

How the Supreme Court Decision Could Impact America's Seniors

Background

One of the many goals of the Affordable Care Act (ACA) is to improve the health and well-being of individuals 65 and older. The law strengthens and protects Medicare and Medicaid, and many seniors are already experiencing better care under the law. A decision by the Supreme Court to strike down, in whole or in part, the ACA could have a dramatic impact on the health care of America's seniors.

Purpose of This Analysis

What are the potential implications of a Supreme Court decision on the ACA for seniors and Medicare beneficiaries generally? It is unlikely that the answer will be immediately clear, and thorough analysis will be necessary to understand fully the decision's impact on Medicare, Medicaid and the health care delivery system for senior citizens. However, in advance of the final decision, we can analyze how potential outcomes might impact older adults. This memo provides a summary of the ACA provisions that are important to seniors, identifies the four legal questions under consideration by the court and briefly analyzes how decisions on each question may impact seniors.

What's at Stake for Seniors?

In the ACA, Congress demonstrated a clear intent to improve seniors' health and well-being. The ACA accomplishes this primarily, but not exclusively, through provisions that strengthen and protect Medicare and Medicaid. There are four general parts of the ACA that improve senior's health care.

Medicare

1) Closing the donut hole

- a. Medicare Part D covers the cost of medications up to a certain point. Between that point, and a catastrophic coverage threshold, the older adult must pay out of pocket for medication (this gap in coverage is often called the Part D "donut hole"). One in four beneficiaries fall in this gap, and end up paying an average of \$3,610 out of pocket on drug expenses.
- b. The ACA requires drug manufacturers to reduce prices for Medicare enrollees in the donut hole. Beginning in 2011, brand-name drug manufacturers must provide a 50% discount on brand-name and biologic drugs for Part D enrollees in the donut

hole. By 2013, Medicare will begin to provide an additional discount on brand-name and biologic drugs for enrollees in the donut hole. By 2020, Part D enrollees will be responsible for only 25% of donut hole drug costs.

c. This is a benefit seniors are getting now under the Affordable Care Act. This benefit would not otherwise be available.

2) Improving senior's access to preventive medical services

a. Prior to the ACA, Medicare beneficiaries were required to pay a deductible and 20% co-pay for many preventive health services.

b. The ACA eliminated cost-sharing for many preventive services and introduced an annual wellness visit for beneficiaries.

c. The ACA also eliminated cost-sharing for screening services, like mammograms, Pap smears, bone mass measurements, depression screening, diabetes screening, HIV screening and obesity screenings.

d. This is a benefit seniors are getting now under the Affordable Care Act. These services would not otherwise be available.

3) Improving the coordination of care for those with Medicare and Medicaid

a. The ACA authorizes demonstration projects that could improve health care delivery and payment methods for the nation's 9 million dual eligibles (those with Medicare and Medicaid).

b. 26 states have applied to participate in demonstrations to better coordinate care for dual eligibles.¹

4) Reducing health disparities in Medicare and Medicaid

a. The ACA requires the collection of race and ethnicity information to be used to identify and analyze health disparities.

b. Various elements of the ACA require the provision of culturally and linguistically appropriate services and information.

5) Limiting cost-sharing for chemotherapy, dialysis and other services in Medicare Advantage plans

a. Traditionally, Medicare Advantage plans have had flexibility to impose cost-sharing structures that differ from fee-for-service Medicare. Prior to the ACA, plans increased co-insurance for some services. Beneficiaries who were enrolled in plans that needed those services were left worse off than if they had the same conditions

¹ Testimony of Melanie Bella, Director, Medicare-Medicaid Coordination Office, before the Senate Finance Committee (September, 2011), <http://www.finance.senate.gov/imo/media/doc/CMS%20testimony--%20Dual%20Eligibles%20%28M.%20Bella%29%209.21.11.pdf>.

and were in FFS. Many beneficiaries enrolled in plans not understanding the differences in cost sharing.

b. The ACA attempts to remedy this by preventing Medicare Advantage plans from imposing higher cost-sharing for chemotherapy and dialysis than is permitted under Medicare Parts A and B.

c. The Centers for Medicare and Medicaid Services (CMS) issued final regulations on these improvements in 2011, and many became effective January 1 of this year.²

6) Improving care for individuals with chronic conditions

a. The ACA has several provisions targeted to improving the quality of care for patients with chronic illness and reducing the costs to Medicare and Medicaid for serving those beneficiaries.

