

Left: HHS Secretary Kathleen Sebelius speaks at George Washington University on the Supreme Court's ruling on Obamacare. (HHS photo/Chris Smith)

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Obamacare leaves poor in Mandate Limbo

Obamacare's inflexible complexity along with its recently declared unconstitutional Medicaid expansion provision has left a certain segment of the population in Mandate Limbo.

Obamacare relies on two mechanisms to expand the number of people who have health coverage:

Health Insurance Subsidies. It gives health insurance subsidies to individuals who make between 100% and 400% of the Federal Poverty Line.

Medicaid. It requires that states expand their Medicaid programs so that everyone who makes up to 138% of the Federal Poverty Line is eligible.

Supreme Court exposes Obamacare's unconstitutional reliance on coercion.

The problem is that the Obama Administration and the Democratic 111th Congress, assumed they could coerce the states to expand their Medicaid programs by threatening to revoke all federal Medicaid funding should states choose not to expand.

The Supreme Court called the Medicaid expansion requirement an unconstitutional, "gun to the head" coercion of the states. Even Justice Stephen Breyer (appointed by President Clinton) and Justice Elena Kagan (appointed by President Obama) agreed!

Now that states have an option, they are now investigating whether they can actually afford the expansion.¹

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"Death Panel" case moves forward

On August 31, 2012, in *Coons v. Geithner*, a federal judge dismissed parts of a challenge to Obamacare's "death panel" officially known as the "Independent Payment Advisory Board" (IPAB).¹

As expected, and based on the Supreme Court's recent ruling in *NFIB v. Sebelius*, the federal judge dismissed the plaintiff's arguments that Obamacare exceeds Congress's Commerce Clause powers, taxing powers, and the implied powers granted under the Necessary and Proper Clause.

The plaintiffs had already conceded that IPAB does not violate the First Amendment rights of the Congressmen plaintiffs, Jeff Flake (R-AZ) and Trent Franks (R-AZ).

That left four issues for the court to examine:

1. Does IPAB violate the Separation of Powers Doctrine?
2. Does IPAB violate the constitutional guarantee of medical autonomy found in the Fifth and Ninth Amendments?
3. Does IPAB violate the Constitution's guarantee of privacy found in the Fourth, Fifth, and Ninth Amendments?
4. Does federal law preempt the law of the State of Arizona?

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Mandate Limbo (continued)

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Current Medicaid Levels

Current Medicaid eligibility levels are represented by a dotted line that divides the green area of Figure 1.²

Expanded Medicaid Levels

For states that choose to comply, Obamacare expands the Medicaid eligibility threshold to 138% of the federal poverty line (represented by the blue arrow). Plus, it expands Medicaid to include *everyone* under 138%—not just children, the disabled, and the elderly.

Non-Expansion states

But a few states have already said they will not expand, and several others have said they are leaning against expansion.³ What happens in these states?

1. **Windfall:** Individuals between 100% and 138% percent of the poverty line, who would receive Medicaid in an expansion state, will now receive federal health insurance subsidies to help them purchase insurance through the health insurance exchanges.
2. **On Medicaid like before:** For those who are already receiving Medicaid (everyone under the dotted line in Figure 1), there will be no change.
3. **Status quo: No Medicare but also no Mandate:** The orange arrow⁴ in Figure 1 represents those who are exempt from the Individual Mandate tax because, based on their income, the IRS doesn't require them to file a tax return.

4. **Mandate Limbo:** But there's a group of individuals who are under the federal poverty line but make just enough to have to file a tax return. It is clear that these individuals will not be eligible for health insurance subsidies. Nor will they be eligible for Medicaid in most non-expansion states. What is not clear is whether they will be subject to the individual mandate.

Mandate Limbo

You will find yourself in Mandate Limbo if in 2014, you make the 2014 equivalent of between \$9,750 and \$11,170.⁵

There are primarily two potential exemptions for individuals who find themselves in Mandate Limbo:

Hardship waivers: First, Obamacare gives the Secretary of Health and Human Services the power to grant "hardship waivers." So, like many other waivers within Obamacare, Americans must rely on the common-sense of bureaucrats to save them from Obamacare's inherent miscalculations and excesses.

But HHS has yet to issue a regulation or other guidance on how it will determine if someone is suffering a hardship. So, we don't know if those in Mandate Limbo will be eligible for this waiver.

Unaffordability exemption: There is another possible exemption. Obamacare grants an exemption to anyone whose share of their health insurance premium exceeds 8% of their income.

