

## Health Care Reform Review Committee Testimony

### April 11, 2012

Chairman Keiser and committee members, for the record I am Rod St. Aubyn representing Blue Cross Blue Shield of North Dakota. I was asked to provide scenarios that would impact insurers should the Supreme Court rule all or part of the ACA unconstitutional.

As background for the Supreme Court case, the committee may be aware that there are 4 issues that were argued before the court.

1. Anti-Injunction Act – This act basically says that tax issues cannot be considered by the court until these taxes actually go into effect. In effect, if the penalties within the ACA are considered taxes, is the Supreme Court prohibited for considering the law suit until 2015, once the penalties/taxes are in effect? Most legal observers of the hearing feel that the Justices will say that the Anti-Injunction Act does not apply and that they can act on the suit at this time.
2. Individual Mandate – The 26 states that brought the suit are arguing that the individual mandate is unconstitutional. This is the most publicized component of the arguments.
3. Severability – This is a critical component of the arguments. This answers the question, “IF the individual mandate is unconstitutional, what other parts of the ACA can survive without the individual mandate.” The administration was arguing that if the individual mandate is stricken, the Court should also strike the “guaranteed issue (prohibition of pre-existing conditions exclusions) and the community ratings”. Those opposed to the ACA argue that the entire act is so intertwined that the entire act should be stricken if the individual mandate is ruled unconstitutional.
4. Medicaid Expansion – The States that sued argued that they are coerced into participating in the expansion of Medicaid (a state program) because of the fear and power of the Secretary of HHS to withhold all Medicaid funding should a state decide not to participate in this Medicaid expansion. The states also argued that this expansion of Medicaid will put a large financial burden on these states even though there are federal funds for the expansion for several years.

In analyzing the impact of the Court’s possible rulings it becomes very difficult because of a myriad of possible decisions. Because so many components are indeed intertwined with the individual mandate, the final court ruling will cause a scramble for Federal and State lawmakers and insurers alike.

I will first take just the major issue being considered – the individual mandate. Should the court rule that the individual mandate is unconstitutional, but the rest of the act is “severable” and

thus can stand on its own, then insurers, lawmakers, and consumers are going to be faced with a significant challenge. This would mean that insurers would have to accept any individual; regardless of their risk and that there would be a “guaranteed issue” requirement. There would be no incentive for individuals to purchase and maintain health insurance coverage. They could simply purchase insurance when they need it. Literally, someone could purchase insurance in an ambulance on the way to the hospital as a result of some accident and the insurer would have to cover the costs. This would be like permitting people to purchase homeowners insurance and having coverage for a fire that already destroyed their property. This would result in premiums increasing even more than already anticipated as a result of the ACA. Most likely federal lawmakers would scramble to come up with solutions to this situation, such as limited open enrollment periods, higher premiums for late enrollees, possible waiting periods for pre-existing medical conditions, etc.

If the court were to rule that the individual mandate AND the Medicaid expansion is unconstitutional, but the rest of the act can stand, then you will have a significant population that would have been eligible for Medicaid coverage now be eligible for subsidies within the exchange. Would there be adequate subsidy funding to compensate for this change?

There are many, many other components within the ACA that could be affected by the court decision such as:

- Exchanges – is there a need and will there be continued funding for the establishment of state exchanges?
- Subsidies – will these still exist?
- Small employer tax credit
- Frontier Amendment – major impact to some medical providers in ND.
- Essential Health Benefits – will these still be required for all products?
- Reinsurance, Risk Adjustment, and Risk corridor programs
- Metallic products on the exchange (Platinum, Gold, Silver, and Bronze Plans)
- Roles of Navigators and Agents
- Expansion of Mental Health Parity
- Near-Term Benefits – many provisions have already been mandated to apply to health insurance such as:
  - Prohibition for annual/lifetime limits
  - Limits on Rescissions
  - Mandated preventive health services with no cost-sharing
  - Dependent coverage for children up to age 26.
  - Uniform explanation of coverage
  - Mandated medical loss ratios

- New appeal processes
- Mandated rate review processes
- Early retiree reinsurance program
- Federal high risk pool
- Internet portal
- Prohibition of children's Pre-ex exclusion (early guaranteed issue)
- Preventive Services – this mandate has already gone into effect, what happens now.
- Coverage of children up to the age of 26

If the entire ACA is stricken, insurers will have to make decisions and possibly change their benefit plans to eliminate these near-term benefits.

Mr. Chairman, I have just barely scratched the surface for some of the components within the ACA. As you can see, the Supreme Court has its hands full trying to rule on the 4 main arguments, and then deciding what should be stricken and what can stand on its own should they rule that the individual mandate is unconstitutional. Legal experts are predicting an answer on June 28, 2012. In the meantime, insurers are faced with the fact that the law is currently in effect and we must continue our efforts to ensure that we are compliant with all the requirements by the different deadlines. These tasks must be completed in a very limited timeframe and we simply don't have the luxury of waiting for a final decision. Every day that we delay is another day we would lose in case the court does find that the act is constitutional. Mr. Chairman and committee members, thank you for the opportunity to speak to you on this issue and its impact on insurers. I would be willing to answer any questions the committee may have.