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The Decision and the States



NFIB vs. Sebelius (Cliffs Notes Version)...

Following over six hours of oral argument the Court rendered judgment on four key elements of the Affordable Care Act:

Issue #1: Would the Anti-Injunction Act, which prevents a suit challenging a tax from being heard before the tax is collected, keep the Court from considering the case?

No (9-0): The Court held that the payments required to be made by individuals who don't get insurance are a "penalty" not a tax.

Issue #2: Is the individual mandate constitutional under the Commerce Clause or the Necessary and Proper Clause?

No (5-4): The federal government can't compel anyone to enter into commerce, whether it is to get insurance or to buy broccoli.

Issue #3: Is a penalty levied against someone who does not get insurance constitutional under the Taxing Power?

Yes (5-4): Although the Court held that such a "penalty" was not a tax for anti-injunction purposes it operates like a tax (IRS collects it, etc.).

Issue #4: Is the requirement that states expand Medicaid to 133% of poverty or lose all federal Medicaid funding constitutional under the Spending Power?

No (5-4): The Court found this requirement to be "coercive" setting a new precedent regarding conditions of grant in aid.



Waiting for HHS...

The complexity of the Court's ruling leaves considerable discretion to HHS to open or narrow options for states:

- **An All or Nothing Choice?**– Most legal observers have argued that while the Medicaid expansion is optional, under the Court's ruling states that choose to expand their program are subject to all other ACA Medicaid requirements.
- **Seeking Clarification** – Governors and Medicaid directors have asked for clarification from HHS on several points:
 1. *If states expand coverage up to a level below 133% will they still receive enhanced FMAP?*
 2. *Can states choose to expand in years after 2014 and still receive the enhanced FMAP?*
 3. *If a state opts out, what other Medicaid provisions of ACA would apply to their state program?*
 4. *If a state expanded coverage through a waiver prior to the ACA, but chooses not to expand further, can they get enhanced FMAP for the previously expanded population?*



Medicaid Expansion Questions...

Despite all of the hype over which governors will say yes to the expansion, the real decisions will be made by legislatures.

- **The Risk of Saying Yes** – Although initial CBO estimates put the cost of the Medicaid expansion for states at \$20 billion over 10 years, a CSG/RAND analysis of just five states (CA, CT, IL, MT, and TX) put the 10-year cost at \$30 billion.
- **The Risk of Saying No** – If a state says no, it will still have to cover the nonexpansion costs associated with the ACA. The CSG/RAND study showed that roughly 50% of state cost was generated by exchanges bring more patients into states' existing Medicaid programs rather than expansion.
- **The Race to the "Doc"** – Expect HHS to take a page from the Department of Education playbook by using grants, waivers, and other means at its disposal to incentivize states to choose expansion.



Exchange Questions...

So far most states have punted on exchange implementation, but the Court's ruling changes the stakes of the debate.

- **The Risk of Going Forward** – The legislative actions required to authorize an exchange are relatively modest, but the public remains deeply divided with 52% calling for repeal and 45% in support (Rasmussen Poll, July 23, 2012).
- **The Risk of Standing Aside** – If a state stands aside, HHS will put in place an exchange that benefits the federal bottom line. This means an exchange that pools individuals with small businesses. A recent RAND analysis found that such an exchange model will make insurance more costly for small businesses but reduce federal spending on subsidies.
- **The Risk of Waiting** – States have the option of building an exchange at a later date, but only at their own expense. Also, moving from an established federal exchange to a state model could spark tough debates as it would increase costs for individuals while reducing them for businesses.



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