7) Improving transitions for seniors from the hospital back home

a. The ACA established the Community-Based Care Transition Program which targets individuals who are in traditional fee-for-service Medicare and are hospitalized and at risk for readmission. The program provides grants to hospitals to work with community-based organizations to provide transitional care interventions.

b. 30 community-based organizations across the country have already partnered with local hospital systems and are committed to reducing readmissions by 20% and hospital acquired conditions by 40%.³

8) Improving seniors access to primary care physicians

a. Through the Independence at Home demonstration, that ACA will pay physicians and nurse practitioners to provide home-based primary care to targeted chronically ill individuals for a three-year period.

b. CMS recently launched this primary care initiative with 16 practices across the country.⁴

9) Improving payment and service delivery models for health care:

a. Through the Medicare-Medicaid Innovation Center, CMS will fund demonstrations to test innovative payment and health care delivery models.

² The Center for Medicare Advocacy, *New Rules for Medicare Advantage and Part D Plans*, (June 2011) <http://www.medicareadvocacy.org/2011/06/02/new-rules-for-medicare-advantage-and-part-d-plans>.

³ CMS Community-Based Care Transitions Program, <http://www.innovations.cms.gov/initiatives/Partnership-for-Patients/CCTP/partners.html>.

⁴ CMS Independence at Home Demonstration, <http://www.innovations.cms.gov/initiatives/Independence-at-Home/index.html>.

b. These demonstrations are being developed and implemented now, through the Bundled Payment program, Comprehensive Primary Care Initiative, Accountable Care Organizations, and more.⁵

Medicaid

The ACA improves Medicaid in three fundamental ways that impact seniors: by expanding the group of people covered by Medicaid, preventing states from cutting Medicaid eligibility and by providing incentives to states to enhance long-term care at home and the community.

- 1) Expanding Medicaid to cover seniors under 65
 - a. The law expands Medicaid to cover nearly all individuals under 65 with household incomes at or below 133% of the federal poverty level.⁶ As a result of the expansion, nearly 3.3 million uninsured, low-income seniors will be covered.⁷
 - b. 6.8 million individuals ages 50-64 lack health insurance. Extending Medicaid to this group will ensure that they are healthier when they reach age 65 and qualify for Medicare, leading to improved quality of life for the individuals and less costs for the Medicare program.
- 2) Keeping States from cutting seniors out of Medicaid
 - a. Under the ACA, states are required to adhere to certain “maintenance of effort” (MOE) provisions related to their Medicaid program. They must maintain the eligibility levels that were in place on March 23, 2010 in order to receive federal funding.
 - b. The MOE provision is keeping states from cutting seniors from their Medicaid roles.
- 3) Making it easier for seniors to get long term services and supports at home and in the community.
 - a. Medicaid provides funding for long-term care services in institutions, such as nursing homes and in the community. Seniors prefer to receive care in their home, and it is generally less expensive, however, most states spend their Medicaid long

⁵ CMS Innovation Center, <http://www.innovations.cms.gov>.

⁶ 133% of the federal poverty level is approximately \$14,484 per year for an individual, and \$29,726 for a family.

⁷ Sara R. Collins, Michelle M. Doty, and Tracy Garber, *Realizing Health Reform’s Potential: Adults Ages 50-64 and the Affordable Care Act of 2010*, (December 2010)

http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2010/Dec/1460_Collins_adults_50_to_64_ACA_reform_brief_v2.pdf.

term care dollars primarily on institutional care. The ACA includes incentives to encourage states to shift Medicaid spending from institutions to the community, so that individuals who require long-term care services may receive care in the least-restrictive environment. Elements of the ACA that enhance home and community long-term care include:

- i. Community First Choice Option to assist states with the cost of transitioning individuals from an institution to the community. CMS finalized the CFCO regulation this spring.⁸
- ii. Balancing Incentive Payment Program directs increased federal matching funds to states that spend less than half of their Medicaid long-term care expenditures on community-based care with the goal of increasing community based expenditures. This spring, six states received grants to improve their community-based care.⁹
- iii. Extending Medicaid's spousal impoverishment protection provisions to spouses of individuals who seek long-term care in the community. This rule goes into effect in 2014.¹⁰

Elder abuse protections and nursing home transparency provisions

The ACA enhances the safety and well-being of older adults well beyond Medicare and Medicaid. The law includes three provisions that would have been considered landmark legislation if enacted on their own:

- 1) The Nursing Home Transparency and Improvement Act aims to increase transparency and accountability in nursing homes.
- 2) The Elder Justice Act will combat crimes committed against older adults, including financial exploitation and physical and mental abuse.
- 3) The Patient Safety and Abuse Prevention Act ensures that people who provide care for older adults provide it in a safe environment free from abuse.

