



# HEARTBEAT

## HEALTH CARE REFORM SPECIAL

### WHAT THE RECENT SUPREME COURT DECISION MEANS FOR HOME CARE PROVIDERS *By Elizabeth E. Hogue, Esq.*

The U.S. Supreme recently issued its opinion in *National Federation of Independent Business, et al v. Sebelius, Secretary of Health and Human Services, et al*, Case 11-393, Decided June 28, 2012. There were two crucial issues decided:

- Can Congress enact a requirement that individuals must purchase health insurance or pay a penalty, the so-called individual mandate?
- Can the federal government force the states to expand eligibility for the Medicaid Program by threatening to withdraw all Medicaid funding from States that do not expand eligibility as directed?

With regard to the first issue, the Court concluded that the individual mandate is not a valid exercise of Congress' power under the Commerce Clause or the Necessary and Proper Clauses of the U.S. Constitution. The Court said that the Constitution grants Congress the power to "regulate Commerce." The power to regulate commerce presupposes the existence of commercial activity to be regulated. The individual mandate, however, does not regulate existing commercial activity. Instead, it compels individuals to become active in commerce by purchasing a product on the ground that their failure to do so affects interstate commerce. The Court did conclude, however, that the power given to Congress to "lay and collect Taxes" does support the individual mandate, which imposes a tax on individuals who do not purchase health insurance.

With regard to whether the federal government may require the States to expand their Medicaid Programs, the Court concluded that it cannot do so for the following reasons. The Spending Clause of the U.S. Constitution grants Congress the power "to pay the Debts and provide for the...general Welfare of the United States." The Court recognizes that Congress may use this power to establish cooperative state-

federal programs, such as the Medicaid Program. The legitimacy of such programs depends, however, on whether the States voluntarily and knowingly accept the terms of such programs; Congress cannot require the States to participate. When Congress threatens to terminate other grants as a means of pressuring the States to accept such programs, therefore, it runs counter to the Nation's system of federalism.

The Secretary of the U.S. Department of Health and Human Services (HHS) may penalize States that choose not to participate in expansion of the Medicaid Program under the Affordable Care Act (ACA) by taking away their existing Medicaid funding. According to the Court, the threatened loss of over 10% of States' overall budgets is "economic dragooning" that leaves the States with no real option but to acquiesce in the expansion of the Medicaid Program.

The Court acknowledged that the government claims that the expansion of the Medicaid Program is just a modification of the existing program and that Congress has the right to modify existing programs. The Court concluded, however, that the expansion "accomplishes a shift in kind, not merely degree." The original Medicaid Program was designed to cover medical services to particular categories of vulnerable individuals, such as children and the disabled. Under the ACA, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with an income below 133% of the poverty level. The Court concluded:

*A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically. The Medicaid expansion thus violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion.*

Consequently, each State now has the right to decide whether or not it will expand its Medicaid Program consistent with the ACA. What does this decision mean for home care providers?

Many providers, including hospitals, supported the ACA because they thought the result would be more patients, especially more patients who pay. It is unclear whether this will still be the result, especially for post-acute providers. With regard to the individual mandate, it remains unclear whether the individuals who currently have no insurance and purchase it as a result of the mandate will have coverage for home care services. It also seems unclear whether or not

individuals who are currently uninsured will utilize home care services.

Likewise, it is unclear how many States will voluntarily decide to expand their Medicaid Programs as described above. Individuals who are eligible for expanded Medicaid Programs may not, however, be individuals who are eligible for home care services.

Stay tuned as the individual mandate and expansion of the Medicaid Programs are rolled out!

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## AN OVERVIEW OF HEALTHCARE REFORM AND THE SUPREME COURT'S RECENT DECISION AS IT RELATES TO OUR AREA

*By Justin Ivatts, PCM (AMA)*

Many states are jumping into Healthcare Reform wholeheartedly while others are dragging their feet for as long as possible and hoping for a Republican victory in the upcoming General Election. And then there are the states that are somewhere in between those two extremes. In our area we are in a microcosm of the whole country because all the aforementioned viewpoints are represented in our three jurisdictions.

**Virginia** has always strongly opposed the new law. Ken Cuccinelli, Attorney General for the Commonwealth, was one of the leaders in filing lawsuits against it. One of the major expectations of the new law is that states will either have their own healthcare insurance exchange or they will let the federal government run it on their behalf. Governor Bob McDonnell does not like either option but says that now Cuccinelli's lawsuit has failed the Commonwealth has to make a choice and given the choice he prefers to run the exchange himself rather than have the federal government interfering in Virginia's affairs.

**Maryland** has taken the opposite point of view to Virginia and is extremely supportive of the new law. Governor Martin O'Malley was so supportive that just as Cuccinelli was preparing his lawsuit in Virginia, O'Malley was ordering the creation of a state

committee to work on implementation of the law in his state. According to The Washington Post in an article by Karen Tumulty and Laura Vozzella Maryland has already applied for federal funding to expand Medicaid and expects 146,000 people to enroll in their healthcare exchange by 2014 and 175,000 by 2020.

**Washington, DC** has not been as "all guns blazing" as Maryland but is certainly a lot further towards the Maryland perspective than the Virginia one. The District has one of the largest (comparatively speaking) Medicaid populations with nearly half of residents covered by Medicaid, so the expansion certainly came as welcome news to DC officials and they will be applying for federal funding. Tumulty and Vozzella also say that DC will have its own healthcare exchange and expects between 60,000 and 120,000 enrollees. DC has already named seven people to the new healthcare insurance exchange board.

So as you see there are differing opinions surrounding Healthcare Reform but given the ruling from the Supreme Court we must now all work together to make it work at least until November.

*This article contains facts and figures from "Healthcare law's impact: How Virginia, Maryland and DC are faring" by Karen Tumulty and Laura Vozzella (June 29, 2012)*

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