Legislative Affairs: Supreme Court and ACA – After Action Report

Last week, the United States Supreme Court heard one of the most important cases in the last 50 years for not only constitutional law, but also the future of our largest industry: healthcare. The issues before the Supreme Court were complex and of the utmost importance to the future of healthcare and the relationship of individuals with their government.

I will try to summarize the "tone" of the legal community afterwards. I have tried to provide the general consensus and greatest weight of opinion.

1. The Anti-Injunction Act of 1867 – The justices were remarkably "cool" on this issue, and did not interrupt or ask many questions. The argument for applying the "tax" label on the individual mandate was made by counsel appointed by the court, since no involved party supported this argument. It would be very surprising if the court found that this law applies, thus delaying a decision.

2. Severability – A majority of the court seemed very skeptical about the court's role in determining the intent of Congress. From Justice Scalia's "cruel and unusual punishment" comment to Justice Breyer observing it would take a year to divine the intent of every provision in the 2,700 page bill, it appears very unlikely that the Supreme Court would allow a severance of "guaranteed issue" insurance from the provision that would make it possible: the individual mandate.

3. The Individual Mandate – There is a great deal of disagreement over the conclusions that can be drawn from the oral arguments. Most pundits and observers of the court agree that if the opinion was filed today, the individual mandate would be struck down 5-4 or less likely, 6-3. The justices met in conference on Friday, March 30th for a preliminary vote. They will construct their arguments over the coming weeks in an attempt to persuade the other justices. Justice Kennedy, the "swing" vote in many high-profile cases, has changed his vote several times previously during this process and may do so again. Most sources agree that the law has an uphill battle and will only survive if one of the conservative justices upholds the mandate on either the "commerce" or "taxation" clauses.

4. Medicaid Expansion – The Medicaid expansion essentially presents an accept-or-else offer of federal dollars to the states. Surprisingly, the court seemed skeptical about this provision given that the constitutionality of previous expansions has not been questioned. South Dakota v. Dole found that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'", violating various clauses of the Constitution. Some legal experts have hypothesized that given the importance and complexity of the Medicaid issue, the justices may err on the side of judicial conservatism and rule against severability. Using the same reasoning, others believe that this provision is the most likely to be severed and survive regardless of the decision on the individual mandate.

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