Supreme Court Hears Challenges to Health Care Reform

Yesterday, the Supreme Court concluded three days of argument on challenges to the Patient Protection and Affordable Care Act (ACA). President Obama signed the ACA on March 23, 2010, and legal challenges to the landmark federal health care reform law arose almost immediately. The law has been challenged by states as well as individual citizens. Many of these challenges have focused on the minimum coverage requirements, generally known as the "individual mandate." The Court agreed to review a decision by the Eleventh Circuit holding the individual mandate unconstitutional, but is also considering many arguments not addressed by the Eleventh Circuit.

While the Court's findings will not likely be known for months, their impact will be felt by employers, health care providers, insurers, individuals and all others who have a stake in the path that federal health care reform follows. While the issues under consideration by the Court this week may appear discrete, they touch upon and are connected to many other provisions of the ACA. For the time being, unless and until the Supreme Court invalidates a provision of the law, the ACA remains in full force and effect. Employers and insurers should continue to comply with those provisions already in effect and should continue to plan for implementation of those provisions that take effect in 2013 and 2014.

The following is a digest of the issues being considered by the Supreme Court. For more in-depth analysis of and insights on the issues, please go to the Ropes & Gray Health Reform Resource Center, where some of our colleagues from our Appellate Litigation and Supreme Court practice offer their thoughts.

Summary of Hearings

Anti-Injunction Act

The first day of oral argument was devoted to whether the Supreme Court may rule on the constitutionality of the ACA now or whether it must wait until the minimum coverage provisions take effect and the payment for failure to comply is due. The ACA requires that individuals obtain minimum essential coverage, and those who do not will be subject to a penalty administered by the IRS. The Court is considering the application of the Anti-Injunction Act (AIA), which prohibits taxpayers from challenging a tax before they have paid it. The appellate courts in the Eleventh and Sixth Circuits found that the Anti-Injunction Act does not apply, but the Fourth Circuit found otherwise. For different reasons, both those defending and opposing the ACA agree that the AIA does not bar the Court from reaching a decision on the constitutionality of the mandate. To ensure that the question would be given due consideration, the Supreme Court appointed separate counsel to argue that the AIA does apply to the penalty under the ACA and therefore bars the Supreme Court from ruling on the merits.

Many of the questions at oral argument were technical points of statutory construction. The justices considered whether the challenge to the individual mandate, which was heard on Tuesday, was necessarily a challenge to the penalty. The justices also examined whether the penalty is a tax for purposes of the AIA and would, therefore, bar consideration of the challenge at this time. Even if the Court determined that the penalty is a tax for purposes of the AIA, the Court might be able to rule on the constitutionality of the mandate if it determines that this defense was effectively waived by the government's failure to raise it. If the AIA acts as a limit on the Court's jurisdiction, then it could not be waived, and the justices asked several questions comparing the structure of the AIA to that of other laws to determine whether the statute is properly deemed jurisdictional. The Court also considered the policy underlying the AIA, including protecting the IRS from numerous lawsuits that would prevent it from collecting taxes, but overall the

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discussion centered on whether the AIA is a jurisdictional limit and whether the ACA's penalty constitutes a "tax" despite Congress's refusal to label it as such.

Constitutionality of the Individual Mandate

On Tuesday, the Court heard arguments about the substantive challenge to the constitutionality of the so-called "individual mandate." Congress's power to regulate interstate commerce has generally been broadly interpreted since the New Deal, but some recent cases have limited that power. At issue is whether imposing a minimum essential coverage requirement is a necessary and proper exercise of Congress's powers to regulate interstate commerce and levy taxes. While the Fourth Circuit did not reach this question, the Sixth Circuit found that the mandate is constitutional and the Eleventh Circuit found that it is not. In both cases, the Courts based their holdings on their interpretation of Congress' power under the Commerce Clause.

The bulk of the arguments on Tuesday focused on Congress' authority to establish the individual mandate under the Commerce Clause. Questioning focused on whether, if the individual mandate were to be upheld, there would be any discernible limits on Congress's power to mandate the purchase of other goods, e.g., broccoli or burial insurance or cell phones to facilitate communication with police officers and firefighters during an emergency, or whether the health insurance market is sufficiently unique and distinct from other markets to authorize enactment of this mandate but not others. Justice Kennedy in particular expressed concern that the mandate appears to change "the relationship of government to the individual in a very fundamental way." While both parties addressed Congress' authority to enact the individual mandate under its taxing authority, the Court asked far fewer questions about this issue.

Severability

Wednesday morning's arguments addressed whether, if the minimum essential coverage requirements were to be found unconstitutional, the individual mandate alone may be struck down, leaving the rest of the law in place. If the Court determines that the mandate is not severable, it could strike down the entire law, including the various insurance reforms with which employers and health insurers are currently required to comply and the provisions governing Medicare and Accountable Care Organizations that have a significant impact on hospitals and other health care providers. Those opposing the law argued that if the mandate is unconstitutional, the ACA in its entirety must be struck down. The administration argued that even if the Court finds the mandate unconstitutional, the remaining provisions of the ACA should remain intact, except for the guaranteed-issue and community-rating provisions, both of which are too closely connected to the individual mandate to be severed. In order to consider the issues fully, the Supreme Court appointed separate counsel to argue that the mandate could be severed from the entire law, including the guaranteed-issue and community-rating provisions, a position which neither party adopted before the Court.

