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April 2, 2012

THE SUPREME COURT MULLS OBAMACARE; THE HEALTH CARE INDUSTRY MULLS THE SUPREME COURT

RESOURCE LINKS

The Patient Protection and Affordable Care Act:
http://www.ebglaw.com/files/38855_Patient%20Protection%20and%20Affordable%20Care%20Act.pdf

The Supreme Court of the United States Patient Protection and Affordable Care Act Case Filing:
http://www.supremecourt.gov/docket/PPAACA.aspx

The Supreme Court of the United States Oral Argument Recordings and Transcripts:

- March 26, 2012
  http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=11-398-Monday
- March 27, 2012
  http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=11-398-Tuesday
- March 28, 2012

  Morning Session:
  http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=11-393

  Afternoon Session:
  http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=11-400

With a marathon three days of arguments about the constitutionality of the Patient Protection and Affordable Care Act (the "ACA") now completed, the Justices of the Supreme Court of the United States, having conducted their post-argument conference, are turning their attention to drafting and the discussions that will lead to a majority opinion and, likely, several dissents and concurrences. The Court's decision should be forthcoming before the end of June, when the current term ends. In the interim, the health care industry and employers generally will be watching eagerly as they plan their provider and payer activities, their employees' coverages, and their investments, acquisitions, and divestures. While, as we will show, the ultimate decision is shrouded in doubt, there are several matters that can be identified in the short run.

How Do the Justices Stack Up?

It has been reported widely that the government did not provide the Justices with a persuasive defense of the ACA, and so conventional wisdom has suggested that the most-controversial provision of the ACA is a dead letter. That provision is the so-called "individual mandate," which requires that most people above the Medicaid eligibility level purchase health insurance or suffer a penalty administered under the Internal Revenue Code ("Tax Code") by the Internal Revenue Service ("IRS"). Arguably, the government was unable to articulate a cogent limiting principle that would govern what would appear to be an otherwise unlimited Commerce

Clause power under which the Congress could not only mandate health insurance but also force unwilling participants to enter commerce to do just about anything else that was considered a national priority, like buying American cars.

While the individual mandate may, in fact, ultimately fall and perhaps take most or all of the rest of the ACA with it, the press and other commentators may be a bit premature in predicting a "conservative" majority in favor of killing it. That prematurity is the result of the consistent overestimation of the importance of oral arguments in the Supreme Court. In fact, oral arguments rarely influence the outcome of a case and the Justices' comments and questions often are no more than the exploration of troubling issues, not their final determination of them. The parties' and *amicus curiaes'* brief, as well as the Court's clerks' memos and the Justices' own research and views, will be far more influential. So is there a count that can be made now, and is it determinative?

It is likely that the members of the Court's so-called "liberal" wing – Justices Ginsburg, Breyer, Sotomayor, and Kagan – will support the ACA generally and the individual mandate particularly, though they will have to do a lot of the heavy lifting that the government had failed to manage. Does that mean that the five so-called "conservatives" will vote the other way? Not necessarily.

Correspondingly, it is highly probable that three of the conservatives – Justices Scalia, Thomas, and Alito – will vote to strike down at least the mandate and, perhaps, the rest of the ACA as well.
Particularly surprising was the apparent vehemence of Justice Scalia in attacking the mandate during argument. A number of academics and counsel had thought that Justice Scalia's vote might have been in play because of the expansive view of the Commerce Clause power that he expressed in earlier cases. They probably have been proven wrong.

Despite reports from many observers to the contrary, the views of Chief Justice John Roberts and Justice Anthony Kennedy, the perennial swing voter, can't easily be determined. Their questions and comments, which seemed, at first blush, to have been antagonistic to the government, ultimately became balanced. Many now believe that, if Justice Kennedy tips the balance to the supporters of the mandate and the ACA, the Chief Justice will join him. And, if Kennedy goes the other way, Roberts will too. Thus, there is a good chance of a 6-3 majority one way or another. But it is not possible to say "which way" yet. There is another option, which is discussed below, under which the Court might dismiss the consolidated cases as premature.

THE ISSUES

Will the Individual Mandate Survive?

Does the Commerce Clause authorize Congress to require that almost all persons in the United States purchase health insurance? Faced with 50 million uninsured persons, cost shifts totaling $40+ billion annually, which is an effective surcharge of $400 for every policyholder, and unwilling to try to impose a tax-based universal national health insurance system, Congress passed the ACA. Among its key provisions is the individual mandate to mitigate the rising costs of health insurance. Because the new law prohibits insurance companies from denying coverage to sick people and from charging them more than others in their communities, Congress reasoned that some Americans would avoid buying insurance until they became ill, at which point insurance companies would have to give them coverage.

Health insurers and the administration argued that absent healthy people, insurance companies would have an adversely selected risk pool of persons who required expensive care and thus would lead to higher, unaffordable insurance premiums. In order to make it feasible for the insurance companies to cover sick people, they argued successfully to the Congress that healthy people should be required to buy insurance.

People who are not exempt from the requirement (e.g., Native Americans, religious objectors, and prisoners) and yet refuse to buy health insurance will have to pay a penalty. People who are too poor to afford insurance will not have to pay the penalty and will likely become Medicaid eligible.

Opponents of the mandate argue that the law is not regulating people who are already engaged in commerce, or intend to engage in commerce, but is forcing people to engage in commerce against their will. Thus, Congress is trying to regulate *inactivity*, not economic *activity*. If the individual mandate is upheld, the Commerce Clause would be without any limit or constraining standard. If Congress can force people to buy insurance, it could, under the banner of economic necessity, force people to buy anything, whether American cars or domestic produce, or anything deemed important to the national interest.

