



BOULDER COUNTY BAR NEWSLETTER

SEPTEMBER 2012

IMPLICATIONS OF SUPREME COURT DECISION ON HEALTH CARE COVERAGE FOR INDIGENT COLORADOANS

BY ELISBETH ARENALES

This article considers the implications of the U.S. Supreme Court's decision in *NFIB v. Sebelius*¹ and outlines in brief some of the new opportunities available to lower income clients under the Patient Protection and Affordable Care Act (ACA).² U.S. Supreme Court.

The ACA requires most citizens and lawfully present aliens to have health insurance (minimum essential coverage) or pay a tax penalty beginning in 2014.³ As written, the Act also required states participating in Medicaid (all states), to expand income eligibility to 138% of the Federal Poverty Level (FPL)⁴ or lose all federal Medicaid dollars.⁵

In June, the U.S. Supreme Court affirmed the constitutionality of the ACA's minimum coverage provision while potentially making it more difficult for low income individuals to gain access to coverage through Medicaid.⁶ Writing for the 5/4 majority, Chief Justice Roberts explained that while the requirement to purchase health insurance is not a per-

missible exercise of Congress's Commerce Clause power, the Federal Government may impose a tax on those without insurance. At the same time, the Court ruled 7/2 that states may not be threatened with the loss of all federal Medicaid funds if they fail to expand the program. Generally, states are held accountable for compliance with Spending Clause programs, including Medicaid, by the threat of losing federal matching dollars. In this instance, the Court said the threatened loss of all federal Medicaid funds is so onerous as to be coercive, and therefore is unconstitutional.⁷

While the decision raises questions about whether states will proceed with the Medicaid expansion, the remainder of the law was upheld and Colorado is proceeding with implementation. What follows is a short summary of a few ACA provisions and some recent changes in Colorado law that may benefit clients.

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The insured: The practice of rescission is prohibited except in cases of fraud.⁸ Lifetime dollar caps on insurance policies are eliminated, annual caps are phasing out.⁹ There is no cost sharing for preventive care visits in any new plan.¹⁰ In 2014, all pre-existing condition exclusions are prohibited, there is mental health parity, gender rating is prohibited and age rating is limited to a 3-1 ratio.¹¹

The uninsured: Getting US Covered, Colorado's temporary community rated high-risk pool, is available to people who have been uninsured for six months or more. Children are no longer subject to pre-existing condition exclusions.¹² Parents may add young

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NOVEMBER 8, 2012
BENCH BAR RETREAT
CU LAW SCHOOL 1 - 5 PM
ANNUAL JUDGES' DINNER
AT THE ACADEMY
AT 5:30 PM

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CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing lynne@boulder-bar.org, or pay online with a credit card at www.boulder-bar.org/calendar.

Wednesday, August 29
Civil Litigation and All-Bar CLE
E-Discovery in the Cloud
Presenter: Trent Walton
Noon-1:00 at Caplan and Earnest
1 CLE \$20, \$10 for new/young lawyers
Lunch \$11

Wednesday, September 5
Criminal Lawyers, DA's and PD's
Discussion with Judge Bailin RE: Her
return to Criminal Court
Presenter: Judge Bailin
Noon brownbag in Courtroom L
1 CLE \$20, \$10 for new/young lawyers

Wednesday, September 5
IDC luncheon meeting
at 11:30 AM at the Spice of Life
Flatirons Golf Course.
Presenter: John Gilbert, PhD, CAC III
You're in (urine) Trouble & Bad
Breath: Substance Abuse Testing
This presentation will include 1 CLE
credit. The cost of lunch is \$20 this
time for non-members as an
introductory rate.
It is normally \$25.00. To register call
Cindy Mayhew 702-232-4573. email
boulderidc@gmail.com.

Wednesday, September 12
Solo/Small Firm Happy Hour
5:00 at The Rib House
13th and Walnut in Boulder

Friday, September 14
Availability of Legal Services
Noon brownbag at
Boulder County Legal Services
315 W. South Boulder Rd, Louisville

Tuesday, September 18
Business Law
Piercing the Corporate Veil
Presenter: Mark Cohen
Noon at Hutchinson Black and Cook
1 CLE \$20, \$10 for new/young lawyers
Lunch \$11

Wednesday, September 19
Family Law
Meet and Greet Judge Judy LaBuda
Noon brownbag in Courtroom N
1 CLE \$20, \$10 new/young lawyers

