LARSON SERIES

Workers' Compensation Emerging Issues Analysis

2013 Edition

50 STATE LEGISLATIVE SURVEY
LARSON'S SPOTLIGHT ON INTERESTING CASES
EXPERT ANALYSIS AND COMMENTARY

LexisNexis

LARSON SERIES

WORKERS' COMPENSATION EMERGING ISSUES ANALYSIS

2013 Edition

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INTRODUCTION

Quite a few years ago I had the pleasure of participating, along with Emeritus Professor Arthur Larson and a few others, in a small, lively, interactive, non-musical "jam session" at Duke University Law School, during which we discussed various aspects of American jurisprudence. The ad hoc moderator of the discussion was Arthur's close friend and fellow Duke Law professor, Robinson Everett. At one point in the discussion, as we began to consider the somewhat peculiar, but vibrant American system that has so carefully carved out room for both federal and state jurisdictions, one of the students opined that things would certainly be simpler if the American legal system didn't offer the chance of significant disagreement between and among the 50 states.

Seizing upon the statement, Professor Everett turned to Arthur and asked him if he thought that America's decision to leave the issues of workplace injuries largely in the hands of the various states had proved worthwhile. Arthur answered that in spite of the differing treatment afforded some state's injured employees vis-à-vis those of another jurisdiction, the "grand experiment" of utilizing a state-by-state approach to workers' compensation law had worked well, that it gave the states the opportunity to test and retest various hypotheses of exclusion and coverage, and that the "fragmented" system allowed variations suited to the states' own experience, needs, and creativity.

Arthur finished with his usual flair. Alluding to the great Gershwin tune, Arthur said, "one state says 'tomato,' another says 'tomahto,' but for Heaven's sakes, let not call the whole thing off."

"Tomato/Tomahto:" Divergent Treatment of Same Issue by Different States

Indeed, New York says "tomato," generally allowing recovery of benefits for mental injuries—other than those caused by bona fide personnel decisions. Its close neighbor, Connecticut, says "tomahto." Its definition of injury does not allow recovery for a claim associated with purely mental phenomena. A few states allow apportionment for pre-existing conditions; most do not. Some allow an exception to exclusivity where the injury was "substantially certain" to occur from the employer's actions. Most do not. The American workers' compensation system embraces the fact that the states have the opportunity to decide the compensability of these sorts of claims using the state's own standards. There is no one-size-fits-all approach to injuries within the American workplace.

2013: Time of Bold and Not-So-Bold Legislative Activity

Building on that theme—that the states are relatively free to experiment with their statutes—we have included for your review a summary highlighting this year's important workers' compensation legislation. Within this summary, one should be able to see the continuation of the "grand experiment." For example, in the case of Oklahoma, we see a state clearly endeavoring to "think outside the box." The decision by that state's legislature and the

governor, after last year's widely publicized unsuccessful effort, to allow employers, under certain conditions, to opt-out of the state-run system has prompted significant discussion—both pro and con. Bear in mind that the "opt-out" program passed and signed into law is but one part of a total re-creation of Oklahoma's comp system. For those employers remaining within the system, use of state courts to handle the claims process has also been jettisoned and a framework for an enhanced system of alternative dispute resolution has been added to the mix.

While not as revolutionary as the efforts in Oklahoma, other states have passed, or at least debated, major "reform" legislation. For example, Tennessee legislators finally became convinced that their state's system of resolving workplace injury disputes within the state courts has been a recipe for high expense, inefficiency and inconsistency. Accordingly, both Tennessee state houses passed new legislation, signed by the governor, to place the determination of workers' compensation issues inside an administrative body, with two levels of administrative review.

