

EDITORIAL

Does She or Doesn't She?

Readers of a certain age will no doubt remember the Clairol hair coloring advertisement that seemed quite risqué when it first debuted more than 40 years ago. It had many different interpretations and caused quite a stir. I'm now going to ask, "Will they or won't they?" in a similar vein, as we ponder the Supreme Court of the United States and the looming June 2012 decision regarding the Affordable Care Act (ACA).

By now oceans of ink have been devoted to media coverage of the ACA, the three days of unprecedented legal hearings and speculation about the potential outcome. Democrats and Republicans have flooded the airways and the expert "talking heads" have impressed us with their punditry. By Thursday, March 29, 2012, major national newspapers like the *Wall Street Journal* and the *New York Times* had already lined up the faithful on their respective editorial pages.

The punchline of the hearings went something like this, "while so much time was devoted to an evaluation of the Act, it seemed as though the Justices were asking questions that everyday people wanted to know." For example, "Do you really want us to read all 2,700 pages?" and "Are we doing a wrecking project or a salvage project?" I'm sure most readers had their own view of this process. Some political commentators framed the arguments in terms of social class, maligning the "punditocracy" and calling ObamaCare, itself, a "masterpiece of Mandarin abstraction."¹

I would like to quickly reframe some of the issues from this past spring, reflect on my own personal experience as a panelist on a recent National Public Radio program, and attempt to answer the rhetorical question, "Will they or won't they?"

As best as I can tell, the Supreme Court is going to address four questions.² First, the Court will determine whether an archaic law from the late-1800s, known as the Tax Anti-Injunction Act or AIA, precludes a review of the ACA until 2014. The AIA provides that the legality of a

tax cannot be challenged until the tax itself has been assessed. Some experts contend that the individual mandate part of the ACA represents a financial penalty, and therefore, is a tax under the AIA. Since no penalty (tax) will be assessed until 2014, the whole conversation is premature.

The second question that the Court will review remains the "hot button" issue, and that is whether the Federal government can compel citizens to purchase health insurance (otherwise known as the "individual mandate") or pay a penalty. The government attorneys argued strenuously that the federal government has this authority under the Constitution's commerce clause; previously, the Supreme Court has interpreted the section as providing Congress with wide latitude in this arena. The challengers argued that the mandate to purchase a product from a private entity is unprecedented and an intrusion on individual liberty.

The third question the Supreme Court will consider (if they rule the mandate unconstitutional), is whether the mandate is "severable" from the rest of the law. ACA opponents argue that the whole law must be overturned if the Court invalidates any part, because the mandate is "inextricably intertwined with the elements." On the other hand, the government argues that only one or two other portions of the law would fall if the mandate were struck down. These other conditions are the requirements that ensure coverage for people with pre-existing conditions ("guaranteed issue") while not charging them higher premiums (the "community rate").

The fourth and final question is whether the ACA's Medicaid expansion is constitutional and whether states must comply with it in order to remain eligible to receive any federal Medicaid funds.

I would submit that we all need to take a collective big step backward and re-examine the core issues that the bill is attempting to address.

I think the easiest way to frame this argument is the recognition that the ACA is really like two laws in one. One aspect deals with insurance reform; in my view, most of the aforementioned questions to be considered by the Court fall into this category. The other aspect of the law deals with healthcare delivery reform.

I believe the healthcare industry--providers, insurers, employers, essentially all the key stakeholders, have been working diligently on healthcare delivery reform for over two years. Faculty in our School of Population Health and others have been leaders in the conversation regarding delivery reform. For example, we embrace the now famous Triple Aim articulated by Dr. Don Berwick several years ago.³ We recognize that we must improve the experience of care, the health of the population, and reduce cost by reducing waste.

We support the move from "volume to value" and understand that Medicare must transform from a simple purchaser of services to a savvy shopper attuned to getting the most value for the dollars spent. We certainly support integration via bundled payment and coordination of chronic care. These are the critical underpinnings of the definition of population health. I have attempted to summarize the entire delivery reform aspect of the bill in four words, "No outcome, no income."⁴ In my view, the four questions being considered by the Court essentially ignore these central issues. They also ignore the fact that stakeholders within the healthcare system have made substantive progress toward these critically important delivery system goals in the last two years.

On the third and final day of the hearings, I was privileged to appear on *Radio Times with Marty Moss-Coane*, a popular National Public Radio program produced by WHYY, the Philadelphia, Pennsylvania public broadcasting station. This daily call-in program has a wide following and often tackles timely, controversial news events. I

appeared on the program with two other guests: Mr. Ted Rugar, a constitutional law scholar and professor of law at the University of Pennsylvania and Mr. Dick Polman, a popular political commentator in our region. Marty Moss-Coane is a recognized, outstanding radio host, able to synthesize a great deal of information quickly and cut right to the heart of the matter. I thought I prepared well for this important opportunity to help clarify what I saw as some of the “missing issues” in the public debate about the ACA.

When the radio program started, Marty turned to Ted Rugar to help set the stage for the important constitutional questions that were in play. I tried hard to steer the conversation to population health and the progress we’ve made in reforming the delivery system over the last two years. I noted that, in Pennsylvania in particular, we were working hard to reduce unexplained clinical variation and reduce waste by tackling central line associated bloodstream infections, readmissions, and promoting evidence-based medicine. Of course, I sadly recognize that these complex concepts cannot be distilled into a 15-second sound bite on the radio. When the program was open to questions from our listeners, I was truly depressed by the questions, as they focused on a narrow interpretation of the individual mandate.

All the while, information from the Henry J. Kaiser Family Foundation⁵ regarding their up-to-the-minute public opinion polls about the ACA

troubled me. I knew, for example, that 70% of Americans had favorable opinions of “guaranteed issue” and “no cost-sharing for preventive services.” I knew that 71% of Americans also like the expansion of Medicaid. I sadly remembered that a December 2011 tracking poll (also from the Kaiser Foundation) found support for the mandate varied from 17% to 61%, depending on which messages or information opponents or supporters of the mandate hear on the issue. Perhaps surprisingly, the most effective information on changing people’s minds is the basic reminder that under the reform law, most Americans would still get coverage through their employers and so would automatically satisfy the requirement without having to buy any new insurance. After hearing that message, favorable reviews of the mandate went up 28 percentage points to 61%.

Though the one-hour *Radio Times* program flew quickly, I was happy to have expert colleagues sitting on either side of me in the studio setting. I thought we handled the “live” phone-in portion of the program with relaxed camaraderie and ease. Later that same day most of my email and text messages were positive but, of course, a few persons took issue with my position in particular--that is, delivery reform is what we ought to be talking about, not these narrow constitutional issues.

So then, where does all of this public attention on the healthcare system over the last several

months leave us? It is the question of the hour for our industry. Does the notion of the Triple Aim mean anything to our citizenry? Is the public so afraid of “government intervention” in their lives that they lose sight of the fact that the bill itself represents a colossal compromise, wherein most of the stakeholders, now three years ago, put future economic rewards aside so that a historic bill could be fashioned and approved? Walking back from the local NPR studios to my office, I asked myself these same questions and found no ready answers.

Will they or won't they? There’s no future in predicting the future, but I’ll add my voice to the cacophony attempting to answer this important health policy question. I believe the court will strike down the individual mandate and uphold its severability. The insurance industry will respond with a flurry of activity. No doubt premiums will continue their inexorable rise. But there is some good news—those much needed delivery system reforms will continue to transform. Cooler heads will prevail and we will make progress in our unique American journey to improve the health of the population and reduce waste in our system. Somehow we must find a way to achieve value for the \$8,000 per person that we spend every year. ■

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