Thursday, September 20
Real Estate Law
What Dirt Lawyers Need to Know
About RE Licensing Law
Presenter: Jonathan Goodman
Noon at The Boulder Cork
3295 30th Street, Boulder
1 CLE \$20, \$10 new/young lawyers
Lunch \$17

Thursday, September 20
Bankruptcy Roundtable Lunch
Noon at Agave Bistro
2845 28th Street in Boulder

Thursday, September 20
Happy Hour for Louisville Lawyers
5:30 at the Rex on the Roof
817 Main Street, Louisville

Friday, September 21
Immigration Lawyers
Morning coffee and
roundtable discussion.
DACA updates/Bring your
tough cases for peer feedback.
8:30AM at Broadway Suites, 1942
Broadway 3rd floor conference room
3rd floor conference room

Wednesday, October 3
Intellectual Property
Federal Circuit Court in Boulder
9 -11:30 AM-Oral Arguments
2:30-5:30 PM Patent Law and
Competition Policy
CU School of Law

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HEALTH CARE COVERAGE *(continued from page 1)*

adults onto their insurance policies, even if they are married or are parents themselves.¹³ Although not ACA related, Colorado recently expanded Medicaid eligibility to Adults without Dependent Children with incomes under 10% FPL.¹⁴

The program is limited to 10,000 people and there is a waiting list. SB 12-134, effective August 8th, requires all Colorado hospitals to offer uninsured patients under 250% FPL the lowest rate negotiated with a private insurance company; increases transparency requirements around charity care and discount programs; and requires hospitals to offer reasonable payment plans before sending patients to collections.¹⁵

Seniors and disabled: Medicare benefits remain intact although some Medicare Advantage Plans may retract some additional benefits. The Part D "donut hole" is phasing out and will be gone by 2020. Seniors no longer have to pay out of pocket for preventive care visits and certain procedures. There are increased standards for nursing homes and a major emphasis on home and community based care and services, including funding to states interested in innovative delivery and payment reform pilot programs.¹⁶

With respect to Medicaid, states are now in the position of having to decide whether to expand the program when there is no penalty for non-compliance. The Department of Health and Human Services is due to issue guidance this year and Colorado likely will decide how to proceed by next spring. Regardless of what this means for Spending Clause jurisprudence, the potential consequences for lower income people are real.^{17, 18, 19}

By design, the ACA brought the lowest income people into coverage through Medicaid and everyone else through the private marketplace. The law facilitates the purchase of private insurance by requiring states to create new health insurance marketplaces called health benefit exchanges.²⁰ Colorado's Health Benefit Exchange (COHBE) is expected to begin taking applications in October 2013 and will screen for Medicaid and premium tax credit eligibility through a joint application.

Beginning in 2014, people with incomes between 100% and 400% FPL will be eligible for sliding scale premium tax credits if, and only if, they purchase insurance through the Exchange.²¹ Cost sharing subsidies will be available on a sliding scale basis to people under 250% FPL.²²

Because the Medicaid expansion was assumed, the ACA makes most people under 100% FPL ineligible for premium tax credits or cost sharing assistance. Without either forms of assistance, the majority of the uninsured under 100% FPL, including an estimated 6,633 in Boulder County, may remain uninsured after 2014.²³

Elisabeth Arenales is the Health Program Director at the Colorado Center on Law and Policy. CCLP advances the health, economic security and wellbeing of low-income Coloradans through research, education, advocacy and litigation.

FOOTNOTES

1. National Federation of Independent Business v. Sebelius, 567 U.S. (2012), WL 2427810.
2. Patient Protection and Affordable Care Act (hereinafter PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010).
3. The penalty phases in between 2014 and 2016, and by 2016 is either \$695 per year (up to three times that amount per family), or 2.5 percent of household income, whichever is greater. After 2016, the penalty will be adjusted based on the cost of living. PPACA, Pub. L. No. 111-148, §1501, 124 Stat. 119,245-47 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §1002, 124 Stat. 1029, 1032-33 (2010).
4. In 2012, 100 percent of the Federal Poverty Level is \$11,170 for an individual and \$23,050 for a family of four; 133 percent FPL is \$14,856 for an individual and \$30,657 for a family of four.
5. The Act collapses income eligibility into four categories: children, pregnant women, parents and a new eligibility category for childless adults, and requires income to be calculated using Modified Adjusted Gross Income (MAGI). The MAGI eligibility determination is not applied to certain categories, including individuals who are age 65 or older or who are blind or disabled. See, Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010; Final Rule, 77

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HEALTH CARE COVERAGE *(continued from page 3)*

Fed. Reg. 57, 17206-08 (March 23, 2012) (to be codified at 42 C.F.R. pts. 431,435, and 457).

