Health Reform WK-EDGE Wrap Up, HR AND BENEFITS TOP STORY—U.S.: Supreme Court kicks contraception challenge back down the road, orders compromise, (May 18, 2016)

Health Reform WK-EDGE Wrap Up

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By Jenny Burke, J.D., M.S.

Catching the parties by surprise, but making no official decision, the Supreme Court ruled earlier than expected on the most recent challenge to the contraception coverage mandate within the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148). The High Court sent Zubik v. Burwell back to the lower circuit courts for a further examination of the alternatives to the mandate’s accommodation that were suggested in supplemental briefs by both parties and submitted to the court after oral arguments (see High court’s contraception compromise appears ‘unworkable,’ April 27, 2016) (Zubik v. Burwell, May 16, 2016, per curiam).

The High Court sent 13 separate cases back to six federal appeals courts, five of which previously ruled in favor of the mandate, and one that had ruled against it. The Supreme Court ordered the lower courts to revisit the previous cases, as well as six additional cases not originally involved in Zubik. They are to consider modifications to the accommodations to the contraception coverage mandate as suggested in the supplemental briefs and what the Court viewed as a potential compromise. The parties should be provided "sufficient time to resolve any outstanding issues between them," the Court said, but conceded that there may still be "areas of disagreement" between the two sides.

Merits. The Justices did not rule on the merits of the case discussed at oral arguments (see High court weighs government’s interest in protecting women’s health against hijacking religious organizations’ insurers, March 24, 2016), instead commenting, "Given the gravity of the dispute and the substantial clarification and refinement in the positions of the parties, the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans receive full and equal health coverage, including contraceptive coverage."

Concurrence. Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, wrote separately, emphasizing that the Court had not decided any of the legal questions considered in Zubik v. Burwell and cautioning lower courts not to read anything into the new opinion and orders about where the Court stands. She wrote, "I join the Court’s per curiam opinion because it expresses no view on 'the merits of the cases,' 'whether petitioners’ religious exercise has been substantially burdened,' or 'whether the current regulations are the least restrictive means of serving a compelling governmental interest.'"

She did note, however, that "requiring standalone contraceptive-only coverage would leave in limbo all of the women now guaranteed seamless preventive-care coverage under the Affordable Care Act. And requiring that women affirmatively opt into such coverage would 'impose precisely the kind of barrier to the delivery of preventive services that Congress sought to eliminate.'" Sotomayor further instructed the lower courts that they "should not construe" either this order or prior orders "as signals of where this Court stands."

Potential outcome. "From the Supplemental Briefs filed by the parties after the oral argument, it appears there are still areas of significant disagreement between the parties so a compromise solution that satisfies the parties and other possible challengers is uncertain," said David M. Kaufman in an interview with Wolters Kluwer. Kaufman is a partner at Freeborn & Peters LLP (Chicago) and a key member of the firm’s health care practice group with over 25 years’ experience representing health insurers, physicians groups, and regulators. "If the issues are not resolved through negotiation, the issues are likely to return to the Supreme Court. By that time,
the Court may have returned to full strength, allowing the case to be decided. The result of the next election then
may have a significant impact on the ultimate resolution of these issues."

**Calling it a 'win.'** Despite Sotomayor's concurrence, the religious non-profit organizations are clearly calling the
Supreme Court's order a win. In doing so, they focused on one part of the Court's order, which clearly stated that
no fines were to be imposed upon the religious organizations failing to follow the mandate. The Becket Fund,
representing the Little Sisters of the Poor, one of the non-profits challenging the mandate, is "very encouraged
by the Court's decision."

"The Court has recognized that the government changed its position," said Mark Rienzi, senior counsel at the
Becket Fund for Religious Liberty and lead Becket attorney for the Little Sisters of the Poor. "It is crucial that
the Justices unanimously ordered the government not to impose these fines and indicated that the government
doesn't need any notice to figure out what should now be obvious—the Little Sisters respectfully object. There is
still work to be done, but today's decision indicates that we will ultimately prevail in court."

"While it may be seen as a win for the religious organizations, the win may be only temporary," said Kaufman.
After all, decisions on both sides were vacated. Kaufman pointed out that, "the lower court decisions that upheld
the accommodation were vacated and the religious organizations will not be subject to penalties pending
resolution of the cases. However, the Court also vacated the decision of the Court of Appeals for the Eighth
Circuit that had agreed with the petitioners that the accommodation violates RFRA."

Lyle Denniston, a long time contributor to SCOTUSBlog, commented that, with the court's approach in this case,
it "both achieved the practical results of letting the government go forward to provide the contraceptive benefits
and freeing the non-profits of any risk of penalties, even though neither side has any idea—at present—what the
ultimate legal outcome will be and, therefore, what their legal rights actually are under the mandate."

**Leaving RFRA alone.** Denniston pointed out that there are three outstanding issues that the Court left out of
the ruling. These include: (1) whether the ACA mandate violates the federal Religious Freedom Restoration Act
(RFRA) by requiring religious non-profits that object to contraceptives to notify the government of that position,
(2) whether the government had a "compelling interest" in assuring cost-free access to contraceptives, and (3)
whether the move by the government to go ahead and arrange access to those benefits for those non-profits’
employees and students was the "least restrictive means" to carry out the mandate.

"Regarding revisiting the RFRA arguments," Kaufman commented, "the Courts of Appeals in the consolidated
cases all ruled in favor of the accommodation. The Supreme Court was explicit in not ruling on the RFRA issues
presented in [Zubik], so the lower courts have no additional guidance regarding RFRA to apply to the cases that
have been remanded." Looking into the future, Kaufman predicts that, "If the lower courts were satisfied that the
government's accommodation is consistent with RFRA, they are likely to find that any additional accommodation
agreed to by the parties is consistent with RFRA, as well. On the other hand, the Eighth Circuit may reach the
same conclusion it reached in [Dordt College v. Burwell (8th Cir., September 17, 2015)], that the accommodation
violates RFRA. This may result in a continuing split in the circuit courts so the Supreme Court may be asked
to resolve the issue once again." "Until the limits of RFRA are clarified, and for so long as the controversies
regarding ACA and its implementation continue, Kaufman stated, "we are likely to see continued challenges to
the coverage and other requirements of this transformational law.

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Companies: Priests for Life; Roman Catholic Archdiocese of Washington; East Texas Baptist University; U.S.
Department of Health and Human Services.