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THE UNITED STATES SUPREME COURT'S AFFORDABLE CARE ACT DECISION AND ITS EFFECT ON NEW MEXICANS

This is a brief analysis of the impact of the Supreme Court of the United States' (SCOTUS) decision in *National Federation of Independent Business v. Sebelius*¹ and the related challenges to the federal Patient Protection and Affordable Care Act (PPACA), which was handed down on June 28, 2012.

Summary

The SCOTUS decision mostly upholds the current provisions of the PPACA, which include changes to Medicaid and Medicare, grants to states for health care finance and delivery innovations and many provisions relating to the health insurance market.

The decision expressly upholds the PPACA's "individual mandate", the requirement that certain uninsured individuals obtain coverage or be subject to a monetary penalty.

With respect to Medicaid, the SCOTUS decision holds that while Congress may offer states an enhanced federal match if they expand Medicaid to 138% of the federal poverty level (FPL), Congress may not penalize those states that do not expand Medicaid to 138% of the FPL.

The SCOTUS decision has the effect of leaving the PPACA largely in place. States will have to make sure that they are in compliance with the PPACA's mandates regarding how insurance is sold. These include the enforcement of coverage requirements such as the ban on preexisting condition exclusions, guaranteed issuance of policies to applicants² and the extension of parents' coverage to children under the age of 26.³ The requirements also include a mandate that states establish health insurance exchanges or allow the federal government to establish exchanges for them.⁴

Although the SCOTUS decision applies to all of the PPACA, there are two areas of focus in that decision. First, the SCOTUS upheld the "individual mandate", which requires most people who are deemed to be able to afford health coverage to obtain it or pay a penalty.⁵ Second, the SCOTUS decision overturned that portion of the PPACA

that required states to expand their Medicaid programs or lose all of their Medicaid funding.

Section 1501 of the PPACA requires most Americans to obtain health insurance, with some exceptions.⁶ The SCOTUS decision upheld this provision. There are over 400,000 New Mexicans who are uninsured.⁷ Therefore, those uninsured New Mexicans who are not exempt must comply by January 1, 2014 or face penalties for not obtaining the necessary minimum health coverage.

The penalties set forth in Section 1501 of the PPACA are quite complex. Generally, the penalty applied to non-exempt individuals will be \$95.00 per adult in 2014; \$285 in 2015; and \$695 starting in 2016. For families, each dependent is counted, and the penalty is the greater of \$2,085 per family or 1% of the family's household income starting in 2014; 2% in 2015; and 2.5% starting in 2016.

The SCOTUS decision also overturned the provision in the PPACA that required states to expand Medicaid to every citizen with an income of 138% of the FPL or below.⁸ Congress provided both an incentive for states to expand Medicaid eligibility and a strong disincentive for states that would otherwise choose not to expand eligibility. A state that expands its Medicaid program would be provided with enhanced federal matching funds — 100% for the first three years; 95%, 94% and 93% respectively in years 2017, 2018 and 2019; and 90% for each year thereafter.⁹ A state that did not undertake this expansion would have lost all of its federal Medicaid grant.¹⁰ The SCOTUS decision held that Congress cannot require states to expand their Medicaid programs or lose their existing Medicaid grants. Rather, Congress can provide incentives, such as the enhanced federal match provided under the PPACA, that go only to those states expanding their Medicaid programs.¹¹

In so holding, the SCOTUS decision leaves states such as New Mexico with the option of (1) expanding Medicaid to garner additional federal matching funds while incurring added expenses after 2017; or (2) refusing to expand their Medicaid programs beyond existing eligible populations.

