Three Possible Outcomes

For three days in late March, the Supreme Court took up the eagerly anticipated challenge to the constitutionality of the Patient Protection and Affordable Care Act or “ACA,” which, when passed, was both hailed and vilified as a sweeping overhaul of U.S. healthcare and the most expansive national legislation passed since the enactment of Social Security and Medicare. Although it has been a full two years since the bill became law, and many of its provisions have already been implemented by health providers, health insurers, and employers, the Court could rule that some or all of its provisions are unconstitutional.

At issue is whether the requirement, or mandate, that individuals purchase health insurance, which is scheduled to go into effect in 2014, is beyond the powers granted the Federal government to regulate commerce and to levy taxes. Should the Court decide that the mandate is unconstitutional, it will also need to determine to what extent the mandate is “severable” from the rest of the ACA, and which provisions, if any, should be left in effect.

For the plan sponsor who provides its employee base with private health coverage, the Supreme Court’s decision, expected as early as June, may divert the current course of health care as prescribed by the ACA and those agencies charged with its implementation during the past two years.

Presuming the Court finds that it has jurisdiction to rule on the case, which it is likely to do, here are three potential scenarios regarding the outcome:

1. **Supreme Court Upholds the Law in Full**
   If the court finds the individual mandate constitutional, then the law will be upheld, and implementation of its requirements will continue. Those who are opposed to the ACA are likely to argue for legislative repeal during the 2012 elections. Should the Republicans win the White House and control of the House and Senate in the fall, they are likely to mount a strong repeal effort during the next Congress.

2. **Supreme Court Holds that the Entire Law is Unconstitutional**
   If the court finds the individual mandate unconstitutional and strikes down the entire law as being beyond the government’s power to regulate commerce, then many of the health care changes already implemented by health care insurers and plan sponsors potentially would have to be undone. These changes include increases in certain benefits, such as the increase in dependent coverage to age 26, as well as the prohibition against annual coverage limits. Other ACA-mandated changes include new rules on healthcare claims and appeals and the required issuance of a Summary of Benefits and Coverage (SBC), which through recent guidance becomes effective this September. While Congress could pass new legislation, given the current environment in Washington and the upcoming elections, this seems unlikely for some time.
3. Supreme Court Holds the Individual Mandate Unconstitutional -Severing Certain Provisions and Upholding Others

Both the government and an amicus (or “friend,” appointed by the Court) argued that parts of the act may continue to stand even if the individual mandate is found to be unconstitutional. There are two versions of this argument. The first, advocated by the government, is that if the court strikes down the mandate, then provisions involving guaranteed issue and community rating, which are strongly linked to the mandate, should also be struck down. The rest of the ACA should continue in effect, however. The basis of this argument is that premiums would soar (and the number of insured might actually decline) if insurance companies were required to cover people who wait until they get sick before applying. But other provisions, such as those establishing exchanges, and many of the provisions affecting employers, could stand on their own and should be allowed to do so.

The second, advocated by the Court-appointed amicus, is that the individual mandate could be struck down on its own, and the rest of the ACA should be upheld. Under this argument, there are other provisions in the act, such as annual enrollment periods, that would prevent people from waiting to get coverage.

At oral argument, several justices seemed skeptical that the Court could properly determine which provisions are integral to the operation of the mandate and which are not, but some suggested the Court could make its own determination, which might be different than those put forth by the parties.

The Court also heard arguments on the constitutionality of the ACA’s expansion of the Medicaid program. Several states argued that because their overall funding for the Medicaid program was linked to a dramatic expansion of eligibility, that the expansion was impermissibly coercive.

Opinion Expected in June

The Court must now determine whether, in its words, it is better to preserve the whole loaf, half a loaf, or alternatively, to decide that the entire issue needs to be revisited by Congress.

As stated, an opinion on all these matters is expected this June prior to the convening of party conventions and the November presidential election. One thing is certain: no matter what the ruling, it will be historic and controversial.