6. NFIB v. Sebelius, 567 U.S. at 44.

7. In discussing the coercive nature of this particular expansion, the Court emphasized the very large role that Medicaid plays in state budgets and said that the move away from categorical eligibility to full coverage for everyone under 138% FPL altered Medicaid in a way that was not foreseeable when states entered the program. NFIB v. Sebelius, 567 U.S. at 54-55.

8. PPACA, Pub. L. No. 111-148, §1001, 124 Stat. 119, 131 (2010).

9. Id.

10. PPACA, Pub. L. No. 111-148, §1001, 124 Stat. 119,131-32(2010).

11. Prohibition of preexisting condition exclusions, see PPACA, Pub. L. No. 111-148, §1201, 124 Stat. 119,154-55 (2010); gender and age rating limitations, see PPACA, Pub. L. No. 111-148, §1201, 124 Stat. 119, 155-56 (2010); mental health parity, see PPACA, Pub. L. No.

111-148, §1311, 124 Stat. 119, 181 (2010).

12. PPACA, Pub. L. No. 111-148, §1201, 124 Stat. 119, 154-55 (2010).

13. PPACA, Pub. L. No. 111-148, §1001, 124 Stat. 119, 132 (2010).

14. C.R.S. §25-5-4-402.3(1 V)(b)(IV)(c) (2012); 10 CCR 2505-10, §§8.100.1.; 100.3, 8.100.5-.6.

15. S.B. 12-134, 68th Gen. Assem., 2d Reg. Sess. (Colo. 2012).

16. See, Terence Ng, Charlene Harrington, and Mary Beth Musumeci, State Options That Expand Access to Medicaid Home and Community-Based Services, KAISER FAMILY FOUNDATION, (2010), <http://www.kff.org/medicaid/upload/8241.pdf>.

17. Justice Roberts writes that it is not lawful to forgo health insurance and not pay the tax, although the ACA prohibits prosecution for failing to make shared responsibility payment. NFIB v. Sebelius, 567 U.S. at 44, n.1 1; 26 U.S.C. § 5000(A)(g)(2). T8-Only U.S. Citizens and qualified aliens are eligible for Medicaid. 8 U.S.C. § 1611. There is an exception for emergency treatment. 8 U.S.C. §

1611(b)(1)(A). The law remains unchanged by the ACA.

19. Enrollment in Medicare satisfies the mandate. See, PPACA, Pub. L. No. 111-148, §1501, 124 Stat. 119, 248-49(2010).

20. States must create Health Insurance Exchanges. The Federal government will operate exchanges in states that refuse to do. PPACA, Pub. L. No. 111-148, §1321, 124 Stat. 119, 186-87 (2010). Colorado's Health Benefit Exchange (COHBE) was created in 2011, and is in the design phase. For more about the COHBE see C.R.S. § 10-22-101 etseq., and COHBE's website at <http://www.getcoveredco.org/>.

21. Those eligible for subsidies (premium tax credits) are required to expend 2% of income if they are between 100-133% FPL up to 9.5% of income at 350-400% FPL. PPACA, Pub. L. No. 111-148, §1401, 124 Stat. 119,213-20(2010).

22. PPACA, Pub. L. No. 111-148, §1402, 124 Stat. 119, 220-23 (2010).

23. Even though uninsured, they are not likely to face a tax penalty as the ACA does not impose a penalty where the cost of insurance exceeds 8% of income. PPACA, Pub. L. No. 111-148, §1501, 124 Stat. 119, 247 (2010). For more about estimates of the uninsured in Colorado, see, Colorado Health Institute, Health Insurance Status of Colorado Adults: 2012 Update, Data Supplement 4 (2012), http://www.coloradohealthinstitute.org/uploads/downloads/EBNE_Adults_Data_Sheet_Final_6_14.pdf. Although Colorado has technically extended eligibility to this population under the Colorado Health Care Affordability Act of 2009, C.R.S. §25-5-4-402.3 (2009), currently only 10,000 slots are available statewide

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PRESIDENT'S PAGE

By Keith Collins



Communities throughout Colorado have faced some of their most difficult challenges this year. We have endured scorching heat, making it one of the hottest summers on record. The heat and lack of rain has decimated farmer's crops. Accompanying the heat was a terrible fire season taking lives and homes. Then in July, Aurora experienced one of the most senseless and violent attacks the state has ever suffered. It has been a tough year for Colorado.

