

“Are we there yet?”  
The Continuing Travails of the Affordable  
Care Act

Oregon Chapter HFMA Spring Meeting – May 15, 2014

*Presented by*

**Bruce F. Howell, J.D., M.S.**

Schwabe, Williamson & Wyatt

bhowell@schwabe.com

# A Brief History of the Universe Prior to the Affordable Care Act

# The ACA

- The Affordable Care Act, Pub. L. 111-148, March 23, 2010
- The Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, March 30, 2010



# The Most Important Piece of Social Legislation in Fifty Years



# The History of the Law

# Supreme Court Originally Granted Certiorari In Late 2011

# Four Issues Were Before the Court



# I. The Tax Anti-Injunction Act





## II. The Individual Mandate



## III. Severability



## IV. Medicaid Requirements

# The Tax Anti-Injunction Act

The issue under this Act was whether the Supreme Court could actually hear the case since, if the Individual Mandate were a “tax”, then the Anti-Injunction Act would prohibit the Court from having jurisdiction

# The Tax Anti-Injunction Act

- **Held:** The requirement that a person pays money to the government if that person does not purchase insurance is a “penalty” and not a “tax” under this Act. Thus, the challenge to ACA can go forward.

# The Individual Mandate

- The issue posed by the plaintiffs was that the Commerce Clause in the US Constitution did not allow the Federal government to cause citizens to perform an act – i.e., purchase insurance

# The Individual Mandate

- Section 1501 of The Patient Protection and Affordable Care Act of 2010 requires that every United States citizen, other than those falling within specified exemptions, maintain a minimum level of health care coverage for each month beginning in 2014 (the “Individual Mandate”). Failure to comply will result in a penalty payment to be paid along with that person’s federal income tax return.

# The Individual Mandate

- Congress shall have the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”
  - U.S. Constitution, Article 1, Section 8, Clause 3



# The Individual Mandate

- Congress shall have the power “(t)o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.”
  - U.S. Constitution, Article 1, Section 8, Clause 3

## Individual Mandate

- **Held:** The Individual Mandate is unconstitutional under the Commerce Clause or under the Necessary and Proper Clause. However, Congress has the power to tax, and the ACA is a valid exercise of that power.

# Severability

- The question here was whether, if the Individual Mandate were unconstitutional, could it be severed from the rest of the ACA and allow the balance of the law to go into effect.

# Severability

- **Held: Moot**

# The Medicaid Issue

- The question presented here was whether the Federal government could “cram down” the requirement that the States increase their Medicaid expenditures in exchange for large grants from the Federal government

# The Medicaid Issue

- **Held:** Congress has overstepped its power over the states and the forcing of expanding Medicaid coverage is unconstitutional. However, the states may participate voluntarily.

# New Challenges

- The new challenges are in four categories

## Subsidies

- The difference between state and Federal exchanges and their subsidies



# Religious Owners

- Closely held for-profit corporations

# Non-Profit Corporations

- Religious organizations complaining of contraceptive benefits

# Tax

- The Constitution requires a tax bill to originate in the House of Representatives

## The Subsidy Issue

- Federal exchanges have no subsidy language in the law
- State exchanges have subsidy language

## The IRS Stance

- The Internal Revenue Service has nevertheless issued regulations allowing such subsidies

## Pending Litigation

- The states of Indiana and Oklahoma and certain business groups have filed suit
- The Halbig case is before the United States Court of Appeals for the District of Columbia

## The Issue

- It is a question of federalism and the power of the executive

## The Cases

- *Jacqueline Halbig et al. v. Kathleen Sibelius, et al.*; Case No. 1:13-cv-00623 (U.S.D.C., Dist. Col.)
- *State of Oklahoma v. Kathleen Sebelius and Timothy Geitner*; Case No. 6:11-cv-00030-RAW (U.S.D.C., ED., Okla.)



## The Closely Held Issue

- The issue is whether or not closely-held private corporations that are owned by persons of strong religious persuasions should be required to provide women's contraceptive services as part of essential health benefits

# The Closely Held Issue

- The First Amendment states that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...”

# The Religious Freedom Restoration Act of 1993

- This legislation was a direct reaction to the case of Employment Division, (Oregon) Dept. of Human Services v. Smith, 494 U.S. 872 (1990)

# The Religious Freedom Restoration Act of 1993

- The main focus is the Religious Freedom Restoration Act of 1993 which states that if a law “substantially burdens” freedom of religion, then the government must show that the law serves a compelling governmental interest and is tailored in the least restrictive manner
- 42 U.S.C. §2000bb-2000bb4

## The Entity Question

- Also in question is whether or not a corporation is a “person” for purposes of the RFRA
- *Citizens United v. Federal Election Commission* 558 US 310 (2010)

## The Cases

- *Hobby Lobby Stores Inc. v. Sebelius*, Case No. 12-6294 (10th Cir. June 27, 2013) (U.S. SCt 13-354 and 356)
- *Conestoga Wood Specialties Inc. v. Sebelius*, Case No. 13-1144 (3d Cir. June 26, 2013) (U.S. SCt 13-354 and 356)

## The Non-Profit Issue

- Under the ACA religious organizations have an exemption but still the organizations do not want to provide contraceptive services to their employees and do not want to be part of a system that does so.

## The Case

- *University of Notre Dame v. Kathleen Sebelius et al.*,  
Case No. 3:13-CV-01276 in the District Court  
for the Northern District of Indiana



## Tax Case

- This case challenges the ACA on the basis that it began in the Senate, and per the Constitution (the “Origination Clause”; Article I, Section 7) the law should have been introduced in the House of Representatives since the Individual Mandate is a “tax”

## Tax Case

- Held: Not a “Bill for Raising Revenue”
- *Sissel v. US Dept of Health and Human Services et al.*, Case No. 10:1263 (BAH) (June 28, 2013)
- On appeal to DC Circuit Court of Appeals with amicus filed by 40 GOP House members

# The Oregon Mess

- There are two distinct legal issues that could impact the transfer from a State to a Federal Exchange

# The Oregon Mess

- The Legislative Issue
- Unabling the enabling legislation



# The Oregon Mess

- The Subsidy Issue
- The Halbig Case



# Questions?



# Thanks for Attending

- Schwabe, Williamson, & Wyatt is one of the Pacific Northwest's leading law firms, with a full-service team of health-care attorneys addressing the needs of physicians, hospitals, health insurers, and employer groups nationally.
- We provide our clients with regional resources and collaborative problem-solving coupled with a strong commitment to our communities.
- Our health care team brings a wealth of experience in the industry to each and every client matter.