Significant legislative activity regarding workers' compensation laws took place in a number of states, including Maine, Nevada, and Connecticut. In several states, special attention was given to first responders. For example, the Nevada legislature passed a bill providing that volunteer members of a county search and rescue organization are to be deemed employees of the county at a wage of $2,000 per month for purposes of industrial insurance. Connecticut had its own story. Reeling from the Sandy Hook shootings, the legislature passed a provision providing medical treatment and wage replacement benefits for responders and Sandy Hook Elementary School workers who suffered mental trauma from the shooting crisis during the period December 14–15, 2012. As noted above, Connecticut workers generally may not recover for such mental trauma. As appropriate as the legislation might be, many within and without the state are left wondering why those suffering trauma from the single, isolated incident are to be specially compensated, whereas EMTs, police officers, firefighters, and others facing other traumatic experiences are left with non-compensable claims.

Much of this year's legislative activity dealt with very specific issues. For example, in Maine, a bill that gained approval allows the injured worker to choose his or own pharmacy. North Dakota has a new statutory provision clarifying that no deference is to be given the opinion of a treating physician. This latter piece of legislation has produced a crescendo of criticism from the claimants' bar.

Governor Acts to Thwart Legislators' Consensus

Sometimes the Governor pushed back against an energetic legislature. For example, Maine Governor LePage vetoed a number of bills dealing with workers' compensation. One bill killed by the executive pen would have rolled back the 2012 workers' comp reforms with respect to lifetime benefits, as well as change job search requirements for injured workers with partial disabilities. Another veto blocked a workplace bullying bill, which would have required the

state's Workers' Compensation Board to conduct a study addressing psychological and physical harm to employees caused by abusive work environments and to report back its findings to the legislature with any recommendation for changes to the state's legislative scheme.

"Extraneous" Legislation Often Directly Impacts Workers' Compensation World

Drug Compounding

Practitioners should remind themselves that it isn't just the bits of legislation labeled "workers' compensation" that affect the rights of injured employees and the employer's or carrier's obligations. Recall the October 2012 outbreak of meningitis connected to three lots of medication used for epidural steroid injections. The medication had been packaged and marketed by the New England Compounding Center (NECC), a compounding pharmacy in Framingham, Massachusetts. Doses from those three lots were distributed to 75 medical facilities in 23 states and administered to approximately 14,000 patients, 48 of whom subsequently died, with more than 700 others having to be treated. In the wake of that tragedy, a number of states, including Georgia, Idaho, Oklahoma and New Hampshire enacted legislation to regulate the compounding practice. Legislation is pending in still other states, including California and Massachusetts.

Prescription Drug Abuse

Many states continue to be concerned with prescription drug abuse, a problem that affects all too many injured workers. Minnesota passed legislation providing for a prescription monitoring program to review records of those prescribed controlled drugs. Washington legislators successfully moved through their chambers a bill prohibiting the refilling of a prescription for controlled substances more than six months after it is initially issued. That state also passed a law making it more difficult for out-of-state physician assistants and osteopathic physicians to write prescriptions for controlled substances. A new Indiana law allows the attorney general to issue a civil investigative demand to obtain immediate access to records related to the sale of synthetic drugs. A number of states, including New Hampshire, established committees or other bodies to continue to investigate the extent to which opiates are being abused.

Generic Drug Reimbursements

Another effort reaching across state borders this year is the effort to increase the transparency for generic drug reimbursements. Arkansas joined Kentucky, North Dakota, Oregon, and Texas as the first states in the nation to address generic drug reimbursements or "maximum allowable costs" (MACs), and to establish transparency into how Pharmacy Benefit Managers (PBMs) determine reimbursement to pharmacies for generic drugs. The MACs set forth the maximum amount or upper limit that a PBM will pay for certain products.

Social Media

As employers and carriers seek additional mechanisms to help them surveil injured employees, the states are reacting with broad-based Social Media legislation. Again, this legislation is not targeted so much at the workers' compensation scene; it has, however, immediate and important impact with regard to surveillance activity. Most legislation follows the pattern of Arkansas, whose House Bill 1901 prohibits an employer from requiring or requesting a current or prospective employee from disclosing his or her username or password for a social media account or to provide access to the content of his or her social media account. Legislation of this type was passed in 2013 in Colorado, Illinois, Nevada, New Mexico, and Washington. Several other states, including Maryland and California, already have these laws in place. Social Media legislation is pending in still other states, including Massachusetts and Wisconsin.

