

THE SUPREMES BY SCOTT SINDER AND KATE JENSEN

Hog Heaven or Makin' Bacon?

Opponents of Obamacare subsidies may have pushed the court to rule in their opponents' favor.

I have had the good fortune to spend 15 years working at Steptoe & Johnson with Rep. Tom Bliley, the former 10-term congressman from Virginia who spent his final six years in office as chairman of the all-powerful House Commerce Committee. One of the chairman's favorite admonitions was, "Pigs get fat, but hogs get slaughtered." So our strategic goal is always to be piggish, not hoggish.

The plaintiffs' counsel in *King v. Burwell*, the Supreme Court case that could decide the future of Obamacare, appears to have disregarded Bliley's wisdom. And that could ultimately doom their case.

The Supreme Court heard oral arguments on March 4, and now we'll likely wait until late June, in the waning days of the current session, for an answer.

The prognosticators, however, already are out in full force, reading every gesture and utterance as a potential clue to how this case will be resolved. At stake are Affordable Care Act subsidies for residents in the 34 states that do not have state-run exchanges.

And that, in my opinion, is the crux of the problem. Nine of those states are "partnership" exchanges that opted to establish exchanges operated by the federal government. The ACA explicitly allows states to delegate operational functions.

So, if the court rules for the plaintiffs, residents in the 25 states with

federal exchanges will have the option to establish partnership exchanges with the federal government. In other words, if there is the political will, a state could continue to allow its poorer residents access to premium subsidies with the stroke of a pen.

The plaintiffs' objective, though, is to eviscerate the law. They do not want to make it easy for states to solve the subsidies problem, and they want to retain the ability to challenge the availability of the subsidies in partnership states. They want to make it hard.

Look at that through the lens of an oral argument. Although oral argument is not always a reliable indicator of the outcome of a case, it can provide insight into the justices' thinking and how the votes are lining up.

WHAT HAPPENED

In most respects, everything we thought would happen happened. Prior to March 4,

pundits largely agreed that four liberal justices would side with the federal government and three



RIMS Presses for Terror Certification Deadline

Risk and Insurance Management Society tells Federal Insurance Office it supports simplifying the process to certify events as acts of terrorism. RIMS proposes a 60- to 90-day deadline from an occurrence for a determination by the Secretary of the Treasury. A 30-day extension would be possible with a Treasury explanation of its necessity. The Terrorism Risk Insurance Act 2015 extension places certification decision authority with Treasury in consultation with the Secretary of Homeland Security, reducing the red tape associated with certification, which previously required Treasury, the Attorney General and the Secretary of State to decide together.

REGULATORY NEWS TICKER

for northeast region at National Association of Mutual Insurance Companies.

www.mass.gov

MICHIGAN Gov. Rick Snyder appoints Pat McPharlin as new director of Department of Insurance and Financial Services, succeeding Ann Flood, who is returning to the private sector on May 15 after serving since 2013 in the director role. McPharlin was CEO of Michigan State University Federal Credit Union, a position he's held for 14 years and retired from in March. McPharlin will start May 18. www.michigan.gov/lara

MISSOURI Senate passes S.B. 239, which would limit non-economic awards in medical malpractice lawsuits. Limits would be \$400,000 for personal injury and \$700,000 for catastrophic personal injury or death. Limits will increase 1.7% each year. If a jury returns non-economic damages exceeding the limits, trial court, upon post-trial motion, shall determine if limits in fact apply. In House at press time. www.insurance.mo.gov

NEVADA Approved 26 captives in 2014, resulting in premium growth of \$3.8 billion. Now has 160 domestic captives. www.doi.nv.gov

NEW HAMPSHIRE Issues bulletin INS-15-003-AB detailing producer compensation restrictions. Says producers are permitted to receive compensation "by way of a commission, service fee, brokerage or other valuable consideration," noting that "or" means producers cannot receive more than one kind of compensation for the same activity. Insurers and producers can agree to other services incidental to a sale, negotiation or solicitation of an insurance contract, but no compensation for those services is permissible if the producer seeks compensation from the insured for the service. Licensed producers may seek compensation from insureds for

services not directly affiliated with sale, solicitation or negotiation of insurance contract for which producer is not being compensated by insurer. Anti-rebating laws still apply. » State Senate sends workers comp reform bill back to committee for further work. Businesses are pushing for a statewide medical care fee schedule. www.nh.gov/insurance

NEW YORK Department of Financial Services notifies insurers it will begin examinations on cyber security after conducting a "comprehensive risk assessment of each institution," DFS head Benjamin Lawsky said in the notice. About 160 life, health and p-c insurers were

conservative justices would support the challengers. Oral argument gave us no real reason to alter our outlook. Further, pre-argument hype about the challengers' standing to bring suit was deflated when the government effectively conceded the point during oral argument. It appears that the case will not go away so quietly.