Expanded coverage under the minimum coverage provision for individuals 50-64

⁸ Department of Health and Human Services News Release (April 2012), <http://www.hhs.gov/news/press/2012pres/04/20120426a.html>.

⁹ Medicaid Balancing Incentive Payment Program, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Long-Term-Services-and-Support/Balancing/Balancing-Incentive-Program.html>.

¹⁰ National Association of States United on Aging and Disability, *Long-term Care In Brief*, http://www.nasuad.org/documentation/aca/NASUAD_materials/l_tcb_protectionforHCBSrecipients.pdf.

Access to adequate and affordable health insurance coverage is difficult for individuals aged 50-64 (who are not covered by an employer sponsored plan), due to their age and likelihood of pre-existing conditions. When the minimum coverage provision is enacted in 2014, younger and healthier individuals will enter the insurance risk pool. Because of greater participation in the risk pool, health insurance companies will no longer be able to deny individuals insurance due to a preexisting condition, or establish lifetime and annual limits on the dollar value of benefits. These improvements will make it easier and more cost-effective for 50-64 year olds to access and utilize health insurance in the individual market. With this access, the “near-elderly” population will be healthier when they enter Medicare.

Legal Questions Before the Court

There are four legal questions before the court:¹¹

- 1) Is the minimum coverage provision (individual mandate) a constitutional exercise of Congressional power under the Commerce Clause?
- 2) If the individual mandate is not constitutional, is it severable from other parts of the law?
- 3) Does the Medicaid expansion create conditions on state participation so coercive as to violate Congress’ power to impose such conditions under the Spending Clause?
- 4) Does the Anti-Injunction Act (providing that taxes can only be challenged after assessed) apply?

Potential Outcomes

Outlined below are the most likely outcomes in the ACA case, a brief analysis of the likelihood of each, the positive and negative impacts on each of the provisions outlined above and the process for moving forward.

Decision 1: The Court upholds the minimum coverage provision (individual mandate) and the Medicaid expansion.

Positive: This is an ideal outcome for seniors. A Supreme Court decision to uphold the minimum coverage provision and the Medicaid expansion would mean upholding the Affordable Care Act in its entirety. This decision would be the most important pronouncement of Congress’s role in creating and supporting the social safety net since the Social Security Act was upheld by the

¹¹ For a brief discussion of each question see, http://www.healthlaw.org/images/stories/2012_06_ACA_SCOTUS_Overview.pdf.

Supreme Court in 1937.¹² This decision will validate Congress' clear intent to improve seniors' health and well-being and uphold all of the provisions important to seniors.

Negative: A decision to fully uphold the law is the best-case scenario for seniors. All of the provisions discussed above would remain in place.

Court's decision-making process: The Justices would be upholding the minimum coverage provision as a valid exercise of Congress' authority under the Commerce Clause of the Constitution.¹³ The Supreme Court's existing Commerce Clause cases establish that Congress can regulate any economic activity that Congress rationally concludes is in the stream of or substantially affects interstate commerce.¹⁴ Despite the Court's history, during oral arguments, several Justices appeared concerned about Congress' decision to regulate the purchasing of health insurance. If the Court upholds minimum coverage, their opinion will likely be carefully crafted to limit the scope the provision, to emphasize that the mandate regulates the insurance market and does nothing to change the relationship of the individual to the government.

To uphold the Medicaid expansion, the Court would be continuing its own precedent which has never held a Spending Clause enactment to be unconstitutionally coercive. Medicaid is a voluntary program for states to participate in and the ACA does nothing to change that.

What to watch for:

- **Legislature:** This decision will not require any congressional action to preserve positive elements of the ACA. A positive decision will provide fodder to those members of Congress who want to repeal the law in whole or in part. These members will likely introduce a flood of new bills, but there will be no immediate changes.
- **Administration:** Under the current administration, the Department of Health and Human Services (HHS) will continue to implement the vast and many provisions of the law that benefit seniors, like the closing of the Medicare Part D donut hole and expanding home and community-based services to provide Medicaid long-term services and supports.

