HEALTH LAW

What Does Obamacare Mean for the Urgent Care Industry?

JOHN SHUFELDT, MD, JD, MBA, FACEP

Chief Justice Roberts, writing for the majority, published the Supreme Court's decision in *National Federation of Independent Business v Sebelius* on June 28, 2012. With a few exceptions, the decision upheld the bulk of the Patient Protection and Affordable Care Act (PPACA), also known as Obamacare.

In the next few paragraphs I will attempt to make some sense out of the ruling and how, if applicable, it applies to the urgent care industry.

The Supreme Court granted certiorari (agreed to review) on four issues where the federal appellate courts were split.

The Anti-Injunction Act

The Anti-Injunction Act (AIA) generally prevents any one party from challenging the legality of a federal tax until a taxpayer has paid the tax, filed for a refund, been audited by the Internal Revenue Service (IRS), or sued for a refund in federal court. The Court appointed an *amicus curiae* (friend of the court) to argue that the AIA prevented a decision on PPACA until its shared responsibility (tax) payment was due. The amicus argued that since the shared-responsibility penalty was collected by the IRS in the same manner as a tax under the auspices of the Secretary of the IRS that the penalty was a tax, and therefore, subject to the AIA and not "ripe" for judicial review because the tax had yet to come due.

The Court rejected this argument and held that the AIA and PPACA are both creations of Congress and that how they relate to each other is up to Congress. "Congress chose to describe the shared responsibility payment, not as a tax but as a penalty." In doing so, Congress had expressed its intent that the AIA should not apply, thus permitting the case to go forward on its merits and not barred by subject matter jurisdiction (no one paid the tax yet). So, under the AIA, the inducement to purchase health care insurance is not a tax and the Anti-Injunction Act is held not to apply.

John Shufeldt is principal of Shufeldt Consulting and sits on the Editorial Board of *JUCM*. He may be contacted at *Jshufeldt@Shufeldtconsulting.com*.

The Constitutionality of the Individual Mandate

The cornerstone of PPACA's mandate is Congress's power to regulate interstate commerce. The Commerce Clause contained in Article 1, Section 8, Clause 3 of the Constitution holds that "Congress has the power to regulate commerce with foreign nations, and among the several states, and with Indian Tribes.[i] The Court established long ago that this clause gives Congress "the power to regulate the channels of interstate commerce, persons or things in interstate commerce, as well as interstate or purely intrastate activities which have substantial effects on interstate commerce."[ii]

The majority of the Court rejected the argument that the Commerce Clause alone could legitimatize the individual mandate and struck it down on that basis. Next, they undertook the task of defining some previously unaddressed questions on the limitations of the Commerce Clause. Are individuals part and parcel of some markets even through their own inaction, and if so, does collective inaction substantially affect interstate commerce? Finally, can failure to act be regulated and if so, where if anywhere does the Commerce Clause ever reach its limits?

The Government argued that because everyone at some point in their life will need healthcare, a decision not to purchase health insurance was a *de facto* decision about how a person without health insurance would engage the health care system in the future. Analogizing the need for health care with the need for broccoli, Scalia asked, "Could you define the market — everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli."

Chief Justice Roberts explained that the "practical statesmen" who framed the Constitution did not anticipate that Congress's power to regulate commerce was not meant to include

compelling commercial activity. "If the power to regulate something included the power to create it, many of the provisions of the Constitution would be superfluous."

The Chief Justice and the dissenting Justices reasoned that the government was attempting to shoehorn two separate markets (consumers of health care and health insurance purchasers) into a single market. By forcing healthy people without insurance to buy health care insurance, PPACA was forcing them into one market when they were not actually active in the other. In other words PPACA is targeted at a class whose commercial inactivity is its defining feature. Further, under the government's logic, this interpretation of the Commerce Clause authorizes Congress to compel citizens to act as the government would have them act.

The government supported their argument by citing two important cases. In *Wickard v Fillburn*, the Court upheld a law that capped production of wheat in order to increase wheat prices. By extension, the Court upheld that a farmer producing wheat for his own consumption could be forced to reduce his harvest even though his wheat would never make it to the public market. *Wickard* was the seminal case about how inconsequential non-commercial, purely intrastate activity could in the aggregate have an effect on interstate commerce. In *Gonzalez v Raich*, the Court previously upheld the Drug Enforcement Agency's seizure of marijuana grown legally under state law. In that case, the Court used the Necessary and Proper Clause which gives Congress the authority to "make all laws which shall be necessary and proper for carrying into execution it enumerated powers."[iii] Thus, Congress could regulate purely intrastate commerce even if the activity fell short of what was justified under the Commerce Clause.

