insurance (pay premiums) won’t help self-funded plans spread the rising cost of healthcare caused by (1) mandates, (2) decreasing health of Americans, and (3) excessive provider charges, cost shifting, and fraud.
- Huge Opportunities
  - National Association of Health Underwriters predicts smaller plans will increasingly look to self-funding as a cost effective option

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ACA BENEFITS ALREADY IN PLACE: NO CHANGE

- Young adults covered up to age 26 (50/50 in public opinion polls)
  - Approximately 2.5 million young adults are now covered on their parents' policies.
  - UnitedHealth Group Inc. (UNH), Aetna Inc. (AET) and Humana Inc., all announced before the decision that they would keep children on plans to age 26.
  - Many states had laws on the books that support the young-adult rule.

- Ban on lifetime limits
  - The three insurance companies noted above have also said that they would have kept these popular rules in effect
ACA BENEFITS ALREADY IN PLACE: NO CHANGE

- Ban on denying care due to pre-existing conditions
  - Insurance industry on board, except in cases of fraud (i.e. when people lie about their conditions on the application). This provision would have been expensive, however, without the mandate, because of the possibility that only sick people would have signed up for insurance.
  - Incentive for young and healthy to opt out of coverage and pay the tax?

- Preventive healthcare benefits without imposing co-pays/other out-of-pocket charges
  - About 54 million Americans now have expanded coverage of at least one preventive service since the law went into effect, according to an analysis by the Kaiser Family Foundation.
  - Additionally, 32.5 million seniors took advantage of these preventive services.

- Gap in Medicare coverage (aka the "doughnut hole"): Seniors who fell into this coverage gap have enjoyed a 50% discount on covered brand-name drugs and 14% savings on generic drugs.
ACA BENEFITS ALREADY IN PLACE: NO CHANGE

- Temporary insurance coverage
  - Two programs have provided coverage for retirees who are over age 55 but ineligible for Medicare and for adults with pre-existing medical conditions who have been uninsured for at least six months. These pools were intended to create coverage until 2014, when permanent solutions are in place.

- Required reporting of proportion of premium dollars spent on clinical services, quality, and other costs and provide rebates to consumers
  - New rules require that 80-85 cents on every dollar on healthcare costs.
ACA BENEFITS ALREADY IN PLACE: NO CHANGE

- Requirement that insurance companies justify "unreasonably" large healthcare premium increases
  - ACA also established standards for insurers to use in providing information on benefits and coverage and will eventually create a new federal body that will have power to block insurers from raising rates.
  - Self-funded increases justified by medical costs of plan

- Small Business Tax Credits
  - Employers with fewer than 25 employees and average annual wages of less than $50,000 that provide health insurance for employees will receive tax credits for providing coverage
ACA PROVISIONS TO GO INTO EFFECT IN 2014

- Medicaid Expansion
  - The ACA was supposed to expand Medicaid to all individuals under 65 earning less than 133 percent of the poverty line, or around $30,000 a year for a family of four.
  - Would have provided coverage to 16 million Americans.
  - But the Court prohibited the federal government from punishing states for not complying. The feds can withhold new funds from states that don't comply, but cannot withhold all Medicaid funding.
  - 14 States have already opted out
    - Texas, who has one of the highest rates of uninsured, will opt out
ACA PROVISIONS TO GO INTO EFFECT IN 2014

- State insurance exchanges
  - Added pressure due to holding on Medicaid expansion
  - Provide insurance access for approximately 23 Million uninsured by 2019
    - According to the Congressional Budget Office (CBO)
  - Tax credits for individuals and families making less than 400% of the federal poverty level (currently $92,000 for a family of four)
  - If states opt out, then what? Federal Intervention?
    - Estimated cost $2.7 Trillion
  - Self-funding a better option than dropping coverage & joining exchange?
PAYING FOR ACA: NEW TAXES AND PENALTIES

- New excise tax on high-premium insurance (Cadillac) plans
  - Equal to 40% of premiums paid on plans costing more than $27,500 annually for a family, starting in 2018
- Increase in Medicare payroll taxes on couples with income of more than $250,000 a year
- Unearned income (i.e. capital gains), subject to additional 3.8% tax
- Customers of indoor tanning salons would pay a 10% tax
- Fees on insurance companies, pharmaceutical companies and medical device manufacturers, including $33 billion over 10 years on fees on drug makers, starting in 2014
- Tax on individuals without qualifying coverage, maximum penalty set at 2.5 percent of income
WHAT NOW?

- Remember the 14% - Don’t Wait for November!
  - You’re Self-funded – but you still need to comply!
  - Costs will rise – will yours?
    - Review your plan
    - Ability to customize plan is a huge advantage
    - Innovative plan design best counter to rising costs due to reform
- Summary of Benefits Coverage – It’s happening now!
QUESTIONS

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