¹² Lyle Denniston, *Essay: Taking its place in history....*, SCOTUSblog (March 2012), <http://scotusblog.com/2012/03/taking-its-place-in-history/>.

¹³ The Commerce Clause comes from Article 1, Section 8 of the Constitution, which states that "Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

¹⁴ *Gonzales v. Lopez, Jr.*, 514 U.S. 549 (1995).

- Judiciary: The Court will have maintained its long-standing interpretations of the Commerce Clause and Spending Clause of the Constitution. Future challenges to other parts of the law will likely be brought.
- Election: A positive court decision will not silence the debate on the ACA in the November election. Health care will continue to be a significant issue in the presidential and congressional election.

Decision 2: The minimum coverage provision is declared unconstitutional, and is severed from the rest of the law to some degree.

Positive: A decision to strike down the minimum coverage provision alone does not directly impact the provisions in the ACA which are most important to seniors. Those provisions will only be at risk if the court rejects all arguments that the minimum coverage provision is severable from the rest of the law (see below). A decision that the provision is severable to some degree would most likely undo various changes to the health insurance market (pre-existing condition ban, community rating provisions, etc.), but would leave most if not all provisions of the law that advance the health and well-being of older adults in place. The Medicare, Medicaid, and elder abuse provisions would likely remain under this scenario.

Negative: 6.8 million young seniors, ages 50-64 will be the hardest hit if the minimum coverage provision is declared unconstitutional.

Without the minimum coverage provision, there will be little incentive for younger, healthier individuals who voluntarily purchase insurance and enter the risk pool. If the court retains the ACA's market reforms,¹⁵ premiums and deductibles for health insurance will skyrocket.¹⁶ This will make health insurance for low-income older adults prohibitively expensive, and those who are uninsured will remain uninsured. If the court does not retain the ACA's market reforms, and repeals the mandate, then many 50-64 year old seniors with health conditions will once again be denied health insurance based on pre-existing conditions.

¹⁵ "Market reforms" refers to the provisions in the ACA that regulate the insurance industry. They include the requirement that prohibit insurance companies from excluding individuals due to a preexisting condition, prohibit health plans from establishing lifetime and annual limits on the dollar value of benefits, and prohibit plans from retroactive recession of coverage.

¹⁶ Brief of *Amicus Curiae* AARP, Center for Medicare Advocacy, Inc., Medicare Rights Center, National Committee to Preserve Social Security and Medicare, National Council on Aging, and National Senior Citizens Law Center, *Nat'l Federation of Independent Business et al., v. Kathleen Sebelius et. Al.*, (January 2012), <http://www.nsclc.org/wp-content/uploads/2012/01/Seniors-Severability-Brf.pdf>.

Court's decision-making process: The Court's decision would overturn historical precedent protecting Congress' power to regulate commerce.

What to watch for:

- Legislature: Rapid action will be necessary by Congress and/or the states to try to retain or recreate provisions of the ACA that protect and expand health insurance coverage. Opponents of the ACA in Congress may act to repeal the provisions not struck down by the court.
- Administration: HHS will continue to explore every possible authority they retain to implement provisions of the ACA. Implementation of provisions not struck down will continue.
- Judiciary: A decision to strike down the individual mandate in the ACA could pose major threats to the nation's safety net. Depending how the decision is framed, the decision could open the door to challenge other safety net programs, civil rights laws and more.
- Election: The ACA will remain a relevant election issue.

Decision 3: The individual mandate is declared unconstitutional and is not severed from the rest of the law. The whole ACA would be struck down under this scenario.

Positive: There is no positive outcome for seniors.

Negative: A decision striking down the whole law would be overwhelmingly negative for seniors. All of the provisions which impact positively senior's health would be stripped away.

Court's decision-making process: If the court finds that the minimum coverage provision cannot be severed from the rest of the law, it would be doing so under the theory that the whole law is intertwined – that each provision is so closely related to the next that they cannot be undone from one another. The Court would likely point to the fact that the ACA, unlike many other laws, did not contain a severability clause. Despite the broad negative repercussions of such a decision, the Court may reach this conclusion in order to avoid analyzing each provision of the law and its relationship to the minimum coverage provision.

What to watch for:

- Legislature: Congressional action will be necessary to restore positive elements of the ACA. Provisions most important to seniors could be reintroduced on their own or in combination with a broader health reform package.