In its application to federal authorities to implement its "Centennial Care" Medicaid redesign plan, the state's Human Services Department (HSD) did indeed state its intent to provide for coverage to all adults with incomes at or below 138% of the FPL.¹² However, the HSD has withdrawn its April 25 waiver application and has not yet issued a new application. The HSD's reaction to the SCOTUS decision was the following:

[The HSD is] reviewing the Supreme Court's decision. After that review and thoughtful discussion, [the HSD] will be making a decision on how to proceed. [The HSD wants] to make sure [it is] reviewing this from every angle, including from a budgetary perspective and how best to continue providing services to those New Mexicans most in need.¹³

The HSD estimates that over 140,000 adults would be newly eligible for Medicaid if it undertook the expansion.¹⁴ Under current Medicaid rules, parents may be eligible for Medicaid only if their incomes are quite low.¹⁵ Adults may also qualify on the basis of disability, pregnancy or breast or cervical cancer. Childless, non-disabled adults are not eligible for Medicaid at all. New Mexico covers some childless adults with incomes below 200% of the FPL (\$22,340 for an individual in 2012) under its State Coverage Insurance (SCI) program. The SCI program has a waiting list,¹⁶ and it is not expected to continue under the Centennial Care Medicaid redesign plan.¹⁷ The PPACA allows states to cover adults not eligible for Medicaid under Basic Health Program plans.¹⁸ New Mexico has not opted to participate in the Basic Health Program at this time.¹⁹

If New Mexico were to reverse its current plan to offer coverage to all adults with incomes below 138% of the FPL, low-income adults who do not qualify for Medicaid and are not otherwise exempt from the individual mandate will be required either to purchase subsidized health coverage²⁰ on a health insurance exchange or in the private market or seek any public coverage program that the state offered instead of Medicaid.

With the provisions of the PPACA being mostly upheld, New Mexico must prepare to enforce several of the health insurance market provisions. Those provisions are

too many to detail here. Some highlights include:

- the inclusion of a set of "essential health benefits" applicable to plans in New Mexico;
- coverage requirements such as the ban on preexisting condition exclusions;
- adherence to medical-loss ratio minimums;
- review of health insurance rates; and
- the establishment of a health insurance exchange.

New Mexico's Insurance Division of the Public Regulation Commission must decide whether it will define the benefits that must be included in individual and small group health coverage plans required under the PPACA or allow the federal Department of Health and Human Services to define these for New Mexico.²¹ Essential health benefits must include items and services within at least the following 10 categories: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care. The federal Department of Health and Human Services is identifying plans in New Mexico whose benefits packages may serve as a template or "benchmark" for determining essential health benefits in the state.

With the SCOTUS decision having upheld the PPACA's insurance coverage requirements, the PPACA provisions on guaranteed issue, the ban on preexisting condition exclusion and the many other coverage requirements set forth in the PPACA are already the law of the land. Many are already in effect,²² and others will become effective in 2014.²³ However, the state will have to enact these provisions under New Mexico law in order for the state's Insurance Division to have the authority to enforce them. So far, no law has been enacted to replicate the PPACA provisions in state law.²⁴

The state has enacted laws to enforce medical loss ratios — the minimum amount that insurers must spend on medical goods and services versus the amount spent on administration and profits.²⁵ As its provisions are as strict or stricter than those set forth in the PPACA, it is in compliance with federal law.

In 2011, New Mexico enacted legislation that set health insurance rate review standards and procedures that place the state in compliance with PPACA requirements for rate review.²⁶

The PPACA requires states to establish health insurance exchanges to facilitate the purchase of health coverage by individuals and small employers.²⁷ New Mexico has until January 1, 2013 to demonstrate to the federal Department of Health and Human Services that it will have a state-based health insurance exchange or exchanges that will be operable as of January 1, 2014.²⁸ If New Mexico does not demonstrate that it will be ready to implement a fully operational exchange by January 1, 2014, the federal government will assume responsibility for running a health insurance exchange in the state.²⁹ New Mexico has been working to establish a health insurance exchange since the PPACA was enacted. Several attempts to enact insurance exchange-related legislation pursuant to the PPACA have failed, including a 2011 bill that was vetoed by Governor Martinez.³⁰ The state Office of Health Care Reform has received planning and establishment grants totaling \$36 million. The Office of Health Care Reform has contracted with a private entity, Leavitt Partners, "to assist with grant applications, technical aspects, and overall development" of an insurance exchange in the state.³¹

