

## Medicaid Expansion May Fall If Supreme Court Determines it Coerces States

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March 28, 2012 – The final session of oral arguments before the Supreme Court on the constitutionality of the *Affordable Care Act* focused on whether the expansion of *Medicaid* in the *Affordable Care Act* violates State Sovereignty.

Enacted in 1965, *Medicaid* is a program that is jointly funded by the state and federal governments and provides health care for people and families with low incomes. The *Affordable Care Act* provides for a substantial expansion of the population that states “must cover.” Specifically, the *Affordable Care Act* requires States to cover anyone from a family with an income below 133% of the federal poverty line, including adults without dependent children. Under the *Affordable Care Act*, the federal government will pay the entire cost of coverage for those who are newly eligible from 2014 until 2016, before dropping its coverage in stages (i.e., to 90% in 2020). The states will thereafter be required to pay as much as 10% of the additional costs.

If a state fails to participate in this expansion of *Medicaid*, the state could lose *all* of its federal *Medicaid* funding – i.e., not just its funding for the expansion. Several states therefore have objected that the *Affordable Care Act* “coerces” them into compliance with a federal objective and violates the “coercion doctrine.”

The coercion doctrine was first mentioned in *South Dakota v. Dole*, a case involving a state’s challenge to the *National Minimum Drinking Age Act*. In part, that Act allowed the federal to withhold 5 percent of federal highway funding from any state that did not raise its drinking age to 21. The Supreme Court, in a 7-2 decision, ruled that the *Drinking Age Act* did not pass the point where pressure turned into compulsion because it only cost the state a small percentage of highway funds.

In contrast, the federal funds that each state receives by participating in *Medicaid* are considerably more substantial. Paul Clement, on behalf of 26 states, therefore argued that the *Affordable Care Act* is in fact sufficiently coercive to be overturned.

Several of the Justices seemed to agree with Mr. Clement that the threat to cut off all *Medicaid* funding if the States fail to participate in the expansion for which the *Affordable Care Act* provides is coercive. Even though the Federal Government would be paying 90% of the cost of enrolling new recipients, Justice Kennedy expressed reservations that giving up all *Medicaid* funding could be an actual alternative for the states: “There is no realistic choice. There’s no real choice. And Congress does not in effect allow for an opt out.” Chief Justice Roberts likened

the lack of choice here to having a gun to your head and giving either “your money or your life.” The Chief Justice concluded: “You have to give up your wallet. You don’t have a choice.”

Other Justices took the position that the federal government cannot possibly be acting coercively when it is simply giving money to the states. Indeed, before Mr. Clement was able to finish the second sentence of his oral argument, Justice Kagan interrupted him by asking whether it would still be coercion if the federal government paid 100% of the costs. Clement answered affirmatively, but Justice Kagan disagreed: “The Federal Government is here saying we are giving you a boatload of money. There is no matching funds requirement, there are no extraneous conditions attached to it, it’s just a boatload of federal money for you to take and spend on poor people’s healthcare. It doesn’t sound coercive to me, I have to tell you.”

Unlike the federal highway subsidies at issue in *Dole*, *Medicaid* is one of the largest items on the budgets of most states. A loss of federal funds would require states to either drastically cut health coverage for the poor or dramatically increase taxes. Chief Justice Roberts pointed out the distinction between *Dole* and the funds at stake here: “That’s really apples and oranges when you’re talking about losing all of your Medicaid funds or losing [5 percent] of your highway funds.” General Verrilli responded: “I think I agree with Your Honor, that it’s different, but I don’t think that that makes coercion as a legal matter.”

Mr. Clement concluded his argument by positing that: “It’s a very strange conception of federalism that says that we can simply give the states an offer that they can’t refuse... and force the states to do whatever we tell them to,” said Clement. “That is a direct threat to our federalism.” General Verrilli countered Mr. Clement’s point by arguing that States are “taking advantage of the opportunities of this statute to greatly expand the amount of money that the Federal government spends and the amount of money that they spend to try to make the lives of their citizens better.”

The Supreme Court has never articulated a clear judicial test under the coercion doctrine, nor has it ever struck down a law as coercive. Nevertheless, the magnitude of the funds given to the states which participate in *Medicaid* seem great enough to prompt the Court to at least seize this opportunity to clarify the point at which “pressure turns into compulsion.” Regardless of whether the Court decides that the *Affordable Care Act*’s expansion of *Medicaid* must be struck down, then, its decision will likely shed light on the balance of power between the federal government and the several states.

### **What’s Next?**

This Friday (March 30, 2012), the Supreme Court Justices will have a conference on this week’s oral arguments. At the end of the conference, starting with the most senior member of the court, Chief Justice John Roberts, and ending with the most junior, Justice Elena Kagan, the Justices will go down the line and vote. Within the next few weeks, the most senior Justice on each side will assign who will write the Court’s opinion. The rest of the Justices will all then decide whether they will sign onto a brief or write a concurring opinion.

Aside from the nine Justices and their law clerks, nobody will know the Court's decision until June when the Court issues its opinion. No matter what the Court decides, it will have a significant impact on the American health care market. Health insurance companies and employers will need to study the Court's decision and determine how it impacts them. Upon the release of the High Court's opinion, we will provide an analysis of the Court's decision.

### **About the Authors**

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