

ADVISORY | Health Care

June 12, 2012

PREPARING FOR SUPREME COURT ACA DECISION: ANALYSIS OF POTENTIAL OUTCOMES AND IMPACTS

The Supreme Court is expected to issue its ruling soon in the landmark cases challenging the constitutionality of the Affordable Care Act (ACA). Capitalizing on the experience we have accumulated in this area, Covington & Burling has prepared the [ACA Supreme Court litigation potential outcome matrix](#) shown below. This matrix provides analysis of the potential outcomes of the current Supreme Court litigation, including the likely impacts if all or portions of the law are found unconstitutional.

Since the ACA was enacted in 2010, Covington lawyers across the firm have been helping clients understand the statute, analyze and comment on hundreds of proposed rules, and monitor the litigation challenging some of its provisions. When the cases reached the Supreme Court, we were honored that the Court appointed one of our partners, [Robert Long](#), to brief and argue one of the issues in the case.

For the past several months, lawyers throughout the firm have been busy preparing for the decisions, taking into account how each of the several questions presented may be resolved, and assessing how the various possible outcomes will affect our clients. Whether the Court upholds or strikes down the individual mandate provision and/or the Medicaid expansion, the decision will affect not only the health care industry, but also virtually every employer.

In addition to the outcome matrix below, Covington has prepared an [ACA Supreme Court litigation resource page](#). We will post a copy of the decision to this space as soon as it is available, along with our analyses of the decision and helpful links to other resources. We encourage you to visit this resource page for additional updates and resources pertaining to the ACA Supreme Court litigation, and to reach out to one of our attorneys listed below for advice and assistance as you analyze the challenges and opportunities that the Court's decision creates for your business.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our health care practice group:

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This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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AFFORDABLE CARE ACT

SUPREME COURT LITIGATION OUTCOME MATRIX

| | Mandate Constitutional* | Mandate Unconstitutional, Severable | Mandate Unconstitutional, Partially Severable | Mandate Unconstitutional, Not Severable |
|--|---|---|---|--|
| Medicaid Expansion Constitutional | <ul style="list-style-type: none"> ■ Act remains in place. ■ Possibility of States refusing to implement Medicaid eligibility increase. ■ States will have to choose to implement Exchange or default to federal Exchange. ■ States will have to choose essential health benefits, or will default to largest small group plan. ■ Possibility of congressional non-funding. ■ Possibility of executive non-enforcement, if GOP win. | <ul style="list-style-type: none"> ■ Act remains in place, but individual mandate is not enforced. ■ Exchanges remain a requirement, although no one required to purchase. Federal Exchange becomes more likely. ■ Price of insurance will be very high, due to inability to do medical underwriting, which will drive up cost of federal subsidies for those who qualify (up to 400% FPL). ■ Possibility of States refusing to implement Medicaid eligibility increase. ■ Possibility of some States implementing individual mandate. | <ul style="list-style-type: none"> ■ Depends on scope of what is severed, but at minimum individual mandate is not enforced, and insurers permitted to conduct medical underwriting. ■ If premium tax subsidies remain, question as to how they will be calculated in the absence of community rating. ■ Possibility of States refusing to implement Medicaid eligibility increase. ■ Possibility of some States implementing individual mandate. | <ul style="list-style-type: none"> ■ Entirety of Act invalidated, including individual mandate, employer shared responsibility mandate, expansion of Medicaid, premium tax credit, fees on pharmaceutical manufacturers and health insurers, creation of temporary high-risk pools, insurance market rules, consumer protections, restructuring of certain Medicare payments, authority of FDA to approve generic versions of biologics, and federal support of comparative effectiveness research and workforce development, among many other things. ■ States can continue to develop Exchanges, but federal funds not available, and federal subsidies not available for those purchasing on the Exchange. ■ Questions as to status of funds already expended by government or paid by private entities to government. |

| | Mandate Constitutional* | Mandate Unconstitutional, Severable | Mandate Unconstitutional, Partially Severable | Mandate Unconstitutional, Not Severable |
|--|---|---|--|--|
| Medicaid Expansion Unconstitutional | <ul style="list-style-type: none"> ■ Individuals with family income >100% FPL can purchase subsidized coverage through Exchange, but there will remain large pockets of uninsured <100% FPL (primarily childless adults). Most will be exempt from the mandate. ■ Because Medicaid coverage is less than Exchange coverage, would be substantially more expensive to provide coverage through the Exchange. | <ul style="list-style-type: none"> ■ If both provisions thrown out, finding severability may be less likely. ■ With no Medicaid expansion and no mandate, large numbers of uninsured, coupled with increase in insurance premiums. ■ Federal subsidies available for those between 100 and 400% FPL. | <ul style="list-style-type: none"> ■ If both provisions thrown out, finding severability may be less likely. ■ With no Medicaid expansion and no mandate, large numbers remain uninsured. ■ Federal subsidies available for those between 100 and 400% FPL, but question as to how they would be calculated in absence of community rating. | <ul style="list-style-type: none"> ■ See above. |

* If the Court finds that the Anti-Injunction Act bars its review of the constitutionality of the mandate until it is challenged as a tax penalty, the outcome would be that the mandate would be treated as constitutional until such time as a subsequent, properly presented challenge is presented for decision. The Anti-Injunction Act does not preclude the Court from ruling on the Medicaid question.