

Gupta / Wessler *Issues & Appeals*

May 4, 2020

Peter R. Marksteiner, Clerk of Court  
U.S. Court of Appeals for the Federal Circuit  
717 Madison Place, NW  
Washington, DC 20439

Re: *Nat'l Veterans Legal Servs. Program v. United States* (Nos. 19-1081, 19-1083), argued February 3, 2020  
before Judges Lourie, Hughes, and Clevenger – supplemental authority under Rule 28(j)

Dear Mr. Marksteiner:

Last week, in *Maine Community Health v. United States* (Apr. 27, 2020) (attached), the Supreme Court authorized a damages action seeking payment from the government of money allegedly owed under the Affordable Care Act. Three aspects bear emphasis.

1. The case did not involve an illegal exaction (unlike this case). As explained in our response brief (at 14-26), illegal-exaction claims don't require money-mandating language. Nothing in *Maine Community Health* disturbs this settled rule. To the contrary, it favorably cites (at 26) both the Solomson treatise, which articulates the rule, Response Br. 21-23, and *United States v. Testan*, 424 U.S. 392 (1976), which “approved the Court of Claims’ assertion of its jurisdiction over claims seeking return of money paid to the government,” *N.Y. Life Ins. v. United States*, 118 F.3d 1553, 1556 (Fed. Cir. 1997). And even the lone dissenter cited the page from *Testan* drawing this distinction and acknowledged (at 6) that certain claims “may be properly asserted simply as a matter of precedent.”

2. Because the case didn't involve an illegal exaction, the Supreme Court applied the money-mandating test—asking whether the ACA “can fairly be interpreted as mandating compensation” for a breach—and affirmed this Court's holding that the Tucker Act authorized suit. Op. 24-30, nn.12-14. Although this test is inapplicable here, *Maine Community Health* shows why it would be easily satisfied regardless. Just as breach of a “statutory promise to *pay* for services rendered *to* the Government” “will typically display an intent to provide a damages remedy for the defaulted amount,” breach of a statutory limit on *charging* for services rendered *by* the government displays an intent to provide a damages remedy for the unlawfully exacted amount. *Id.*

3. On the merits, the Court held that a subsequent appropriations rider did not alter the statutory obligation, and expressed “doubt” that statements from individual legislators “could ever evince the kind of clear congressional intent required to repeal a statutory obligation through an appropriations rider.” Op. 22. Likewise here, the district court correctly held that snippets from the Appropriations Committee did not “amend” the E-Government Act. Opening Br. 32-35.

Respectfully submitted,

/s/ Deepak Gupta  
*Counsel for Appellants National Veterans Legal Services  
Program, et al.*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2020, I electronically filed the foregoing 28(j) letter with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

/s/Deepak Gupta

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