AKO
POLICYHOLDER
ALERT

ANDERSON
KILL &
OLICK, P.C.
Attorneys and Counsellors at Law

June 29, 2012

Supreme Court Rules That Affordable Care Act Is Constitutional

Risk Management Departments: Say Hello to HR

By Rhonda D. Orin

Yesterday's blockbuster decision of the U.S. Supreme Court on the Affordable Care Act means that, for many employers, it's time for risk managers to start learning about health insurance issues that traditionally have been the sole purview of human resources departments.

The days of viewing health insurance simply as an employee benefit are over.

In *National Federation of Independent Business v. Sebelius*, the court ruled that the Affordable Care Act is constitutional. The ruling is almost as complicated as the 1,000-page health law itself.

For most employers, the ruling will not have an immediate impact. The ruling does not change any of the effective dates or reforms affecting employers that were enacted in the Affordable Care Act in 2010 In the years since then, most employers have been engaged in studying and initiating procedures for rolling in the changes. The ruling makes clear that this time was well spent, as those procedures should all be put into place in upcoming years.

Employers, though, would be well advised to have a basic understanding of what the ruling says. While the ruling itself is readily available on the Internet, the following is a summary of its key parts.

Chief Justice Roberts Casts the Swing Vote — Twice

The first issue addressed by the court was whether it is constitutional to require people to maintain "minimum essential" health insurance coverage and, starting in 2014, to pay a "penalty" if they fail to do so. 26 U.S.C. §5000A. This requirement is commonly known as the individual mandate. The second issue was the constitutionality of provisions in the Affordable Care Act that expanded Medicaid.

While it is well known that the vote was 5–4 regarding the individual mandate, lesser known is that there were *two different* 5–4 majorities. There also were two majorities — one 7–2 and the other 5–4 — regarding the expansion of Medicaid.

In the decision's initial discussion of the individual mandate, Chief Justice Roberts voted with the most conservative members, Justices Scalia, Thomas and Alito, along with Justice Kennedy, to declare a key provision

ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000 Fax: (212) 278-1733

ANDERSON KILL & OLICK, P.C.
One Gateway Center, Suite 1510
Newark, NJ 07102
(973) 642-5858 Fax: (973) 621-6361

ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(267) 216-2700 Fax: (215) 568-4573

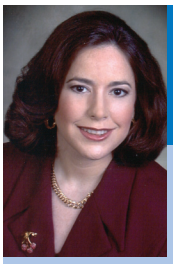
ANDERSON KILL & OLICK, P.C.
1055 Washington Boulevard, Suite 510
Stamford, CT 06901
(203) 388-7950 Fax: (203) 388-0750

Anderson Kill Wood & Bender, P.C.
864 East Santa Clara Street
Ventura, CA 93001
(805) 288-1300 Fax: (805) 288-1301

ANDERSON KILL & OLICK, L.L.P.
1717 Pennsylvania Avenue, Suite 200
Washington, DC 20006
(202) 416-6500 Fax: (202) 416-6555

www.andersonkill.com

Attorney Advertising



who's who

Rhonda D. Orin is the Managing Partner of the D.C. office of Anderson Kill & Olick. She specializes in representing policyholders, including employers, in the recovery of insurance coverage in the life/health and property/casualty arenas, and in advising employers about insurance issues related to employee benefits. She is the author of *Making Them Pay: How To Get the Most from Health Insurance and Managed Care* (St. Martin's Press, 2000).
rorin@andersonkill.com
(202) 416-6549

The article appearing in this alert does not constitute legal advice or opinion. If you require more information, legal advice or an opinion with respect to a specific situation, please contact the authors.

© 2012 Anderson Kill & Olick, P.C.

of the Affordable Care Act, known as the individual mandate, *unconstitutional* under two clauses of the U.S. Constitution: the Commerce clause and the Necessary and Proper clause.