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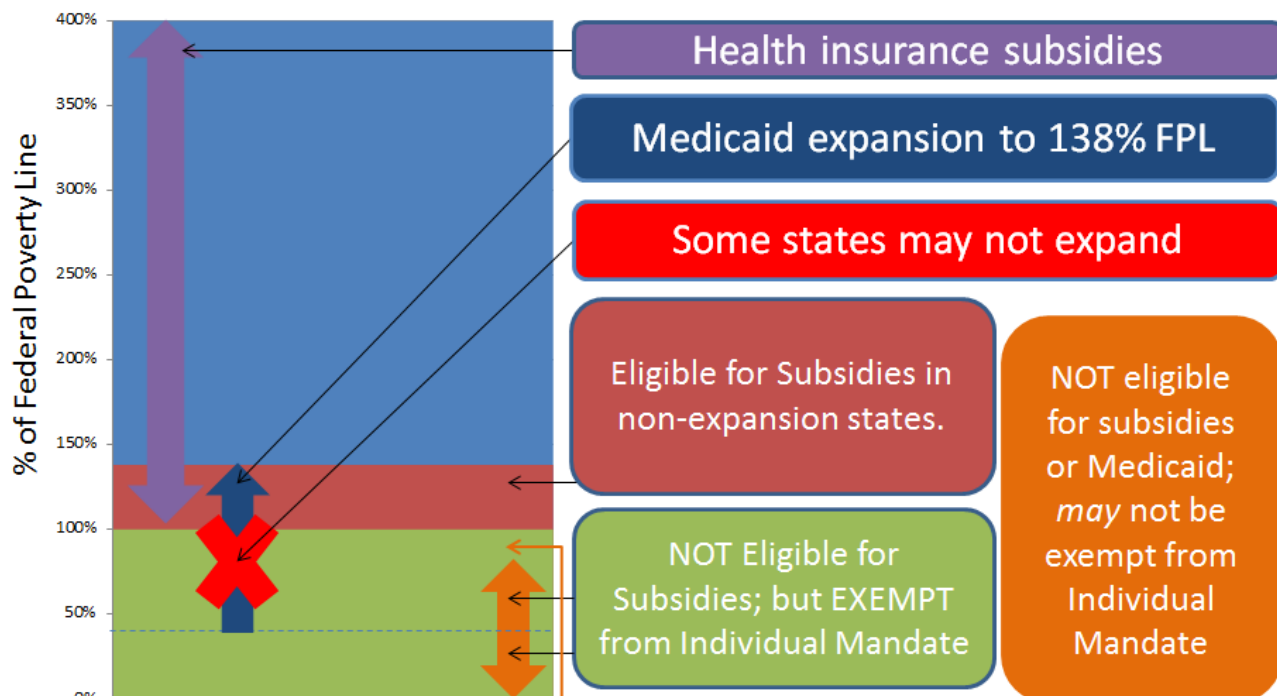


Figure 1: Medicaid Expansion

Obamacare Pays for Lottery Tickets

When Nancy Pelosi said we'd have to pass Obamacare before we'd find out what's in it, no one expected to find that Obamacare funds would be used to purchase lottery tickets. But that's exactly what the state of New York plans to do with part of the grant money it will receive under Obamacare's Medicaid Incentives for the Prevention of Chronic Diseases program.

Under the program, the state of New York has received a \$2 million grant to be used to pay people to be healthy.¹ Of the 18,456 participants in the program 13,842 participants will each receive an average of \$115-\$122 in incentives for healthy actions like:

- going to the doctor;
- filling and taking certain prescribed medications;
- attending certain health education classes and programs;
- losing weight; and
- quitting smoking²

Most of the incentives will be direct cash payments, but lottery tickets will be given to those who participate in the diabetes prevention

program.³

In all, the program will give away \$85 million dollars over five years. 10 states have received grants under the program including California, Connecticut, Hawaii, Minnesota, Montana, Nevada, New Hampshire, New York, Texas, and Wisconsin.⁴

¹ Centers for Medicare and Medicaid Innovation, MIPCD: The States Awarded, <http://www.innovations.cms.gov/initiatives/MIPCD/states-awarded.html> (last visited, August 30, 2012).

² Centers for Medicare and Medicaid Innovation, MIPCD State Summary: New York, <http://www.innovations.cms.gov/Files/x/MIPCD-NY.pdf> (last visited, August 30, 2012).

³ *Id.*

⁴ Fact Sheet, Centers for Medicare and Medicaid Services, Medicaid Incentives for Prevention of Chronic Diseases Grants (Sept. 13, 2011) available at <http://www.cms.gov/apps/media/press/factsheet.asp?Counter=4114>.

Federal appellate court: Start over (continued)

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The plaintiffs had argued in the first of these issues that Congress unconstitutionally delegated its authority to the IPAB an independent and unaccountable agency.

