

COSGROVE, EISENBERG AND KILEY, P.C.
COUNSELORS AT LAW

MEMORANDUM

To: Barbara Waters Roop and John Goodson

From: Carl Valvo

Re: Concerns Related to the Addition of the Voter-Approval Requirement to the Health Care Constitutional Amendment

Date: May 11, 2006

On July 14, 2004, the Constitutional Convention gave the first of two required approvals of an initiative amendment to the Massachusetts Constitution relative to health care insurance ("the Health Care Amendment" or "HCA"). Prior to doing so, however, the convention voted to amend the HCA by adding the phrase, "subject to approval by the voters at a statewide election," so that the HCA, with the new language underscored, now provides as follows:

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.

You have reported that some supporters have raised concerns that the voter-approval language may be used to require voter ratification of every piece of health care legislation enacted after the voters approve the HCA in November. You have asked for my opinion as to the proper meaning of the voter-approval requirement.

I. The Meaning and Application of the Voter-Approval Requirement.

It is, of course, presently impossible to provide with any certainty an interpretation of the voter-approval requirement. Among other reasons, the history of the adoption of the HCA (including, *inter alia*, the substance of the campaign debate and the formal arguments offered by proponents and opponents in the voter information booklet) has yet to be completed. Even so, there are sound reasons to conclude that it is highly unlikely that the Massachusetts courts will interpret the requirement in the manner feared by some. Indeed, it appears from public statements that the sponsors of the voter-approval language share a reasonably narrow view of its

meaning and so it is far from clear that anyone can or will offer a credible articulation of the broad interpretation either before or after the election.¹

A. The Text of the HCA.

It is true that the voter-approval language might have been better drafted to avoid the kinds of concerns that have surfaced. Nonetheless, an examination of the text of the HCA reveals that the better reading of the voter-approval requirement is that it does not apply to the full gamut of health care legislation, or even to all health coverage legislation, as has been suggested. Rather, it applies to “such laws . . . as will ensure that no Massachusetts resident lacks . . . health insurance coverage . . .” A single law that extends public health services for a particular medical condition, or even a law that mandates coverage by private or public insurers of a particular condition, type of condition or group of residents, is not a law that “ensures that no Massachusetts resident lacks health insurance coverage.” While such particularized laws may contribute to the lessening of the scope of the problem to be solved by universal health insurance legislation, they are not and cannot be confused with such comprehensive legislation.² The HCA requires the Commonwealth to achieve comprehensive coverage; it does not require, however, that the goal of universal comprehensive coverage be achieved by a unitary, comprehensive legislative initiative (such as a single act or a series of integrated, mutually-related acts). It is only the latter, should the Legislature choose to approach the problem in that manner, which triggers the voter-approval requirement.

Thus, on the face of the HCA, as amended, the voter-approval requirement would be triggered by a single, comprehensive universal health plan that is intended to meet the

¹ For example, in offering the voter-approval amendment to the HCA, Sen. Richard Moore stated that its purpose was to allow the voters to approve a universal health care “plan” with the potential costs more fully developed. There is no indication anywhere in his remarks suggesting that the language was intended to mandate a referendum on every piece of legislation affecting access to health coverage. Similarly, AIM reported to its members in its Legislative Bulletin of August 6, 2004, that it was instrumental in sponsoring the voter-approval amendment, which it characterized as “requiring that any specific plan developed by the Legislature for achieving universal health care itself be presented to the voters for approval,” and “requiring a ballot question vote on the actual universal health plan.” (Emphasis added). The rationale for such a requirement, according to AIM, is that “any such plan is likely to involve not only a substantial recasting of the health insurance and health care systems, affecting all residents of Massachusetts, but also additional burdens on taxpayers, significant trade-offs involving other government programs and services, and major implications for the state’s business climate.” Clearly, the intended purpose of AIM’s amendment was to assure voter ratification of any major legislative restructuring of health insurance coverage in Massachusetts, comparable in scope to the recently enacted Chapter 58 of the Acts of 2006 (“An Act Providing Access to Affordable, Quality, Accountable Health Care”) or, outside the health insurance area, to the Electric Utility Restructuring Act of 1997 or the Education Reform Act of 1993.

² In his remarks offering the voter-approval amendment, Sen. Moore made this very distinction. He referred to the Commonwealth’s recent efforts at incremental improvement – expanded children’s insurance and a fully funded prescription program, neither of which anyone thinks should be referred to the voters – with the comprehensive (and potentially expensive) reform and restructuring plan he saw as being what the HCA calls for.

requirements of the HCA. Such a plan could be implemented all at once or phased in over a reasonable time. Individual, separately enacted laws that address particular aspects of the access problem, but are not intended to “ensure [by themselves] that no Massachusetts resident lacks health insurance coverage,” would not be subject to the voter-approval requirement, even though they may contribute ultimately to achieving overall compliance with the aims of the HCA. In close cases, rulings by the appropriate parliamentary officer may be made to distinguish laws that will require voter approval from those that do not, much like the rulings now required to determine if a proposed law (such as one that involves the disposition of state property or the imposition of additional personnel costs on cities or towns) requires special procedures.³