Governor Hickenlooper, in one of his speeches this summer, stated that Coloradans are tough people. The first settlers of this state were tough people, survivors. The pioneering of the west was not easy and full of hardship. That survival mentality still runs strong through Coloradans today. I too believe that the people of Colorado still carry the spirit of this state's founding fathers and can come together as a community to overcome even the worst atrocities.

The word that I keep coming back to is "community." Merriam-Webster defines community as "a unified body of individuals." Although I think this is an accurate definition of what a community is, it fails to convey the essence and power the term beholds.

If you turned on your television to watch the news this summer, then you could not help but see news coverage of the plight of your community members suffering from the events I have mentioned. But if you stayed tuned or followed the stories online, you saw an accompanying story unfolding in near unison with these tragic events. Those were the stories of people who took action to do what they could to help.

It seemed that for every newscast that updated us on the further destruction and devastation endured, there were two or three stories about the selfless acts of others. Stories of teenage boys rushing in to help save a neighbor from an oncoming fire, to hundreds of people coming out to support the thousands of firefighters

across the state. There were young girls holding a bake sale for the victims of the Aurora shooting and local Olympians dedicating their efforts to those suffering back home.

Unfortunately, it is always the worst news that makes the big splashy headlines these days and if all you read are headlines then you will miss the rest of the story. The news this summer and still today is full of wonderful and uplifting stories about community. Great stories about groups of people coming together for a common cause, to help others. These stories are powerful examples of the human spirit and a great reminder of how our country, and this state came to be. A reminder about

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PRO BONO PAGE

Pro Bono Referrals

Twenty-one cases were referred during July. Thank you to the following attorneys:

Norm Aaronson – CULADP
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Deborah Cantrell – CULADP
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Michelle Stoll
Karen Trojanowski

BCAP Volunteers

Thank you to the following attorneys who accepted pro bono referrals for the Boulder County AIDS Project in July.

Paul Bierbaum
Julie Kreutzer
Jennifer Lorenz

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September 17	Steve Meyrich	303.440.8238
September 24	Helen Stone	303.442.0802



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PRESIDENT'S PAGE *(continued from page 5)*

what is really important in our lives and how the smallest act of kindness from a stranger may make all the difference.

I experienced this sense of community on a personal level this summer. I was involved in a serious bicycle accident where I broke my pelvis and collarbone. I was fortunate it was not any worse, but it left me in a wheelchair for nearly seven weeks and I am still working to walk again. There were many challenges that I had to face, from figuring out how to get home from the hospital, to getting dressed, to just getting around. These challenges not only affected me but also had a big impact on my wife and kids. Fortunately, for our family, our community rallied and supported us.

I witnessed first hand the power of a community of people and the priceless support they can provide. I received a lot of support and well wishes from my professional community, my personal friends, neighbors, and even complete strangers. It has been a humbling and educating experience. It has caused me to pause and reflect on my own life and actions how I might be a better community member going forward.

So, you may wonder what does all of this have to do with the Boulder County Bar Association. The bar association is just another wonderful community we have here in Boulder. If you are getting this newsletter then you are likely a member of this community. There are many opportunities here at the bar association where you can make a difference as a community member. You can mentor a new lawyer or take a third year to coffee to pass on sage advice. You can get involved in your section and assist in creating CLE programs, or even volunteer to put on a CLE

yourself. Or on a fun note, attend our Food Wine Jazz Art event in the spring to help raise money for Legal Aide. There are countless ways all of us can make a difference. It does not have to be anything monumental, even the smallest gestures of kindness can go a long way.

The bar association is a great community to be a part of. It is great because we have generous members who are willing to come together as a community. It is an honor to have been chosen to lead this organization and I am looking forward to the many great things we have planned for this coming year.



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Please watch the Monday Morning E-Briefs and Newsletter Calendar for the CLE programs that will be presented for you.. This is going to be another terrific year of excellent CLE programs, thanks to these hard-working section co-chairs.



In-House Counsel co-chair, Sarah Pritchard (center) and section member, Arron Brodsky with Michelle Hayes, co-chair of the ALS Committee, enjoying the In-House Counsel Section Happy Hour.



Scott Osgood (left) and Larry Hoyt, co-chairs of the Real Estate Section at the Orientation for all Section Co-chairs.



Justin Konrad (left) Co-chair of IP, Abigail Smith, Board of Director, and Phil Bluestein, co-chair of Business Law Section.



In-House Counsel Happy Hour attended by (left ot right) Sarah Long, Beth Karpf and Saliah from Covidian.

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