The federal government argues that the individual mandate is an essential part of a broader regulatory scheme to fix the health care system. Just being essential to this reform doesn't make it constitutional, though. There are other ways that Congress could have helped insurance companies with the added costs of insuring everyone – for example, it could have raised taxes and helped pay for sick people's insurance or changed the antitrust laws to allow greater nationwide competition among insurers that would lower prices.

Does the Anti-Injunction Act Deprive the Court of Jurisdiction?

The individual mandate (or minimum coverage provision) takes effect in 2014. Between now and then, the law could change, as could individual behavior. Thus, the Court has been asked to opine that a review of the tax penalty provision of the ACA's individual mandate is premature because the "Anti-Injunction Act" precludes consideration of the mandate until the future, i.e., after the upcoming presidential and congressional elections.

The tax penalty for those without health insurance is capped at the average price of a health insurance policy. The tax penalty is the only sanction for failing to have health insurance. And the IRS – and only the IRS – may assess, collect, and enforce a tax penalty. Enacted in 1867, the Anti-Injunction Act denies courts jurisdiction over pre-enforcement suits that would restrain "the assessment or collection of any tax." 26 U.S.C. § 7421(a).

Is a Rose a Rose?

The ACA labels its exaction for failure to have health insurance as a tax "penalty" and not as a "tax." But the Anti-Injunction Act arguably still applies because the ACA requires that the tax penalty for failure to maintain health insurance "be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Tax Code. 26 U.S.C. § 5000A(g)(1).

And penalties under subchapter B of chapter 68 in turn must "be assessed and collected in the same manner as taxes." 26 U.S.C. § 6671(a) (emphasis added).

Both the United States and the opponents of the ACA believed that the Anti-Injunction Act doesn't apply here or, if it did, could be waived. Accordingly, the Court appointed counsel to argue this point. The proponent argued that the ACA's individual mandate applies to penalties that are "assessed and collected in the same manner as taxes," and so a pre-enforcement challenge is premature. The opponent argued that the Anti-Injunction Act is not jurisdictional but is merely a claims-processing rule. Congress has ratified that approach by enacting exceptions that speak to the courts' jurisdiction.

During oral argument, none of the Justices seemed sympathetic to the idea that the Anti-Injunction Act barred the current actions. Is the issue therefore a non-starter? Probably, but not necessarily. At least one scenario can be envisioned where there is no clear majority either way as to the mandate or as to severability and a compromise is fashioned to dismiss the case under principles of judicial restraint annealed by the Anti-Injunction Act.

Does Federalism Preclude Congress from Imposing the ACA on the States?

Besides attacking the individual mandate as exceeding the Commerce Clause power and arguing that the ACA's provisions are not severable and that their complaint is not precluded by the Anti-Injunction Act, a majority of the states contend that the enhanced Medicaid eligibility provisions of the ACA, which require a significant expansion of state Medicaid programs including support of health insurance "exchanges," violates basic principles of federalism.

The Spending Clause, contained in Article I of the U.S. Constitution, permits Congress to "provide for the . . . general welfare of the United States" and thus to "fix the terms on which it shall disburse federal money to the States." The states argue that they are coerced by onerous conditions that Congress otherwise would not impose by threatening to withhold all federal Medicaid money. The Solicitor General noted that the states were warned from the beginning of Medicaid that Congress could expand it. Participation in Medicaid is optional but compliance, once in the program, is not.

While several Justices had obvious fun in debating what constitutes compulsion, most commentators, and probably correctly so, believe that the states will lose this argument – unless the individual mandate falls and the Court holds that the entire ACA has to go with it.

If the Mandate Is Unconstitutional, Does the Rest of the ACA Survive?

The Supreme Court will also consider the question of "severability" – whether the entire statute must be struck down because one or two of its provisions are unconstitutional. The Court will focus on whether Congress would have still enacted the law without the unconstitutional provisions.

Traditionally, there is a presumption of severability. However, in the early versions of the ACA, there was a severability clause that was excised from the final law.

On one hand, most of the provisions of the ACA have nothing to do with private insurance or any mandate, e.g., False Claims Act amendments, accountable care organizations, abstinence education,

etc. On the other hand, the legislative history can be read to demonstrate that most of Congress believed that acceptance of the mandate was the legislative price for everything else.

Some Justices hypothesized that if the "heart" of the law were removed, the whole law had to die. Others talked about renovating the structure. All sides seemed daunted by the Herculean task of scouring the myriad provisions of a 2,700 page bill or of taking on what essentially is a legislative, not a judicial, function. In the end, it is possible, assuming that the individual mandate is held unconstitutional, that the Court could strike down the rest of the ACA in its entirety or do nothing else at all, thus leaving it to Congress to repair the situation. Or, the Court could accept the government's view that only the guaranteed issue and community rating provisions are dependent upon the mandate, and no other provisions have to be negated.

What's Next?

As noted, we should have a decision from the Court within the next three months. In the interim, there is a good deal of planning that can be done. If you are a managed care provider, you recognize that, irrespective of the ACA, there is national imperative to control costs while improving care. Whichever way the Court rules, state Medicaid programs are overburdened and the opportunities for Medicaid managed care programs are extensive. If you are in or touch the business of health insurance, you have to be prepared to act quickly, especially if the mandate falls. The issues predominate in pending political campaigns and you might wish to address them there. If you are in the hospital, urgent care, hospitalist, etc., business, you recognize that the imperative to gain efficiencies by consolidating functions and locations is both fostered by the ACA and will survive if the ACA is struck down or limited.

We are in a transitional phase in national health care policy, and entropy creates opportunity. Epstein Becker Green will continue to inform you about emerging opportunities.

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For more information about this issue of *IMPLEMENTING HEALTH AND INSURANCE REFORM*, please contact the author below or the member of the firm who normally handles your legal matters.

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