Workers' Comp Laws as Economic "Weapon"

As I mentioned above, the impetus for the Oklahoma opt-out program, as well as the Tennessee "Reform Act," was almost totally economic. Each state perceived that it was falling behind other states in its efforts to attract and keep employers, payrolls and, therefore, taxes. That is to say that some state legislators wanted to change their proverbial workers' compensation "accents," to stop saying "tomahto" and instead to say "tomato," like their neighbors to the South (or, as was the case of Tennessee, not just the neighbors to the South, but also to the East and West).

Will the experiment succeed for Oklahoma and/or Tennessee? Will employers from the Sooner state opt to utilize ERISA plans (with a few additional benefits) and, based upon the broad and powerful preemption provisions contained within ERISA, remove a broad swath of the Oklahoma workers' compensation system from the state's control? Will the much less controversial "reforms" in Tennessee provide for a more efficient and consistent determination of claims? We'll have to wait and see. While we're waiting, you might peruse the other legislative highlights found within these pages.

Final Words; Caveat

This article, which contains selected legislative highlights as determined by the Publisher that would be of interest to the workers' compensation community, is a snap shot in time, the cut off being **September 14, 2013**. At the time this book went to press, several states still had pending legislation. Be sure to check the status of the bill before citing to it.

Please send your suggestions and comments to trob@workcompwriter.com or Robin.E.Kobayashi@lexisnexis.com.

–Thomas A. Robinson

ALABAMA

COMMENTARY BY KENNETH E. RILEY:

SB 453 was filed in the Alabama Senate and was coined a "substantial overhaul" of the somewhat antiquated Workers' Compensation Act. The legislation addressed several issues that would simply help to streamline the litigation process in today's age. The current Act has not been amended in over twenty years. One of the main components of the bill addressed the permanent partial payment maximum, which is currently set at $220 per week. The cap has not been raised since the adoption of the Act in the mid-1980s. Alabama is among the lowest in the country in this regard. The bill also sought to limit the right to permanent medical treatment with a 'use it or lose it' provision that would operate to close the injured employee's right to medical treatment if treatment is not sought after 3-5 years. Of course, exceptions for prosthetics and the like were incorporated into the legislation. The bill further limited the length of time that an injured worker may receive permanent and total disability benefits to 72 years of age as opposed to lifetime benefits currently in place. The bill would increase the number of weeks that an employee may receive compensation for permanent partial disabilities from 300 to 333. The bill finally sought to streamline communication between business/insurance companies and healthcare providers as well as address the cost of healthcare.

The business community and employee representatives worked together to reach accord on the overhaul. While included in the discussion, ultimately, the hospital and physician lobbies worked to defeat the passage of the bill in fear that the very attractive workers' compensation reimbursement rates would be brought in line with rates more commonly paid by traditional health insurance companies.

While several state leaders vow to continue to address the outdated and inequitable system, it is well understood that the healthcare lobby is very influential in the Alabama State House. Only time will tell if Alabama will continue to lead the nation in falling behind when it comes to workers' rights.

LEGISLATIVE HIGHLIGHTS:

In 2013 the Legislature passed a three-bill package to make it easier to track prescriptions through the Prescription Drug Monitoring Program (PDMP), to regulate providers of pain management services, and to crack down on doctor shopping for prescription drugs. Backed by the Medical Association of the State of Alabama (MASA), the objectives of these bills are to minimize drug diversion while enabling physicians to continue treating patients who have legitimate issues with pain without placing tremendous burdens on physicians to do so. MASA says patient care should not take a back seat to fighting drug abuse in this country.

Controlled Substances Prescription Database. HB 150, among other things, makes changes to ensure the confidentiality of records, provides for funding of the database, provides that licensing board have the discretion to impose a requirement for physicians to access or check the database before prescribing, dispensing or administering medications as of their professional practice.

Pain Management. HB 151, among other things, provides for the registration and regulation of physicians providing pain management services, for conducting investigations and inspections, and for contracting to assist in the prevention of abuse and misuse of drugs.