Both counsel and the justices were quite animated during the morning session. While the severability question must be addressed only if the Court finds the individual mandate unconstitutional, many have speculated based on the nature of the questions asked during Tuesday's argument on the mandate that severability has taken on heightened importance for the Court. It was clear from questions and comments that, with precedent that is less than clear, the justices were struggling with how to approach the severability of one provision that is so central to a complex and comprehensive law. They also spent a good deal of time reflecting on the impact of the various options before them. Justice Sotomayor noted that striking down the entire law, which counsel for the Petitioners advocated it should do because the mandate --its heart-- would be removed, would result in an exercise of judicial power that would invalidate provisions that raise no

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constitutional concerns, including the insurance reforms already in effect. On the other hand, Justice Kennedy raised the possibility that doing anything less would, in essence, result in the Court reading into the law a severability clause that does not exist. Counsel designated by the Court to argue in support of striking only the mandate noted that doing so would result in the Act creating economic hardship for insurers, who would still have to provide guaranteed coverage with no limits on pre-existing conditions, something that was never contemplated by Congress when it enacted the statute. Finally, if the Court were to adopt the Government's approach and strike the individual mandate and the guaranteed-issue and community-rating provisions, it would have to determine what Congress deemed essential. While Justices Kagan and Sotomayor signaled a belief that, given the actual text of the Act, the Court could determine that only these three provisions are inseparable, others, including Chief Justice Roberts, appeared more skeptical that the Court could draw a sharp line there and conclude that they were the only non-severable components of the law. In a somewhat light-hearted moment, Justice Scalia wondered out loud whether by engaging in the process of picking and choosing which provisions of the 2,700 page law were essential, the Court would have to undertake a task that would violate the Eighth Amendment's ban on cruel and unusual punishment. It is clear from the arguments made and questions raised that the severability question presents the Court with a significant challenge.

Medicaid

Wednesday afternoon the Court shifted its attention from the individual mandate to Medicaid. The ACA expanded the requirements for states determining eligibility and coverage under Medicaid. Under the ACA, states, through their Medicaid programs, must cover individuals under age 65 with individual or family incomes up to 133% of the federal poverty level beginning in 2014. The federal government will pay 100% of the cost of this expanded coverage for the first two years and will decrease their contribution to the cost of the expansion to 90% in 2020. If any state does not follow the new requirements, the Secretary of Health and Human Services (HHS) has the discretion to withdraw all of that state's federal Medicaid funds, not only those tied to the new rules. Several states argued that this provision is unconstitutionally coercive, indirectly requiring them to expand coverage to account for the potential loss of federal funding or cease participating in the Medicaid program. The administration argued that the federal government has broad authority in how it exercises its spending powers, a proposition that is supported by substantial precedent.

The questions at oral argument focused on the power of the federal government in relation to the states. In response to the arguments of the 26 states challenging the Medicaid expansion, the Justices asked several questions about the meaning of the word "coercion." The justices and counsel attempted to sort out the differences between attractive offers (annual salary of $10 million), difficult choices (your life or your wife's life) and apparent choices that are not meaningful choices (your money or your life). There seemed to be consensus that the last option is coercion, but disagreements among the justices and with counsel about whether the first two are examples of coercion and which might most closely resemble the Medicaid expansion. Counsel for the states argued that the amount of money at stake makes the expansion coercive, but could not provide a clear line for Congress and the courts to use in the future to determine when an expenditure is too big. He further argued that if a state fails to comply with the program's requirements, it could lose all of its Medicaid funding, a proposition that was aggressively challenged by Justice Breyer in light of the discretion granted to the Secretary of HHS regarding the status of on-going funding and the limits the Administrative Procedure Act places on the exercise of that discretion. Questions posed to the Solicitor General were similarly focused on difficult line-drawing. The Court has previously suggested there are limits to Congress's spending power, but has not found any laws to be unconstitutionally coercive. The justices

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asked what sort of law would be unconstitutionally coercive and pressed on the point made earlier, asking whether the states have a meaningful choice to reject these funds.

At the close of the hearings, counsel for both parties framed their concluding comments by focusing on the connection between the Act and individual liberty. The Solicitor General commented that individuals who will, for the first time, receive coverage under the expanded Medicaid provisions, "will be unshackled from the disabilities that those diseases put on them and have the opportunity to enjoy the blessings of liberty." He went on to add that the individual mandate, by providing access to health insurance for 40 million people who are currently uninsured, also "secures[s] the blessing of liberty." Counsel arguing on behalf of the states saw it differently, concluding that "it's a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not…and through the spending power…force the states to do whatever we tell them."

The Court is expected to rule by the close of its term in June.

For further information about the Supreme Court arguments or about the ACA generally, please contact your usual Ropes & Gray advisor and please review our additional analysis on the arguments and on many other aspects of the Act at our Health Reform Resource Center on ropesgray.com.

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