- Administration: This will be a tremendous challenge for the Administration and states. The Administration created new agencies and offices to implement the law's important innovations and improvements. Their viability will be in question. In addition to the law's new programs, this decision would hit programs in place long before the law. The Administration would likely identify and utilize any existing or remaining authority to implement changes.
- Judiciary: The door may be open to future challenges to other safety net programs as discussed above in Decision 2.

Decision 4: The Court finds the Medicaid expansion unconstitutional.

Positive: If the court just finds the Medicaid expansion unconstitutional, the Medicare provisions, Medicaid long-term care enhancements and elder abuse and nursing home transparency protections would likely remain in place. Seniors would continue to benefit from these provisions.

Negative: There are three ways a decision finding the Medicaid expansion unconstitutional would negatively impact seniors.

- 1) No new coverage for low-income older adults: An estimated 3.3 million uninsured individuals aged 50-64 would receive health insurance under the Medicaid expansion¹⁷, and if this Court strikes this provision, these individuals would remain uninsured. They would continue to struggle to find affordable health care options likely leaving them less healthy and with lower income and resources when they qualify for Medicare.
- 2) Knocking seniors currently eligible for Medicaid off the roles: Repealing the Medicaid expansion provision would also mean that states would not be held the "maintenance of effort" requirements in the expansion. This could lead to states undoing the eligibility levels that were in place in March, 2010. This may mean that many of the 16 million elderly and persons with disabilities who currently receive Medicaid¹⁸ may no longer be eligible for services.

¹⁷ Sara R. Collins, Michelle M. Doty, and Tracy Garber, *Realizing Health Reform's Potential: Adults Ages 50-64 and the Affordable Care Act of 2010*, (December 2010)
http://www.commonwealthfund.org/~media/Files/Publications/Issue%20Brief/2010/Dec/1460_Collins_adults_50_to_64_ACA_reform_brief_v2.pdf.

¹⁸ Center for Budget and Policy Priorities, *What is Medicaid?* (December 2008)
<http://www.cbpp.org/cms/index.cfm?fa=view&id=2223>.

- 3) Threatening the larger social safety net for seniors: This decision opens the door to dangerous judicial challenges to the federal-state programs that seniors rely on including many programs authorized by the Older Americans Act.

Court's decision-making process: This would be a landmark, negative decision as the Court has never struck down an expansion of Medicaid or anything enacted as coercive. The decision would set a new limit on Congressional Spending Clause authority.

What to watch for:

- Legislature: Congress would need to act quickly to pass legislation to protect the Medicaid maintenance of effort provision, to ensure that seniors who rely on Medicaid for long-term services and supports and other services do not lose their eligibility.
- Administration: The Department of Health and Human Services (HHS) is currently working to prepare states for Medicaid expansion in 2014. Under this decision, HHS and those state agencies that had been actively working to implement the expansion would quickly attempt to identify other opportunities and authorities for expanding coverage to low-income individuals.
- Judiciary: A Court decision to overturn Medicaid expansion should sound the alarms for advocates who care about the larger social safety net for seniors. Under the Spending Clause of the Constitution, Congress may attach conditions to states who receive federal funds. *No court has ever invalidated these conditions as coercive*. A Court decision to limit Congress' constitutional Spending Clause power would be a *radical* departure from existing law.¹⁹ It could usher in a dangerous wave of challenges to federal aid to states for education, housing and transportation.²⁰

Decision 5: The Anti-Injunction Act applies.

Positive: A decision that the AIA applies would mean that a challenges to the constitutionality of the minimum coverage provision could not be heard until sometime after 2014.

Negative: There is no immediate, negative impact of such a decision. The court could still decide on the Medicaid expansion question in a negative way as discussed above.

Court's decision making process: Most legal scholars believe this outcome is highly unlikely.

¹⁹ Families USA, Health Care and the High Court, March 2012 available at <http://familiesusa2.org/assets/pdfs/health-reform/Health-Care-and-the-High-Court.pdf>.

²⁰ *Id.*



What to watch for:

- Legislature: No immediate action from the legislature would be required to maintain positive provisions. Legislative efforts to repeal the ACA would likely continue.
- Administration: The Administration would push forward with implementation.
- Judiciary: Opponents of the ACA would prepare to bring additional litigation challenging the minimum coverage provision in 2014.
- Election: The question of the constitutionality of the ACA and the minimum coverage provision would stay alive and be debated publicly throughout the election.