B. Purpose of the HCA.

In addition to examining the text of the provision at issue, Massachusetts courts interpret constitutional language in a manner that is consonant with the general purpose and design of the constitutional provision in which the language is found. See, e.g., Mount Washington v. Cook, 288 Mass. 67, 70 (1934) (“The aim of all interpretation is to give effect to the dominating idea of the instrument. Statements in the Constitution and its Amendments must be given effect in consonance with the end they are designed to accomplish.”); McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 559 (1993), quoting Cohen v. Attorney Gen., 357 Mass. 564, 571 (1970) (“the Constitution `is to be interpreted in the light of the conditions under which it and its several parts were framed”); Mazzone v. Attorney General, 432 Mass. 515, 526 (2000), quoting Tax Comm'r v. Putnam, 227 Mass. 522, 524 (1917) (A constitutional amendment should be “interpreted in the light of the conditions under which it . . . [was] framed, the ends which it was designed to accomplish, the benefits which it was expected to confer and the evils which it was hoped to remedy.”)

The perceived evil to be addressed by the HCA was not that the Legislature has been reckless and profligate in enacting health coverage legislation that is immune from popular referendum, thereby necessitating a broadly applicable voter-approval requirement. Rather, to the contrary, the manifest purpose of the HCA is to remedy the persistent and growing problem of the uninsured in our society by mandating some form of legislative response.⁴ As has been expressed both informally by the HCA’s proponents in their public communications about the measure, as well as in their formal testimony to the relevant committees during the art. 48 process, the HCA defines the goal, but preserves maximum flexibility to the political branches of the Commonwealth in achieving the defined goal. More specifically, the HCA permits the Commonwealth to adopt a single comprehensive health insurance system that by itself meets the constitutional standards, or the constitutionally prescribed outcome can be achieved by a pastiche of smaller, particularized coverage programs. The chief objection of the HCA’s opponents is

³ The Legislature may also adopt rules to assist in determining whether the voter-approval requirement applies to any particular legislative act. Such legislative determinations, while not binding on a reviewing court, will be given substantial deference in close cases.

⁴ The HCA started its procedural journey to adoption as part of our Constitution well before the recent enactment of Chapter 58, but that act’s passage highlights another purpose of the HCA, which is to stand as an obstacle to the repeal of such comprehensive legislation, at least without the substitution of a plan at least as efficacious in meeting the HCA’s standards.

that any unified legislative plan to meet the comprehensive goals of the HCA is not fiscally sustainable and should not, therefore, be a mandate potentially enforceable by the courts. As the voter-approval language was inserted at the behest of those voicing such objections, it should be read as being addressed to their concerns. Accordingly, the voter-approval requirement should be read to apply to only such legislation as would implicate the kinds of sustainability issues that arise when coverage is provided to (or mandated for) all of those who have little or none, that is, legislation that is intended to achieve universal access. Admittedly, this approach will not yield a bright line that will settle the very close cases, but it should serve to exempt from a voter-approval requirement the great run of health legislation that the Legislature routinely considers.⁵

C. Practical Considerations.

Another important principle of constitutional interpretation is that an interpretation must yield a result that is workable. An amendment article that establishes a principle of government “must be interpreted in harmony with the other parts of the Constitution so as to make the whole a consistent frame of government. It must also be given such scope as to render it practically workable toward the accomplishment of those objects to which it appears to be directed.” Opinion of the Justices, 237 Mass. 598, 607-608 (1921).

Without belaboring the point, it appears to me that a broad application of the voter-approval requirement to virtually all new health legislation (and, on the face of the measure, to all executive branch implementation efforts) is unworkable and at odds with common sense. Broad application of the requirement would, for example, preclude emergency legislation prompted by a public health threat or impede the adoption of new health coverage programs funded by the federal government. The SJC has rejected an interpretation of constitutional language far less ambiguous than that presented here where adoption of its literal mandate would defeat the general purpose of the provision in which it appears. See Tobias v. Secretary, 419 Mass. 665 (1995) (language in art. 48 requiring that Attorney General’s summary of ballot questions appear “on the ballot” did not preclude legislation authorizing separate information sheets to contain such summaries, where the number and length of such summaries in the 1994 election made it practically unworkable to fit them all “on the ballot”). For similar reasons, I believe that the Massachusetts courts would not apply the voter-approval language as broadly as has been suggested.

In sum, while work can profitably be undertaken to articulate a more precise standard to distinguish the kind of legislation that is subject to the voter-approval requirement from that which is not, it seems clear enough at this juncture that the requirement applies to a far narrower class of laws – viz., those that provide for universal coverage – than has been suggested. It is highly unlikely that the Massachusetts courts will interpret the requirement in a manner that is neither compelled by the constitutional text, consonant with the main design of the HCA, nor practically workable.

⁵ I note that there is nothing in the HCA, as amended, that indicates that if particular legislation is submitted to, but not approved by, the voters, the underlying constitutional obligation to ensure access is dissolved.