Supreme Court to Consider AIA's Applicability to Healthcare Law

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In accepting for consideration five questions regarding the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148), the Supreme Court on November 14 granted an hour exclusively for arguments on whether the Anti-Injunction Act (AIA) bars consideration of the constitutionality of the individual mandate.

Section 5000A, added by the PPACA, requires nonexempt individuals to have health insurance starting in 2014. If they fail to buy insurance, a penalty is assessed on their income tax return. The government has the authority to regulate interstate commerce and the authority to tax, but the PPACA says it imposes the penalty under Congress's commerce clause power. (For tax-related excerpts of P.L. 111-148, see *Doc 2011-4583* or *2011 TNT 43-55*.)

The Eleventh Circuit found the mandate unconstitutional under the commerce clause and the taxing power but did not address the AIA, which the district court held did not bar the suit. (For *Florida v. U.S. Department of Health and Human Services*, Nos. 11-11021, 11-11067 (11th Cir. Aug. 12, 2011), see *Doc 2011-17561* or *2011 TNT 158-14*. For a petition for certiorari from Florida's attorney general, see *Doc 2011-23738* or *2011 TNT 219-14*. For a cert petition from the National Federation of Independent Business, see *Doc 2011-23735* or *2011 TNT 219-13*.)

Section 7421(a) forbids lawsuits that would restrain the assessment or collection of any tax, and the government initially asserted that the AIA prevented the plaintiffs from proceeding until the penalty provision of the mandate was enforced against them.

Although the government changed positions and now agrees with the plaintiffs that the AIA does not prevent federal courts from considering the merits of the healthcare cases, the Supreme Court has an independent obligation to satisfy itself that it has jurisdiction to hear the case.

In its supplemental brief to the Fourth Circuit, the government said that because the individual mandate penalty provision is in chapter 48 of subtitle D, it is not covered by the AIA. (For *Liberty University v. Geithner*, No. 10-2347 (4th Cir. Sept. 8, 2011), see *Doc 2011-19031* or *2011 TNT 175-12*. For prior coverage, see *Tax Notes*, Oct. 3, 2011, p. 17, *Doc 2011-20685*, or *2011 TNT 190-1*.)

Not all observers agree that the AIA is inapplicable on its face. Mortimer M. Caplin, former IRS commissioner under President Kennedy and now with Caplin & Drysdale, said that whether the AIA applies to the individual mandate is a vitally important question. Caplin and Sheldon Cohen, also a former IRS commissioner, submitted an amicus brief to the D.C. Circuit in *Seven-Sky v. Holder* arguing that the AIA applied. Although the majority did not find it applicable, the court discussed the AIA at length in its opinion. (For the brief, see *Doc 2011-20706* or *2011 TNT 190-15*. For *Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir. Nov. 8, 2011), see *Doc 2011-23522* or *2011 TNT 217-19*.)

Caplin said the statute "goes to the heart of our whole tax system," both as a historical matter — the first income tax was enacted in 1861, and the AIA was adopted in 1867 — and as a practical one. To permit the IRS to handle more than 250 million returns and associated disputes in an orderly fashion, it is essential to prohibit suits before the disputed tax is actually paid or defended against in an enforcement action, he said.

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Randy Barnett, the Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center and an attorney for the National Federation of Independent Business, one of the plaintiffs in the case, said the full hour allotted for arguing the issue indicates that the Court intends to take a detailed look at it. He said he does not believe the AIA bars the lawsuit but that "the Court had to brief it, given the decisions in the Fourth Circuit and *Seven-Sky*."

Neil S. Siegel, a professor at Duke University, said the AIA poses a significant obstacle to resolving the case. "Both sides have pretty good arguments about what constitutes a tax for purposes of the AIA," he said.

Congress could pass a law making it clear that the AIA does not apply to lawsuits challenging the mandate, Siegel said. Section 7428(a), which allows organizations to challenge a determination of their

tax-exempt or private foundation status without being barred by the AIA, sets a precedent. Alternatively, the Court could find the AIA inapplicable because current lawsuits do not restrict the government's authority to assess and collect the tax when it becomes effective in 2014, he said. That interpretation would sidestep arguments about whether the language of the statute or its location in the code should indicate whether it applies.

Siegel criticized arguments that separate the mandate from the penalty and then assert that suits against the mandate are not barred because the AIA does not apply. ''I don't see how you can divide the statute like that. . . . It's not clear the plaintiffs have standing to sue without the penalty,'' he said.

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Mathew B. Staver, founder and chair of Liberty Counsel, which is representing Liberty University in its challenge to the PPACA, said he is pleased that the Court granted cert and directed the parties to address the AIA. In September the Fourth Circuit held that the university's case was barred by the AIA. Its certiorari petition is being held by the Supreme Court, but Staver said Liberty Counsel will submit an amicus brief in *Florida*. (For the university's petition, see *Doc 2011-21548* or *2011 TNT 199-19*.)

The cert grant raises the question of who might be appointed to argue for the application of the AIA. The government and the parties all agree that the AIA does not apply, so the Court may appoint an amicus to argue the issue. Staver said that if the Supreme Court chooses to appoint an amicus to argue that the AIA applies, it must do so soon, because the brief will be due in 45 days.

One likely candidate is Alan B. Morrison, the Lerner Family Associate Dean for Public Interest and Public Service Law professor at George Washington University, who wrote the amicus brief submitted by Caplin and Cohen. Morrison told Tax Analysts that he would accept the position if asked. Section 7421(a) refers to ''persons,'' but Morrison said he would argue that the AIA applies to all suits against the mandate, whether filed by states or by individuals. ''It's hard to imagine why Congress would allow states to interfere with tax collection, but not individuals,'' he said.

The Supreme Court also granted certiorari on whether the individual mandate and the Medicaid amendments are constitutional. If the mandate is unconstitutional, the Court must then decide whether the PPACA must be invalidated in its entirety because the mandate is not severable from the rest of the act. It might address whether the individual mandate involves a tax or a penalty, which underlies its constitutional basis; the legislative history of the PPACA refers to it as a tax. ■