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PPACA: A Pandora's Box For The Health Care Industry

Law360, New York (March 23, 2012, 1:12 PM ET) -- By the end of March 2012, the United States Supreme Court will have heard three rounds of oral argument on the constitutional challenges to the Patient Protection and Affordable Care Act (PPACA). The issues before the court are:

- The constitutionality of the individual mandate, which requires the vast majority of those not yet eligible for Medicare to purchase insurance or pay a tax penalty.
- If the individual mandate is found to be unconstitutional, whether other provisions of PPACA are also struck down.
- Whether the individual mandate challenge should be decided prior to the imposition of the penalty on a noncomplying individual. Under the Anti-Injunction Act, lawsuits to enjoin the imposition of a tax are prohibited. In prior cases, the Supreme Court held that the Anti-Injunction Act applies to tax penalties as well as taxes.

The Supreme Court will also consider a related challenge to constitutionality of the expansion of Medicaid under PPACA, in a related challenge brought by a number of states. A decision is expected by the end of June.

It is not likely that the Supreme Court will rule that the constitutional issue must be deferred until after Jan. 1, 2014, when the individual mandate provision takes effect. Thus, the most likely scenario is that the constitutionality of the individual mandate will be decided by summer.

The Individual Mandate and the Healthcare Market

PPACA prohibits insurers from rejecting applications for health coverage based on medical history or charging higher premiums to individuals with pre-existing conditions. The individual mandate is designed to address the problem of adverse selection that arises when individuals purchase insurance coverage only when they anticipate needing healthcare services and then dropping coverage.

Adverse selection can drive up prices, causing the comparatively healthy to drop coverage, leaving a smaller pool of sicker people driving yet higher prices. The individual mandate forces the comparatively healthy to stay in the risk pool.

The key issue before the court will be whether healthcare is sufficiently different from other products in the market that the federal government can use its authority to regulate interstate commerce to compel purchase of health coverage.

Opponents of PPACA note that the Supreme Court has never held that the federal government has authority to force individuals to purchase goods or services. In contrast, the authority of the states to compel purchase of insurance, for example, mandatory automobile insurance, is well-established. The opponents question whether a meaningful distinction can be made between compulsory purchase of health insurance and compulsory purchase of any other good or service.

The defenders of PPACA assert that healthcare services are distinctly different than any other market. In a variety of settings and situations, a healthcare provider does not have discretion to refuse services to those who cannot pay. An auto dealer can refuse to sell cars to people who do not have the price; a hospital cannot turn away a person with an urgent need for medical care because they do not have funds.

If the Supreme Court upholds PPACA, it is likely to do so on grounds that emphasize the differences between the market for healthcare services and other goods or services.

Severability of the Individual Mandate from Other PPACA Provisions

In a number of surveys of sophisticated Supreme Court watchers, modest to moderate majorities predict that the court will uphold the individual mandate.

If the Supreme Court finds the individual mandate unconstitutional, it will have to determine whether all of the PPACA provisions fail with the constitutional mandate. PPACA does not contain a severability clause, but the absence is not dispositive. The general rule is that a court should excise as little of a statute as possible where it finds a portion of a law to be unconstitutional.

Given the assumption that the Supreme Court finds the individual mandate to be unconstitutional, relatively few court observers expect PPACA to be struck down in its entirety. However, there are a range of predictions regarding which PPACA provisions the court would survive and which fail with the individual mandate.

The most logical outcome is that if the individual mandate is struck down, the ban on medical underwriting and pricing would also be struck down as inextricably linked to the individual mandate. A broader construction of severability could result in elimination of the federally mandated insurance exchanges, which will provide subsidized coverage for lower income individuals who are not eligible for Medicaid and the penalties imposed on employers whose employees purchase subsidized coverage.

Impact on the Healthcare Market If PPACA Is Upheld

A wide range of PPACA implementation efforts are in a holding pattern, waiting for the Supreme Court decision. If PPACA is upheld, many states that have held off implementing

insurance exchanges will scramble to catch up. The exchanges must be ready to start enrollment in private health coverage plans by the fall of 2013. If state does not have a functioning exchange, the U.S. Department of Health and Human Services will provide a federally administered exchange.

The healthcare delivery provisions of PPACA create incentives for consolidation and vertical integration in the healthcare market. This trend toward consolidation is driven both by economic factors and demands for improved quality at a lower cost.

From an economic perspective, large practices can absorb the cost of electronic medical record systems more readily than small practices. Accountable care organizations and parallel initiatives by healthcare plans are facilitated by closer links, including joint ventures and common ownership, between medical providers and hospitals.

To the extent that uncertainty about the future of PPACA has slowed adopting of new programs, a Supreme Court decision upholding PPACA is likely to accelerate implementation of accountable care organizations, electronic medical record programs and other healthcare delivery provisions of PPACA.

Perhaps the most significant impact of a decision upholding the individual mandate is the increased demand for healthcare services resulting from the increase in the insured population. 2014 and the following few years are likely to see significant pent-up demand for healthcare services.

In the longer term, between a larger insured population and aging demographics, the demand for healthcare services will grow. At the same time, the public demand for affordable coverage will put pressure on healthcare providers to control costs without reducing quality.

Impact on the Healthcare Market If the Individual Mandate Is Struck Down

If the Supreme Court strikes down the individual mandate, and the closely related ban on medical underwriting and pricing, the explosive increase in the insured population will not occur. If the healthcare delivery provisions of PPACA remain in place, the trend toward consolidation is likely to continue.

Indeed, even if PPACA is struck down entirely, the debate and analysis of healthcare delivery models spurred by PPACA will remain a force in the private market. Health carriers will continue to press for cost savings and quality improvements.

Thus, the current trend toward consolidation and modified models of healthcare is likely to continue regardless of the decision Supreme Court issues in June.

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