But the court used only a single paragraph to dismiss the issue and explain its reasoning. Under the Anti-Delegation Doctrine Congress cannot delegate its authority to an agency without first stating general principles for an agency to follow and without defining its boundaries. In the instance of the enactment of IPAB, the court ruled that Congress had followed this doctrine.

Only twice has the Supreme Court overturned a law based on the Anti-Delegation Doctrine.

That leaves the guarantees of medical autonomy and privacy and the issue of whether Obamacare preempts Arizona law.

These issues, the court said, were all premised on the understanding that the "Individual Mandate" was a legal requirement and not an optional tax. In light of

the Supreme Court's ruling that the Individual Mandate is a tax, the court allowed the plaintiffs to file a supplemental brief.

The Plaintiffs filed their Supplemental Brief on September 13, 2012.² In it they argue that Obamacare's individual mandate—even as a tax—is superseded by (and thus violates) Arizona's Health Care Freedom Act (HCFA).³

In some ways similar to laws passed by Missouri⁴ and Virginia,⁵ the HCFA gives Arizona's residents the right to pay directly for their health care without an intermediary insurance company and without being penalized by fines or taxes for doing so.

Finally, the plaintiffs also argue that, even as a tax, the Individual Mandate also violates the plaintiff's (Nick Coons') rights to medical autonomy and privacy. They argue that tax "unduly burdens" Mr. Coons' medical decisions by threatening a tax penalty if he does not get insurance. By getting health insurance he would be required to "enter[]" into

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How to Comment on a Regulation

1. Go to the Regulations page at: ObamacareWatcher.org
2. Choose a regulation.
3. Click on the "Comment Now" link to be directed to the Regulations.gov website.
4. Click "Submit a Comment" which is located towards the top of the page.
5. Fill out the comment form.

Glossary of Agency Abbreviations

- CMS:** Centers for Medicare and Medicaid Services
- DOL:** Department of Labor
- EBSA:** Employee Benefits Security Administration
- HHS:** Department of Health and Human Services
- HRSA:** Health Resources and Services Administration
- IRS:** Internal Revenue Service
- OIRA:** Office of Information and Regulatory Affairs
- TREAS:** Department of the Treasury

Mandate Limbo (continued)

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By one estimate, in 2014, a minimum level of individual insurance will cost at least \$1,800 per year. If this is accurate people in Mandate Limbo will be exempt from the Individual Mandate as \$1,800 will be above 8% of their incomes which (in 2012 dollars) is between \$780 and \$894.

But because we can only speculate how a minimum required plan will cost, the unaffordability exemption does not yet eliminate Mandate Limbo.

¹ See Drew Gonshorowski, "Medicaid Expansion Will Become More Costly to States," Heritage Foundation Issue Brief# 3709 (Aug. 30, 2012) available at <http://www.heritage.org/research/reports/2012/08/medicaid-expansion-will-become-more-costly-to-states>.

² This line is merely conceptual and *not* to scale.

³ See The Advisory Board, "Where Each State Stands on ACA's Medicaid Expansion," THE DAILY BRIEFING (July 5, 2012) available at <http://www.advisory.com/Daily-Briefing/2012/07/05/Where-each-state-stands-of-the-Medicaid-expansion>.

⁴ This arrow is for conceptual purposes and is *not* drawn to scale.

⁵ For the 2012 tax year, the IRS filing threshold will be \$9,750 and the federal poverty line is \$11,170.

Regulations open for comment

Health Care Electronic Funds Transfers and Remittance Advice Transactions

RIN: 0938-AR01 **Agency:** HHS

Status: Interim final rule with comment period. Public comments accepted through October 9, 2012.

For the latest status on these and other regulations, visit us at:

<http://ObamacareWatcher.org>

Federal appellate court: Start over (cont.)

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relationships that require him to relinquish [medical or other personal] information or pay a penalty."

Interestingly enough, they base this argument on the abortion case, *Planned Parenthood v. Casey*.

Federal attorneys have until September 27th to file their reply.

¹ *Coons v. Geithner*, No. 2:10-cv-01714-GMS (D. Ariz. Aug. 31, 2012)(order) available at <http://regwatch.visibli.com/share/pTXkd9>

² Plaintiffs' Supplemental Brief, *Coons v. Geithner*, No. 2:10-cv-01714-GMS (D. Ariz. filed Sept. 13, 2012) available at http://goldwaterinstitute.org/sites/default/files/coons%20supplemental%20brief%20091312%20-%20FILED_0.pdf.

³ Constitution of the State of Arizona, Article 27 § 2.

⁴ See Mo. Rev. Stat. §§ 1.330 and 375.1175.

⁵ See Virginia Code § 38.2-3430.1:1.

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