Endnotes

¹ The SCOTUS decision of June 28, 2012 is actually Case Numbers 11-393, 11-398 and 11-400 (567 U.S. ____ (2012), *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.; Department of Health and Human Services, et al. v. Florida, et al.; and Florida, et al. v. Department of Health and Human Services, et al.*

² Preexisting condition exclusion ban and guaranteed issue provisions are found at PPACA §§ 1201 and 1255, amending Section 2702(a), 2704 and 2708 of the federal Public Health Service Act (PHSA).

³ PPACA §§ 1001(5) and 1004(a), amending the PHSA § 2711.

⁴ PPACA §§ 1311, 10104 and 10203.

⁵ The term "penalty" is used here as that term used is in the relevant section of the PPACA, § 1501, which amends Section 5000A of the federal Internal Revenue Code of 1986. In the SCOTUS decision, the majority found the penalty under § 1501/5000A to be a "tax":

The Federal Government does not have the power to order people to buy health insurance. Section 5000A 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.

National Federation of Independent Business et al. v. Sebelius, supra, FN 1, at pp. 44-45. The Legislative Council Service's use of this term herein does not constitute an endorsement of any interpretation, and the terms "penalty" and "tax" are both implied.⁶ There are exemptions for individuals deemed not to be able to afford coverage because it exceeds 8% of household income. PPACA § 1501(e)(l). These are also exemptions for individuals who are members of religions that object to health coverage, for members of Indian tribes, for non-citizens, for incarcerated individuals and for those individuals whom the federal secretary of human services determines to have suffered a hardship. PPACA § 1501(d).

⁷ United States Census Bureau, 2010 American Community Survey, Table S2701, available at: <http://www.census.gov/hhes/www/hlthins/data/acs/aff-2010.html> (last visited July 3, 2012).

⁸ PPACA § 2001, amending the federal Social Security Act at 42 U.S.C. 1396a(a)(1)(A)(i)(VIII). The actual threshold is 133% of the FPL, with income disregards of 5%.

⁹ PPACA § 2001; amending 42 U.S.C. 1396d(y)(1).

¹⁰ 42 U.S.C. 1396c.

¹¹ Chief Justice John Roberts, who delivered the opinion of the Court, states:

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.

National Federation of Independent Business et al., supra at FN 1, at p. 55.

¹² See HSD, 1115 Waiver Application, April 25, 2012, at Table 1.1.

¹³ Electronic mail received at 4:22 p.m., June 28, 2012, from Matt Kennicott, communications director, Office of the Secretary, HSD.
¹⁴ 22,340 of these adults would come from the rolls of the State Coverage Insurance program, plus 131,108 other adults would be newly eligible. *Source*: electronic mail from Brent Earnest, Deputy Director, HSD, July 2, 2012, 4:23 p.m.

¹⁵ See Medicaid eligibility guidelines in Title 8 of the New Mexico Administrative Code; e.g., NMAC § 8.202.500.11, which provides that parents must have incomes that are less than the eligibility level for the New Mexico Works Program, which is 85% of the FPL, or \$1,584 a month for a family of four. There are other programs for specific populations, such as for disabled adults, pregnant women and individuals with breast or cervical cancer. Each of these has separate income and eligibility guidelines.

¹⁶ As of June 29, 2012, the HSD reports that the SCI program waiting list contains from 30,000 to 40,000 individuals. (Electronic mail received at 11:02 a.m., June 29, 2012, from Matt Kennicott, communications director, Office of the Secretary, HSD.)

¹⁷ See HSD, 1115 Waiver Application, April 25, 2012, at Table 1.1.