Doctor Shopping; Deceptive Procurement of Prescription Drugs. HB 152, among other things, prohibits a person from deceptively obtaining a prescription for the same or similar controlled substance from two or more practitioners in a concurrent time period.

Disposal of Unused or Expired Prescription Drugs. HB 237 allows pharmacies to accept unused or expired dispensed medications returned solely for the purpose of destruction.

Thomas A. Robinson on

Larson's Spotlight on Interesting Workers' Compensation Cases for 2013

Each week this past year on the LexisNexis Legal Newsroom Workers' Compensation Law (www.lexisnexis.com/wc), I've shared with readers my picks of interesting workers' compensation cases issued for that week by the courts. Bear in mind that I'm selecting cases based on whether they have broad implications, include unusual, rare, or complex facts, relate to newsworthy issues, place an interesting twist on established workers' compensation principles, and/or include an excellent discussion of the law citing *Larson's Workers' Compensation Law* (LexisNexis).

Needless to say, this list below is highly subjective on my part. I'd love to hear from any of you if you know of other interesting cases that should have been included in this year's Larson's Spotlight list. Send them—along with questions or comments—to trob@workcompwriter.com.

For your convenience, the cases below are arranged by key topic and then alphabetized by state, with any federal cases reported at the beginning of the topic in question.

A Table of Contents is included to help you navigate this list. The organization and text for all table of content headings were derived from *Larson's Workers' Compensation Law* (© LexisNexis).

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Quoting *Larson's Workers' Compensation Law* multiple times, the Supreme Court of Rhode Island recently quashed a decree by the state's Workers' Compensation Court Appellate Division that had affirmed a denial of workers' compensation benefits to a Verizon service technician assaulted by a random stranger while the employee worked on outdoor cable lines in Providence. Viewing favorably the discussion found in *Larson*, the court reasoned that the employee's injuries were compensable under the "street-peril" (sometimes referred to as "street risk") doctrine. The court also said the doctrine was not limited to claims involving automobile accidents, that by requiring the employee to travel and park on public streets, Verizon exposed its employee to various street perils, including assaults by random strangers. For additional discussion, see http://www.workcompwriter.com/rhode-island-utilizing-street-peril-or-street-risk-doctrine-supreme-court-reverses-denial-of-claim-by-verizon-employee-

assaulted-by-random-stranger/#more-519. See Ellis v. Verizon New England, Inc., 2013 R.I. LEXIS 57 (Apr. 12, 2013). See generally Larson's Workers' Compensation Law, §§ 3.01, 6.01.

Acts of God and Exposure

Missouri: Claimant Need Not Prove, by Medical Certainty, That Deceased's Hepatitis Was Caused by Workplace Exposure

A Missouri appellate court recently reversed a decision by the state's Labor and Industrial Relations Commission that concluded the surviving spouse of a laboratory technician had failed to establish that her husband's death from complications associated with hepatitis C was work-related. It was undisputed that the technician came into contact with blood and other body fluids on many occasions in his workplace, but the Commission found that the claimant failed to provide evidence that the employee was exposed to hepatitis C in the workplace. The appellate court held that the Commission required too much, that the workers' compensation law did not require a claimant to establish, by a medical certainty, that his or her injury was caused by an occupational disease in order to be eligible for compensation. Instead, the claimant was required to establish a causal connection between the conditions of employment and the occupational disease. The court observed that the claimant offered medical expert testimony that the deceased's work at the medical center and his daily exposure to blood put him at a greater risk of contracting hepatitis C and that it was more likely than not that the deceased acquired his hepatitis C infection due to his occupational exposure, either by a needle stick or by handling blood and body products. Such evidence was sufficient to meet the claimant's burden of production on the issue of causation, held the appellate court. See Smith v. Capital Region Med. Ctr., 2013 Mo. App. LEXIS 376 (Mar. 26, 2013). See generally Larson's Workers' Compensation Law, § 5.05.