But Chief Justice Roberts then voted with the most liberal members, Justices Ginsburg, Breyer, Sotomayor and Kagan, that the same provision was a constitutional exercise of Congress' powers to tax and spend. This vote saved the mandate, and the Affordable Care Act in its entirety, because they also determined — to the great dismay of the dissenters — that the constitutional parts of the Affordable Care Act survived the ruling that other parts were invalid.

In short, the court split evenly into two camps and Chief Justice Roberts voted with both of them.

On the Medicaid expansion, seven of the Justices agreed that the expansion, as enacted in the Affordable Care Act, was unconstitutional. The two dissenters were Justices Ginsburg and Sotomayor. But there was only one unconstitutional part: a requirement that the expansion could be imposed on the states by the federal government. So Justice Roberts and the four liberal Justices saved the Medicaid expansion by voting 5–4 that it became constitutional once the compulsory provisions were invalidated. As a result, the Medicaid expansion remains enforceable, but can only be offered to the states on a voluntary basis.

The Individual Mandate Is Constitutional As a Tax

Ultimately, the court ruled 5–4 that the individual mandate falls squarely within Congress' power under the U.S. Constitution to "lay and collect Taxes." Art. I, §8, cl. 1. The majority was comprised of Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor and Kagan; the dissenters were Justices Scalia, Kennedy, Thomas and Alito.

In determining that this tax was constitutional, the court acknowledged that the goal of the tax is to influence conduct: i.e., to persuade individuals to purchase health insurance coverage. The court determined, however, that "taxes that seek to influence conduct are nothing new," such as the imposition of the cigarette tax and, conversely, the creation of tax incentives for purchasing homes. Opinion of the Court at 36, 42.

The court also determined that while the power of Congress to impose taxes is not unlimited, in that taxes cannot be imposed as penalties, this tax is not barred because it is not punitive. The court determined, for example, that "[F]or most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more." A footnote explains that a person with an annual income of $100,000 per year would likely owe the IRS about $200 for any month without health insurance, while the monthly premium for a qualifying insurance policy is projected to be about $400. As further evidence that this tax is not punitive, the court noted that it results from a voluntary choice. In the eyes of Congress, "the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance." Opinion of the Court, at 38.

The Individual Mandate Is Unconstitutional Under the Commerce Clause

Before reaching this decision, however, the court ruled by a different 5–4 majority that the individual mandate could not be justified by Congress' power under the Constitution's Commerce clause to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. That issue was the dominant controversy during the three days of oral argument in March.

Writing on behalf of the court, Chief Justice Roberts concluded that the power to regulate commerce exists only when commerce already is taking place. Thus, it cannot be applied to compel people to purchase health insurance if they are not already doing so. Opinion of Roberts, C.J. at 20 ("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. Every day individuals do not do an infinite number of things") (emphasis original).

Here, the majority was comprised of Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito, although the latter four Justices expressed their views in a dissenting opinion only. They did not join Chief Justice Roberts' opinion because, as discussed in more detail below, they were of the view that the entire Affordable Care Act was rendered unconstitutional by this finding and should not have been upheld. The four votes against the finding that the individual mandate was not a valid exercise of the Commerce clause were cast by Justices Ginsburg, Breyer, Sotomayor and Kagan.

Chief Justice Roberts further concluded that the individual mandate cannot be sustained under the Necessary and Proper clause as an essential component of the insurance reforms. This broad clause authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, §8, cl. 18. The opinion concluded that this clause pertained only to powers that were already being exercised. The individual mandate did not comply because it pertained to a threshold action — the purchase of insurance — that was not taken in the first place.

The Dissenting Opinion

Four of the Justices — Scalia, Kennedy, Thomas and Alito — filed a joint dissent about the entire decision. They took the position that a law is not severable by the court; once any part of it is deemed unconstitutional, the entire law is invalid. Under their reasoning, the 5–4 ruling that the individual mandate is unconstitutional, along with a 7–2 ruling that an expansion of Medicaid, as enacted by Congress, is unconstitutional, requires the invalidation of the entire Affordable Care Act.

