

3-28-2012

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Recommended Citation

Chirba, Mary Ann & Noble, Alice. "Alice Noble and Mary Ann Chirba on the Individual Mandate Argument: Beyond Uncompensated Care." *Health Affairs Blog*, March 28, 2012.

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Alice Noble And Mary Ann Chirba On The Individual Mandate Argument: Beyond Uncompensated Care

March 28th, 2012



by [Alice Noble](#) and [Mary Ann Chirba](#)

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“Reading between the lines” of the Supreme Court arguments seems to be everyone’s favorite pastime this week. For health lawyers, these three days are heady times, a chance to revel in exquisitely crafted briefs and complex legal theories, consummately argued in a way that lifts the entire profession. Rarely has the public paid such rapt attention to legal proceedings before our nation’s highest court. Before [Day 1’s transcript](#) had time to be transformed into a hot link, pundits and experts were busily reading between the lines of the comments and questions from the bench and concluding the Court is unlikely to find a jurisdictional bar in the Tax Anti-Injunction Act.

[Day 2’s argument](#) brought spirited debate about the reality and consequences of being in or outside of the health insurance market. As anticipated (dreaded?), what Justice Breyer termed “the broccoli possibility” was raised not once, but several times. The Justices were active and the attorneys were ready. Their exchanges ranged from charged and provocative to reflective and even humorous. Witnessing our nation’s highest judiciary literally wrestle with one of our nation’s highest priorities is at once sobering and exhilarating.

A Larger Problem Than Just Uncompensated Care

Still, Day 2’s arguments raise deeper concerns. What is most worrisome is that today’s advocates spoke of the individual mandate as being enacted primarily to address the serious but distinct problem of uncompensated care. For instance, Solicitor General Verilli emphasized that “*Congress confronted a grave problem when it enacted the Affordable Care Act: the 40 million Americans who can’t get health insurance and suffered often very terrible consequences.*” (Tr., p. 107) Counsel for the 26 State challengers also focused predominantly on emergency care, arguing “*there is a much bigger cost shifting going on here, and that’s the cost shifting that goes on when you force healthy people into an insurance market precisely because they are healthy, precisely because they are not likely to go to the emergency room, precisely because they are not likely to use the insurance they are forced to buy in the health care insurance.*” (Tr., p. 74) The NFIB’s attorney agreed that uncompensated emergency room care is “the” problem and characterized the Affordable Care Act as an unfounded exercise of plenary power that exceeds the limits of Congress’ power. In his view, “*the failure to buy health insurance doesn’t affect anyone. Defaulting on your payments to your health care provider does.*” (Tr., p. 104)

Huh? The failure to buy, or at least have health insurance most certainly DOES affect everyone



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because it is the lack of a diverse risk pool and the concomitant inability adequately to spread costs that make health care and health care insurance so financially burdensome. And it is this increasingly unsustainable burden that causes “[d]efaulting on your payments to your health care provider....” It can also determine whether an employer can offer insurance, or, more fundamentally, offer employment or even stay in business.

Uncompensated care is certainly a problem, and a big one. But it is only a portion of a much larger and complicated threat to our national economy, and Congress knew this. Even among the insured, there are people who cannot keep up with their rising premiums, co-payments and deductibles. Therefore, health care cost inflation obviously affects patients, providers and payers; it affects the accessibility, quality and cost of health care and health insurance; and, therefore, it affects the financial viability of all players in the health care sector. However, it also affects wages, employers’ costs, the cost of just about every product manufactured in the U.S., GDP, GNP, and the ability of U.S. employers and our nation as a whole to compete in a global economy.

Simply put, it affects commerce — intrastate, interstate and international commerce.

Shared Responsibility: Following Massachusetts And The Heritage Foundation

Recognizing the widespread causes for and impact of health care cost escalation, Congress adapted the Massachusetts framework of “shared responsibility” to a more complicated national political economy. Formulated by the Heritage Foundation following the defeat of then First Lady Hillary Clinton’s proffered Health Security Act, it recognizes that uncontrolled health care cost escalation affects all people and all players – not just those who lack insurance and not just those in the health care sector, but in the nation’s economy as a whole. *The ACA recognizes that all are affected and, therefore, all must play a role in working toward a solution.*

Therefore today and throughout all three days of argument, let’s not forget that between the lines of oral and written argument lie the real story and the *raison d’etre* for the legal parrying. And we dearly hope the Justices, and the nation, are reading between these lines.

If they do, what else will they discern? They will see a broader context of human need, far broader than uncompensated emergency care. They will see the response of an ambitious, albeit imperfect law to the needs of patients and providers, individuals and their families, and employers and insurers. They will recognize that not only does the Affordable Care Act provide hope for a brighter health care future, but it is *already* providing coverage, innovation, and the rational oversight previously lacking in our nation’s fractured health care “system.”

Between the lines are the growing ranks of those unable to access care, now reaching deep into the middle class—a group that once seemed immune from such deprivation. These are not just the 40 million (or so!) lacking insurance, but those who are under-insured, as well. The wisdom of relying so heavily on employer-sponsored coverage is debatable even when times are good. In this punishing economy, when jobs are scarce and companies are failing, the full reach of this model’s anti-competitive effects threaten its financial sustainability.

The Importance Of Understanding The Realities Of Health Care In The United States

Too much of today’s arguments ignore the harsh reality that for many patients in the U.S., being ill is often the least of their health care worries. For the under- or uninsured, the greater fear may be seeing the doctor since copayments, deductibles and out-of-pocket payments may topple their already precarious finances. Should they find their way to care, further risks abound. Study after study casts doubt on the reliability of our hospitals and physicians – will they admit us? Will they do more harm than good? ~~Patients~~ Consumers struggle to find their footing on the rocky landscape of “quality of care” and worry if too much health care is being prescribed not because it is needed, but because beds must be filled and expensive technologies must continue to hum and beep along.

Only time will tell how attuned the Justices are to the lived experience of many Americans struggling to find or keep coverage, and the complex but real remedies the Affordable Care Act offers. This should not, of course, dictate the Court’s decision of the issues, but a fair consideration of the monumental case demands a deep appreciation by the Justices of the ills the Affordable Care Act seeks to cure. When they meet to discuss the cases what will they be thinking? How attuned will they be to the reality of our health care system in 2012? Given what was not said in today’s argument, even reading between the lines on Day 2 may not be enough to overcome this learning

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curve.

Editor's note: *Alice Noble and Mary Ann Chirba signed [an amicus brief](#) in support of the constitutionality of the ACA's Medicaid expansion. For more on the debate over the constitutionality of the Affordable Care Act's minimum coverage requirement — or individual mandate — and day two of the Supreme Court's oral arguments concerning the ACA, see additional Health Affairs Blog posts by [Marc Rodwin](#), [William Sage](#), [Sara Rosenbaum](#), [Timothy Jost](#), and [Wendy Mariner](#).*

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