The Street-risk Doctrine

Rhode Island: High Court Reverses Denial of Injury Claim by Verizon Worker Assaulted by Random Stranger

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assaulted-by-random-stranger/#more-519. See Ellis v. Verizon New England, Inc., 2013 R.I. LEXIS 57 (Apr. 12, 2013). See generally Larson's Workers' Compensation Law, §§ 3.01, 6.01.

Positional and Neutral Risks

Iowa: Injuries Sustained in Idiopathic Fall Found Compensable

Reversing a decision by a state trial court that had, in turn, reversed an award of workers' compensation benefits in favor of a 79-year-old part-time janitor who had suffered an idiopathic fall at his place of employment, an Iowa appellate court, quoting *Larson's Workers' Compensation Law*, recently held that the janitor's fall, while on a coffee break with his supervisor, arose out of and in the course of the employment since there was "some employment contribution to the risk" under the particular facts of the case. The court indicated that the evidence showed the office was cramped and the corner of the supervisor's desk was pointed, adding to the injuries sustained in the fall. See AARP v. Whitacre, 2013 Iowa App. LEXIS 518 (May 15, 2013). See generally Larson's Workers' Compensation Law, §§ 7.04, 9.01.

New York: Employer Successfully Rebuts Presumption of Compensability for Unwitnessed Death

Repeating the basic rule in New York (and a number of other states) that a presumption of compensability exists when an unwitnessed or unexplained death occurs during the course of the decedent's employment, but that presumption may be rebutted by substantial evidence to the contrary, a New York appellate court recently affirmed a decision by the state's Workers' Compensation Board that an employee's death was not causally related to his employment. Observing that the decedent went alone to a locker room where, approximately 20 minutes later, he was found unconscious and that he later died, the court also observed that the death certificate, which was issued after an external examination of decedent's body and an interview with his supervisor, determined the cause of death to be arteriosclerotic cardiovascular disease. According to a medical expert retained by the employer, that condition was typically caused by factors such as hypertension, elevated cholesterol levels and tobacco use, and it was not related to decedent's work activity. The expert further testified that he had personally examined decedent in connection with an earlier workers' compensation claim and found him to be hypertensive, and the record reflected that decedent failed to obtain treatment for that condition. See Fatima v. MTA Bridges and Tunnels, 2013 N.Y. App. Div. LEXIS 3464 (May 16, 2013). See generally Larson's Workers' Compensation Law, § 7.04.

Oregon: Idiopathic Fall From Standing Position to Brick Floor Was Not Compensable

Citing *Larson's Workers' Compensation Law*, an Oregon appellate court recently held that a cook/cashier's fall from a standing position onto the brick floor of her workplace did not arise out of her employment where the cause of the fall was idiopathic in nature. Testimony by a medical expert that had the employee fallen to a carpeted floor her injuries would have been

less severe was not relevant to the issue of compensability, indicated the court. The court reiterated the important distinction between falls that are "idiopathic" in nature and those that arise "from an unknown cause." In the case of the former, the associated injuries could be said to arise out of the employment only where the consequences of blacking out were made markedly more dangerous by the employment (falling from a ladder or other raised position). Here the claimant pointed to two employment-related factors: the hardness of the floor and the height of her fall due to the employer's requirement that she stand while working. The court held that, as a matter of law, those two employment-related factors did not greatly increase the danger or seriousness of injury. See Hamilton v. SAIF Corp., 2013 Ore. App. LEXIS 447 (Apr. 17, 2013). See generally Larson's Workers' Compensation Law, § 7.04.

