
MEMORANDUM

TO: BARBARA W. ROOP AND JOHN GOODSON
FROM: CARL VALVO
SUBJECT: RETROACTIVE APPLICATION OF THE HEALTH CARE AMENDMENT
DATE: 5/25/2006

In the course of your efforts to secure final action by the joint session of the General Court on the initiative amendment to the Massachusetts Constitution relative to health care insurance (“the Health Care Amendment” or “HCA”), you have encountered at least one individual who has a concern about whether the HCA may be applied retroactively to laws already on the books at the time the HCA is approved by the people and becomes effective. Specifically, the concern is whether the voter-approval requirement added to the HCA by the joint session of the last General Court will require submission to the voters of the recently enacted Chapter 58 of the Acts of 2006 (“An Act Providing Access to Affordable, Quality, Accountable Health Care”). You have asked for my opinion as to this concern.

Based on general principles of constitutional law and on the language of the Health Care Amendment itself, I conclude that there is no possibility of retroactive application of the HCA to either invalidate laws on the books or to require that any previously enacted law, including Chapter 58, will be subject to the voter-approval requirement.

General Principles

It is a well-established and generally accepted principle, both in Massachusetts and in other states, that a constitutional amendment is presumed to apply only prospectively, unless it contains clear language expressing an intention that it be applied retroactively. This principle applies regardless whether the constitutional provision in question is adopted by popular initiative or otherwise.

A Massachusetts case that illustrates an application of the principle is Massachusetts Bay Transportation Authority v. Boston Safe Deposit and Trust Company, 348 Mass. 538 (1965). In that case, the Supreme Judicial Court was confronted with the suggestion that certain legislation enacted prior to November 3, 1964, providing for a pledge of the credit of the Commonwealth to the MBTA ran afoul of art. 84 of the Amendments of the Massachusetts Constitution, which was adopted by the people on November 3, 1964. Article 84 amended art. 64, § 1, to require that pledges of the credit of the Commonwealth be enacted by a two-thirds vote in each branch of the Legislature. Since the MBTA legislation had been enacted earlier in 1964, the claim was made that its pledge of credit was ineffective because it was not passed by the two-thirds votes required by the new constitutional amendment.

The Supreme Judicial Court rejected the claim on the grounds that the MBTA legislation was validly enacted at the time it was passed by both houses and approved by the Governor and the super-majority requirements of art. 84 did not apply retroactively. *Id.* at 558-560. The Court stated that "[a] provision of the Constitution commonly is to be interpreted as stating a broad and general principle of government, *regulative of all conditions arising in the future* and falling within its terms." *Id.* at 559 (emphasis added), quoting Opinion of the Justices, 261 Mass. 523, 543-544 (1927). The Court concluded that "there can be no doubt that the Legislature and the people in adopting the [constitutional] amendment of November 3, 1964, understood that they were making a *change in the legislative process effective for the future*. We believe there was no intent to halt or impede the continued financing of established projects involving the pledge of the Commonwealth's credit voted by the Legislature prior to the amendment and hence without reference to the two-thirds vote requirement." *Id.* at 560 (emphasis added).

The correctness of the SJC's analysis in the MBTA case is supported by the universal agreement of the courts of other states with the principle that only clear language to the contrary will overcome the strong presumption that constitutional amendments apply prospectively only. A sampling of decisions from other states in recent years is indicative of the universality of the proposition. *See, e.g., Schumacher v. Department of Natural Resources*, 256 Mich.App. 103 (2003) (Statutes and constitutional provisions are presumed to apply prospectively, unless the drafters clearly manifested a contrary intent); *State v. Reeves*, 604 N.W.2d 151 (Neb. 2000) (Constitutional amendment operates prospectively only, unless the words employed show a clear intention that it should have a retrospective effect); *In re Advisory Opinion to the Governor-Terms of County Court Judges*, 750 So.2d 610 (Fla. 1999) (Unless specifically stated in the text or in the statement placed on the ballot, constitutional amendments are generally given prospective effect only); *Petran v. Allencastre*, 985 P.2d 1112 (Haw.App. 1999) (State constitutional amendment which prohibits adverse possession claims against parcels of real property larger than five acres applies prospectively only); *Board on Law Enforcement Officer Standards and Training v. Voyles*, 732 So.2d 216 (Miss. 1999) (Constitutional and statutory amendments have prospective force only, unless a contrary intention is manifested by the clearest and most positive expression); *People v. Dean*, 677 N.E.2d 947 (Ill. 1997) (Constitutional provision or amendment operates prospectively from its effective date unless its language clearly indicates intent to apply provision or amendment retroactively); *In re Great Outdoors Colorado Trust Fund*, 913 P.2d 533 (Colo. 1996) (Retroactive application of laws is highly disfavored; unless terms of amendment clearly show intent to make amendment retrospective in operation, it is presumed that constitutional amendment will be given only prospective application); *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349 (Ark. 1994) (Constitutional amendments operate prospectively unless language used or purpose of provision indicates otherwise); *Landis v. Rockdale County*, 427 S.E.2d 286 (Ga.App. 1992) (Amendment to Georgia Constitution extending sovereign immunity to all state departments and agencies, regardless of insurance, could not be applied retroactively); *State v. Wacek*, 703 P.2d 296 (Utah 1985) (Constitutional amendment is to be given only prospective application, unless intent to make it retrospective clearly appears from its terms); *People v. Talamantez*, 215 Cal.Rptr. 542 (Cal.App.4.Dist. 1985) (Proposition Eight, rendering a defendant susceptible to impeachment by

all his many prior felony convictions, applies only to crimes committed after the effective date of the Proposition).

The Text of the Health Care Amendment

Nothing in the text of the Health Care Amendment indicates an intention that it apply retroactively to laws enacted prior to its effective date. The entire text of the Health Care Amendment is contained in a single sentence:

Upon ratification of this amendment and thereafter, it shall be the obligation and duty of the Legislature and executive officials, on behalf of the Commonwealth, to enact and implement such laws, subject to approval by the voters at a statewide election, as will ensure that no Massachusetts resident lacks comprehensive, affordable and equitably financed health insurance coverage for all medically necessary preventive, acute and chronic health care and mental health care services, prescription drugs and devices. (Emphasis added)

As is readily apparent, the opening words of the HCA clearly express the intention that the substantive duty it creates and the special voter-approval procedure to be applied to the kind of legislation it describes¹ take effect “[u]pon ratification of this amendment and thereafter.” Thus, wholly apart from the presumption against retroactive application discussed above, the Health Care Amendment unambiguously declares that its provisions operate as of the date of adoption and thereafter and not before. Accordingly, there can be no credible argument that the HCA can be used to challenge the validity of previously enacted laws, such as Chapter 58 of the Acts of 2006, simply because they were not subjected to the HCA’s voter-approval procedure. That procedure, like the two-thirds vote requirement of art. 84 that was considered in the MBTA case, can apply only to legislation arising after the HCA is adopted by the people in November 2006.

¹ I have previously advised that based on the intent of the sponsor and proponents of the Moore Amendment, in addition to traditional canons of constitutional interpretation, it is highly unlikely that a future court would apply the voter-approval requirement to incremental health care coverage laws.