Where does that leave us? The perennial question marks: Chief Justice John Roberts and Justice Anthony Kennedy.

KENNEDY CLUES

Justice Kennedy's questions during oral argument sent mixed signals. He expressed concern about federalism implications and "death spirals" in states' insurance markets under the challengers' reading of the law. But he also questioned whether the Hobson's choice confronting the federal-exchange states (i.e., establish a state-run exchange or else) amounts to unconstitutional coercion, particularly given the extensive discussion related to how onerous it is to set up an exchange, and whether the statute should be interpreted to avoid such an outcome.

On the other hand, Justice Kennedy signaled pretty clearly the weakness in the government's case is the wording of

the law. In fact, when Solicitor General Donald Verrilli embarked on his textual argument, Kennedy interrupted, telling him he was headed in the "wrong direction" for his case. Kennedy also expressed skepticism about deferring to the IRS's interpretation of the law to resolve this dispute. With billions of federal dollars at stake, he noted, the IRS should have a "very, very clear" idea of what Congress intended.

ROBERTS CLUES

Basically, there were none. The chief justice, usually an active participant in oral arguments, stayed mostly silent. The few questions he did ask might indicate he's (again) looking for a creative way to preserve the status quo and throw the issue back to the other branches of government.

Kennedy was not the only justice who mentioned federalism concerns and the potentially unconstitutional coercion of the states. Justices Sonia Sotomayor, Elena Kagan and Samuel Alito also questioned the lawyers on this point. Federalism could very well become a rallying point for a majority opinion, and the challengers missed a clear opportunity during oral argument

to take the issue off the table by failing to argue how easy it is to establish a partnership exchange that the federal government would continue to operate.

If the dividing line between the majority and the dissenters in this case turns out to be the "textualists" on one side and those who are concerned with death-spiral-type implications on the other, the challengers missed a critical opportunity to make it an easier choice for the justices, particularly Justice Kennedy, to vote their way.

WHAT'S NEXT

If the government wins, the status quo reigns. Republicans plan to do something in the short-term to assist individuals if there is any loss of federal subsidies. But the big questions remain: What can Republican leadership and the base agree to do? And what will President Obama sign (if anything)? Come June, however, the challengers' choice of hog over pig should render these questions moot.

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Isle of Man Sets Law on Special Purpose Vehicles

The Isle of Man has introduced a new framework for insurance-linked securities and other special purpose vehicles to lure more activity to the island. They can include catastrophe bonds, mortality bonds, sidecars and industry loss warranties among other collateralized reinsurance vehicles.

The government worked closely with insurers and the Insurance and Pensions Authority on crafting the law, which offers speed to market with a licensing process geared to be completed within five days after receipt of fully prepared applications. Fee structures are also meant to be competitive by allowing for fixed fees for the lifetime of an SPV that has a known lifespan.

required to provide information on their efforts to prevent cyber breaches by April 27 to the regulator. » DFS has also asked p-c insurers in state to provide regulator with information on price optimization, the practice of varying rates based on factors not directly rated to risk of loss. DFS says in the request for information it is concerned premiums are higher for consumers who are "less likely to notice, shop around or object." Responses were due to DFS by April 15. www.dfs.ny.gov

OHIO Department of Insurance promotes three. Laura Miller is now assistant director

of product regulation and actuarial services, responsible for making sure insurer rate and product filings comply with state and federal law. Todd Oberholtzer moves from assistant chief counsel to chief legal counsel. Dwight Radel named assistant director of risk assessment, overseeing insurers licensed in state are financially compliant with state law. www.insurance.ohio.gov

OKLAHOMA Troy Wilson, first chairman of Oklahoma Workers' Compensation Committee, will step down effective May 31. LeRoy Young, medical doctor, will succeed him. Wilson came out of retirement in 2013 to

lead the restructuring of the state's workers comp system. Mark Liotta, a former state legislator from Tulsa, will join commission in August to replace Denise Engle, whose term is expiring. » USGS releasing new hazard map for earthquakes in state with type, length and location of reactivated faulty lines and notated risks from quakes caused by human activity. www.oid.ok.gov

PENNSYLVANIA Workers comp rate set for fourth consecutive yearly decline. Overall rate drop is 5.99% with no changes to benefits for injured workers. Effective April 1. » Departed commissioner Michael Consedine signs on

as SVP, deputy general counsel and executive director of government affairs at Transamerica in Baltimore in charge of the insurer's state and federal government relations. www.ins.state.pa.us/ins/site/default.asp

TENNESSEE Nashville judge rules limiting workers comp benefits for laborers living in U.S. illegally is unconstitutional. Says state legislature's limits on benefits to illegal workers is in effect an effort to trump federal immigration policy, which is, under the Constitution, federal turf. The company in the lawsuit was found to have knowingly hired the illegal immigrant and is now on