In the end, the majority concluded that because the individual mandate could not be authorized under the Commerce Clause, the Necessary and Proper Clause was unable to save it. In doing so the Court rejected the "mandate" by reasoning that Congress did not have the power to compel people to purchase health insurance. Thus the Court rejected the individual mandate as unconstitutional under the Commerce Clause.

The Severability of the Individual Mandate if Unconstitutional

The government anticipated that the individual mandate might not make the Commerce Clause hurdle so it argued that if even if the Court rejected the constitutionality of the individual mandate and that the penalties were truly penalties (not taxes) for the purpose of the AIA, they *were* taxes under a constitutional analysis and could be justified as a proper use of Congress's power to lay and collect taxes. If successful, it would mean that even if the mandate did not survive, the Government could still tax individuals who elected not to purchase health insurance.

Before outlining the Court's holding, Chief Justice Roberts wrote about the Court's reticence to invalidate the acts of elected leaders. "The text of a statute can sometimes have more than one possible meaning and it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." This is integral to understanding how the Court determined that penalties are not taxes under the AIA but are taxes through a constitutional analysis lens. It is through this adroit legal reasoning that PPACA was saved.

To come to this conclusion, the court cited several cases where the label applied by Congress was not determinative in a constitutional analysis. In addition, as the Chief Justice pointed out, the Court's interpretation need not be the natural one but only the fairly possible one in order to construe law as constitutional. At the end of day, despite the dissenter's charge of judicial overreaching, the Chief Justice reminded the plaintiffs that the Court had a duty to adopt a constitutional interpretation of PPACA even if Congress and the President did not originally justify the shared responsibility payments as a tax.

The Court went to great lengths to say that it was not upholding the mandate with a tax in order to construe PPACA as constitutional under the Taxing Clause. On the contrary, the Court was simply preserving PPACA's inducement for obtaining health insurance (tax) even though it held that the mandate to purchase insurance is unconstitutional. Thus, the penalties for violating the individual mandate are upheld under the taxing clause.

Expanded Medicaid Coverage Requirements of States

Under PPACA, states were mandated to expand Medicaid coverage to all individuals under the age of 65 with an income less than 133% of the federal poverty level or face having all their federally subsidized Medicaid funds withdrawn. By a 7-2 majority, the Court struck down this use of Congress's spending authority because in their determination, it was simply too coercive. The states relied upon two cases. In *Steward Machine Co. v Davis*, Justice Cardoza wrote that the idea of an inducement created by conditions placed upon federal subsidies could be so severe that an inducement actually becomes compulsory. The majority applied Cardoza's logic, opining that the withdrawal of all federal funds was impermissibly compulsive and that Congress was attempting to conscript states into a new program by threating to punish them if they stayed with an existing one.

In summary, the Medicaid expansion program remains, albeit voluntarily; thus, PPACA's Medicaid expansion is not binding on the states.

Conclusion

Save for individual states' now-voluntary participation in Medicaid expansion, the essential components of PPACA remain

intact. In some respects, both sides of the aisle claimed victory. Chief Justice Roberts and the Court broke new ground while showing both judicial restraint and Congressional deference.

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What does this mean for our industry? Unlike the Court's decision, the jury remains out for the on-demand care industry. From my vantage, the following are some things to consider:

1. We should expect more patients to walk through our doors. Although not everyone will obtain insurance (some will elect to pay the tax) we will see more patients who are now covered by either private insurance or Medicaid. Using what happened post Romneycare in Massachusetts as an anecdotal barometer, the emergency departments and clinics were flooded with patients seeking treatment for their pent up health care demands.

   No matter the ultimate outcome, we will continue to see an uptick in our volume. Many emergency departments across the country are starting to send non-paying patients out the door after performing emergency medical screening and documenting that they do not have an emergency medical condition.
2. If your particular state opts into the Medicaid expansion and you currently accept Medicaid patients, you will see a fairly dramatic increase in the number of patients who now qualify for assistance under the 133% of the federal poverty level determination. If you don't accept Medicaid patients, you may want to consider it.
3. As more individuals enroll in Medicaid and private insurance, I expect to see our average per patient reimbursements decline, thereby continuing the downward trend in urgent care revenue and the "you'll make it up in volume" health plan mantra. This will affect the smaller groups to a greater extent than the larger players.
4. We will start to see some new payment models and incentives. I would not be surprised to see capitation models come back into vogue, particularly in an accountable care organization-dominated world.

If, after reading this, you are considering ending it all, don't forget this could all be rendered moot after the November elections! No matter the outcome, our future will not be boring. ■

[i] U.S. Constitution, Article 1, Section 8, Clause 3.
[ii] *Id.*
[iii] U.S. Constitution, Articles 1 & 8, Clause 18.