The dissenters wholly rejected the court's decision that the individual mandate was saved by the determination that it was a valid exercise of Congress' power to tax and spend and that the Medicaid expansion was saved by voiding a requirement of compulsory state participation. Finding such actions to constitute "vast judicial overreaching," the dissenters concluded, "The Court today decides to save a statute Congress did not write." Scalia, Kennedy, Thomas and Alito, JJ., dissenting, at 64.

Vegetables?

For the most part, the decision distilled extremely complex legal issues into basic, understandable elements. For example, the Roberts analysis of the individual mandate concluded with exquisite simplicity:

> The Federal Government does not have the power to order people to buy health insurance. Section 5000A [the individual mandate] would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.

Other parts of the decision, however, wandered into hypothetical extremes that border on hilarity. For example, an inordinate amount of ink was devoted to debates about vegetables — broccoli in particular. Justice Roberts paved this path by comparing a mandate to purchase health insurance to a mandate to purchase vegetables, as the health of many Americans would improve with better diets. Opinion of Roberts, C.J. at 23 ("Congress addressed

the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables").

Justice Ginsburg was highly critical of this reasoning, which she called "the broccoli horrible." In a separate opinion, part concurrence and part dissent, joined in relevant part by Justices Sotomayor, Breyer and Kagan, she noted that requiring individuals to purchase vegetables is many steps removed from ensuring actual improvement in their diets, while "[r]equiring individuals to obtain insurance attacks the source of the problem directly, in a single step." Opinion of Ginsburg, J. at 29.

The vegetable analogy continued with Justice Ginsburg's critique of the majority's reasoning on the Commerce clause that a person who may someday need health care cannot be deemed to be actively engaged in health care commerce and thereby subject to regulation, just as a consumer who may someday buy a car cannot be deemed "active in the car market." She argued that the market for health care cannot be compared to the market for cars or for broccoli because health care is an inevitable need that will eventually need to be financed by someone, either the recipient or someone acting on the recipient's behalf:

> Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price.

(emphasis original).

Justice Ginsburg rejected Chief Justice Roberts' opinion that commerce cannot be regulated unless someone is actively engaged in it as a "newly minted doctrine" that has no constitutional or precedential support and will not last long. See Opinion of Ginsburg, J. at 31 ("if history is any guide, today's constriction of the Commerce Clause will not endure"). She found the doctrine lacking in logic as well since "[e]veryone will, at some point, consume health-care products and services. Thus, if the Chief Justice is correct that an insurance-purchase requirement can be applied only to those who 'actively' consume health care, the minimum coverage provision fits the bill." Opinion of Ginsburg, J. at 18.

Justice Ginsburg ultimately contended that the court should not have issued a decision about the Commerce clause at all. It was unnecessary, she stated, because the court had already upheld the individual mandate as a proper exercise of Congress' power to tax and spend. Although the majority opinion on the Commerce clause addressed this concern, and stated that it could not have decided the act imposed a valid tax without first determining its constitutionality under the Commerce clause, Justice Ginsburg took the position that she had found "no satisfying response." Opinion of Ginsburg, J., at 37.

The Affordable Care Act: Here to Stay

Throughout his decision, Chief Justice Roberts was careful to distinguish between the role of the Judiciary and the role of the Legislature. He noted that the court does no more than assess the constitutionality of legislation. It is not empowered to opinion on the merits. Sometimes Chief Justice Roberts made this point elegantly ("We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders"); sometimes he reverted to more aggressive language:

> Members of this Court are vested with the authority to interpret the law; we 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.

Opinion of Roberts, C.J., at 2, 6.

Either way, the point is clear. Congress has enacted health care reform and, now, the Supreme Court has affirmed its constitutionality. Unless something drastic happens after the November elections, the Affordable Care Act is here to stay.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

Be Carbon Conscious . . .

Please consider switching your subscription to email. By switching to email, you will receive our timely **Client Alerts** that are sent by email only. It's easy, send your mailing and email address to andersonkill@andersonkill.com.

To subscribe to Anderson Kill Newsletters and Alerts, please visit www.andersonkill.com/publications_subscribe.asp. To unsubscribe, please email unsubscribe@andersonkill.com.