¹⁸ See Henry J. Kaiser Family Foundation, *The Role of the Basic Health Program in the Coverage Continuum: Opportunities, Risks, and Considerations for States*, March 12, 2012 (available online at <http://www.kff.org/healthreform/upload/8283.pdf>; last visited June 29, 2012).

¹⁹ In the 2012 Second Regular Session of the Fiftieth Legislature, Senate Bill 7 (Feldman) attempted to establish a Basic Health Program in New Mexico. The bill was not ruled germane by the Senate Committees' Committee and further action on the bill was postponed indefinitely (available online at <http://www.nmlegis.gov/Sessions/12%20Regular/bills/senate/SB0007.pdf> (last visited June 29, 2012)).

²⁰ People with incomes below 250% of the FPL (roughly \$4,803 per month for a family of four) will have lower cost-sharing (deductibles and copayments). PPACA § 1402. People with incomes below 400% of the FPL (\$7,684 per month for a family of four) will receive tax credits for their premium payments. PPACA § 1402; Health Care and Education Reconciliation Act of 2010 at §1001(b).

²¹ See United States Department of Health and Human Services Center for Consumer Information and Insurance Oversight (CCIIO), *ESSENTIAL HEALTH BENEFITS BULLETIN*, December 16, 2011; available online at: http://cciio.cms.gov/resources/files/Files2/12162011/essential_health_benefits_bulletin.pdf (last visited July 5, 2012).

²² E.g., the extension of coverage to children up to 26 years of age and the ban on preexisting condition exclusions for individuals 19 years of age and younger went into effect on September 23, 2010. PPACA §§ 1001(5); 1201 and 1255, HCER § 2301; amending PHSA § 2704 and 2714(a). For a detailed summary of the insurance coverage requirements and their effective dates, please contact Michael Hely, Staff Attorney, Legislative Council Service: michael.hely@nmlegis.gov; (505) 986-4635.

²³ E.g., the ban on preexisting condition exclusions for individuals over the age of 19, guaranteed issue and renewability; the ban on waiting periods of over 90 days; and adjusted community rating. PPACA §§ 1201(a) and 1255; PHSA 2702(a); 2703 and 2708.

²⁴ The 2011 Senate Public Affairs Committee Substitute for Senate Bill 608 (Regular Session, Feldman) and 2012's Senate Bill 290 (Regular Session, Feldman) attempted to codify these PPACA provisions in state law but neither bill was enacted.

²⁵ See Sections 59A-22-50, 59A-23C-10, 59A-46-51 and 59A-47-46 NMSA 1978.

²⁶ See Laws 2011, Sections 1 through 13. The federal Department of Health and Human Services' Center for Consumer Information and Insurance Oversight (CCIIO) listed New Mexico among its listing of states with "effective" — i.e., PPACA-compliant — rate-review programs. CCIIO, *Health Insurance Rate Review: Lowering Costs for American Consumers and Businesses*, available online at: <http://cciio.cms.gov/resources/factsheets/>

[rate_review_fact_sheet.html](#) (last visited July 5, 2012).

²⁷ PPACA § 1311.

²⁸ PPACA § 1321(c)(1)(B) and United States Department of Health and Human Services regulations, 45 CFR Parts 155, 156 and 157.

²⁹ PPACA § 1321(c).

³⁰ Senate Corporations and Transportation Committee Substitute for Senate Bills 38 and 370 (Feldman and Munoz, 2011 Regular Session); vetoed by Governor Susana Martinez, Senate Executive Message 38. In that message, while Governor Martinez vetoed the exchange bill, she said that she was in general support of "the creation of a framework to establish a state insurance exchange". Senate Bills 6 (Feldman) and 278 (Munoz) failed in the 2012 Regular Session.

³¹ Source: HSD, *HSD Selects Contractor to Assist in Exchange Development*, E-News, May 11, 2012; available online at: <http://www.hsd.state.nm.us/pdf/newsroom/enews/E-news%205-11-2.pdf> (last visited July 5, 2012).

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