South Carolina: Injuries From Unexplained Fall on Level, Carpeted Hallway Were Not Compensable

Returning to a difficult issue, determining the compensability of injuries suffered in a fall while walking on a flat, uncluttered area of the employer's premises, a divided South Carolina appellate court recently reversed a decision of the Appellate Panel of the state's Workers' Compensation Commission's that had found that a claimant sustained compensable injuries to her neck, back, and left shoulder when she fell while walking in a carpeted hallway of her workplace. Acknowledging that the claimant testified that she fell because of the friction between the carpet and her shoes, the majority held that she had failed to establish a causal connection between her injuries and the workplace. Reinstating the decision of the single commissioner that had denied compensation, the majority, citing *Larson's Workers' Compensation Law*, held that no special condition existed at the time of the injury. The claimant faced no increased risk as she walked down the level, carpeted hallway. The only fact connecting her fall to her employment was that her injuries occurred while she was working in a carpeted area of the employer's building. Given that the burden of proof was on the claimant, proximity within the premises was insufficient. See Nicholson v. South Carolina Dep't of Soc. Servs., 2013 S.C. App. LEXIS 214 (Sept. 4, 2013). See generally Larson's Workers' Compensation Law, § 7.04.

Assaults

Iowa: Pizza Deliverer's Injuries in Altercation With Panhandler Found Compensable

In a case with rather bizarre facts, an Iowa appellate court recently affirmed an award of workers' compensation benefits to a pizza delivery employee who sustained a punctured lung when, as he returned from a delivery, he became embroiled in a fight with a panhandler who was being chased out of the pizza establishment by several other employees. The employer contended the injuries occurred some distance from the pizza establishment and arose from the employee's desire to get into a fight. The appellate court noted, however, that the commissioner had considered more persuasive the employee's own version of the incident. The evidence supported, therefore, the finding that the injuries arose out of and in the course of

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The Court's opinion was one of the most anticipated in about half a century. Rather than the usual hour per side, the Court heard argument in the cases challenging the constitutionality of the Act for 5.5 hours over three days, one of the longest arguments in modern Court history. To provide comparisons, the parties were allotted 1.5 hours in *Bush v. Gore*, 531 U.S. 98 (2000). In *United States v. Nixon*, 418 U.S. 683 (1974), a case in which a sitting President was ordered to release the Watergate tapes, 3.0 hours were spent arguing.

Thus, if the time the Supreme Court allots to oral argument is an indication of how important a case is - and it is - then the Act surely piqued the interest of the justices, the litigants, and the nation.

Although historically significant, the opinion did little to change the employer-provided health insurance system that existed in the United States prior to the Court's ruling, other than upholding the Act's constitutionality, thereby leaving intact its provisions that apply to employers.

The Court resolved constitutional challenges to two provisions of the Act: First, a surprising 5-to-4 majority of the Court, which included Chief Justice John Roberts, upheld the individual mandate, which requires individuals to purchase "minimum essential" health insurance coverage or pay a tax penalty. Second, the Court struck one aspect of the Medicaid expansion provision. Under that provision, the federal government would have withheld all Medicaid funds from any state which elected not to expand its Medicaid roles to cover all those with incomes less than 133% of the poverty level. The Court, however, left many portions of the Medicaid expansion provisions in effect that deny federal aid to those states that elect not to expand their Medicaid roles.

Writing for the majority (consisting of the Chief Justice and Justices Ginsburg, Breyer, Sotomayor, and Kagan), Chief Justice Roberts held that the lynchpin of the Act, the requirement that most Americans purchase minimum health insurance, could not be enforced as a "mandate" but the "shared responsibility payment" required of those who elect not to purchase health insurance will be assessed and paid to the Internal Revenue Service ("IRS") in the same manner as a tax, although it is labeled in the act as a penalty. The Court also held that the Medicaid expansion provision that would forfeit all Medicaid if a state did not expand the Medicaid coverage set forth in the act, was unconstitutional.

The Statutory "Penalty" Associated with the Mandate Is Not A "Tax" For Purposes of the Anti-Injunction Act

The Court initially determined that for purposes of the Anti-Injunction Act, the individual mandate was a penalty and not a tax. Generally, under that act, those subject to a tax must pay it first and then seek to recover the tax paid, before seeking to enjoin imposition of the tax. (26 U.S.C. § 7421(a).) Thus, one challenge to the Act was that if the mandate is a "tax," the Court could not consider the Act until 2014, when the mandate takes effect and a taxpayer would first be assessed the penalty.

Because the Act called the shared responsibility payment a "penalty," rather than a "tax," the Anti-Injunction Act does not apply. The Court noted that the Act described many other exactions as "taxes," and cited to the rule that where Congress uses certain language in one part of a statute and different language in another, it is presumed that Congress intended a different meaning. Because the "shared responsibility payment" is called a "penalty," it was not considered a "tax" for purposes of the Anti-Injunction Act.

Amicus curiae argued that because the penalty will be assessed and collected in the same manner as a tax, the Anti-Injunction Act applies. The Court agreed with the Government, however, that the directive to the Secretary of the Treasury that it use the same "methodology and procedures" to collect the penalty does not make it a tax. However, the Court considers the "penalty" to be a "tax" when determining Congress's power to impose it.

The Commerce Clause Does Not Save the "Mandate"

In the lower courts and among legal scholars and pundits, a focal point of the debate was whether the reach of the Commerce Clause (U.S. Const., art. I, § 8, cl. 3) could support Congress's enactment of the individual mandate. In what may become significant legal precedent to challenge Congress's other exercises of its powers under the Commerce Clause, the Court held that the mandate does not pass constitutional muster under that clause.

One of the evils the Act was intended to address was the cost-shifting of uninsured care to those with insurance. The Government argued that Congress had the right to impose an individual mandate because that cost-shifting has a "substantial and deleterious effect on interstate commerce." The Court held that the Commerce Clause gives Congress the power to regulate commerce, but not to compel it. The power to regulate commerce presupposes the existence of commercial activity to be regulated. The individual mandate does not regulate commercial activity, but, instead, requires individuals to become active in commerce by purchasing a product, on the ground that the failure to do so affects interstate commerce. The Court noted that the Government's logic would justify a mandatory purchase to solve almost any problem – including requiring consumers to buy vegetables under the guise of mandating better nutrition.

The Court rejected the Government's argument that because everyone will likely need medical care at some point in their lives, they will engage in health care transactions, and can be "regulated in advance." The Court held that the Commerce Clause is not a general license to dictate the manner in which products needed in the future will be purchased.

As pithily stated in the opinion, "the individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under" the Commerce Clause.

The Court then rejected the Government's argument that the Necessary and Proper Clause permitted the survival of the individual mandate. Although the Court is "very deferential" to Congress's determination that a regulation is "necessary," "acts of usurpation" "deserve to be treated as such." The Commerce Clause cannot be stretched to require people to purchase insurance, even though the mandate is an integral part of the Act.

Under the Taxing Clause, However, the Penalty Is a "Tax"

While rejecting the individual mandate's constitutionality under the Commerce Clause, the Court nevertheless upheld it under the Taxing Clause (U.S. Const., art. I, § 8, cl. 1). Although the Court held that the "shared responsibility payment" was not a tax but a penalty for purposes of the Anti-Suit Injunction, as discussed above, the Court determined that the mandate could be upheld as within Congress's enumerated power to "lay and collect taxes." Going without insurance is "just another thing the Government taxes . . ."

Congress's choice of how to label a payment to the IRS is controlling for purposes of the Anti-Injunction Act, but the label does not control the substance of whether that payment falls under Congress's power to tax.

Because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," the substantive nature of the mandate is such that under the Taxing Clause the penalty must be treated as a tax, and therefore, the mandate is constitutional under the Taxing Clause.

The Penalty Aspect of the Medicaid Expansion is Unconstitutional

Before the Act, states received significant funding from the federal government for Medicaid, and had flexibility in determining eligibility and benefits. The Act would have required that all states dramatically expand those eligible for Medicaid, under the sanction that if the states do not expand Medicaid in that fashion, they will lose all Medicaid funding and not just that allocated for the expansion. While most states do not now provide Medicaid benefits to childless adults, the Act would have required states to cover all individuals under the age of 65 with incomes up to 133% of the federal poverty level – and provide a new mandated "essential health benefits" package. Initially, as conceived in the Act, the federal government would pay