Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1910

Date: 27-Dec-11

From: Steve Leimberg's Estate Planning Newsletter

Subject: **Al Lurie on the Third Washington Burning: The Uncivil Health Care Wars**

"The third branch of our democracy, the judiciary, is about to take its lumps alongside the other two, as the Supreme Court takes up a case that is at the core of much of the breakdown of comity among the working parts of our federal government, that underlies the low esteem in which the government is held by the public, namely the health care reform legislation - the Affordable Care Act (so named for maximum public-relations effect) -- that is certain to cleave the High Court's justices into warring camps, that will likely be seen to discredit the judges, to say nothing of the Court itself, among sharply divided swaths of the public at large, depending on their respective political persuasions."

Al Lurie has never been one to mince words. This pension guru and maven (not to mention former Assistant IRS Commissioner: Employee Benefits & Exempt Organizations) and General Editor of *Federal Income Taxation of Retirement Plans* (LexisNexis 2008), shares with **LISI** members his thoughts on how the Patient Protection and Affordable Care Act, aka ObamaCare, could impact the Supreme Court.

Here is Al's commentary.

EXECUTIVE SUMMARY:

Washington has been burned twice before: once 197 years ago literally, by the enemy from without, when the British burned the White House and the U.S.Capitol during the War of 1812; and once metaphorically, by the enemy from within, when the Confederacy broke away from those central institutions of the United States (indeed untied itself from the Union) in the civil war between the states. The following lines tell of the third time, right now, when those two bulwarks of our system have been subject to severe risk of conflagration figuratively in the overheated environment of the health care debate; and the third of our three constitutionally founded institutions, the Supreme Court, is about

to be drawn into the same fire, from which it may become badly burned.

COMMENT:

At a time when the dysfunction of Congress has triggered a mass disaffection of Americans with their government, which one might suppose could not possibly get worse, one could be wrong. We are rushing headlong into a season of potentially greater discontent – the period directly preceding the 2012 presidential election – when attacks on the incumbent and on those of the other party who are vying to unseat him will not just discredit all the rivals, but even the very institution of the presidency, that is certain to add a new dimension of disenchantment with our system of government in many quarters.

As if that were not enough, the third branch of our democracy, the judiciary, is about to take its lumps alongside the other two, as the Supreme Court takes up a case that is at the core of much of the breakdown of comity among the working parts of our federal government, that underlies the low esteem in which the government is held by the public, namely the health care reform legislation - the Affordable Care Act (so named for maximum public-relations effect) -- that is certain to cleave the High Court's justices into warring camps, that will likely be seen to discredit the judges, to say nothing of the Court itself, among sharply divided swaths of the public at large, depending on their respective political persuasions.

Do I prove too much? I can hear some readers declare so, especially as to the impact just foretold for the judiciary. To them I would say, remember Florida 2000 and the judgment of the Court's majority that Bush beat Gore for that state's Electoral College votes, and how the Democrat's supporters (not just the lay voters, but even some in academe) demonized the majority for having "shamelessly" stolen the presidency from Gore, who, by every count, had won the popular vote. Do you think that didn't lessen the respect for and authority of the Court, that echoes still in the view of many of that mind?

I would submit that the impending health care review by the Court actually carries much more potential threat of same than Gore versus Bush, when viewed at comparable stages of the proceedings – i.e., before commencement of arguments before the High Bench – because of all the baggage already borne by the health reform issues, going back

four years to the time Obama first raised the health reform banner on the campaign trail, and continuing with increasing intensity and animosity between the Parties in the Congress after the election, as the White House made the issue its signature (almost sole) legislative objective for all of 2009 and continuing into 2010, while the Republicans as steadfastly fought the effort at every turn. Much of the battle was galvanized around the fighting words “public plan option”, building with escalating rancor and anger among the Members to what had seemed like irreconcilable differences between the Ds and Rs in both Houses of Congress (particularly in the Senate, where the Republicans, although a minority, held enough seats to maintain a filibuster).

Suddenly, in March, the Democratic strategists dropped the public option and devised an ingenious stratagem that finessed any possibility of a filibuster in the Senate, by breaking the legislation into two separate bills that passed in both Houses one week apart at the end of March; and so these two bills, signed by the President, the first as the Patient Protection And Affordable Care Act and the second as the Health Care And Education Reconciliation Act, became the law.

The Beat Goes On

Was that the end of the war between the Parties? Far from it. That became the rallying cry for the Republicans for the midterm elections in 2010, as they vowed to repeal the law(s) if they won the Congress in the November elections; and there were increasing signs all through the polls taken in the spring and summer that the position resonated with increasing segments of the voters. There was, of course, also the little matter of a severe economic downturn, a mortgage crisis, and growing unemployment that played into the hands of the “outs”. The election did indeed confirm the polls, as the Republicans won a smashing victory in the House and came within a couple of votes of capturing the Senate. That immediately led to triumphal announcements by the new Republican leadership in the House (Boehner) and the Ranking Minority Leader in the Senate (McDonnell) that they would promptly introduce repeal legislation, and, further, bend their efforts to limiting Obama to a one-term presidency come the 2012 elections. Some repealer bills were introduced in the immediate wake of the 2010 elections; but there is little evidence that much effort was put into their passage, and none appears to have progressed.

With scars of the reform battles increasingly evident, the Congress turned to the more pressing concerns of: (1) financial reform (that eventuated in passage of Dodd-Frank over strenuous Republican resistance); (2) raising the U.S. debt limit (which engendered a monumental donnybrook between the Parties), that went to the brink and led to just a short-term accord deep into the 11th hour (but not without a one-step downgrade of the Nation's credit rating by one of the three rating agencies, due in no small part to the apparent intransigence of both Parties in so crucial a matter); and (3) attempts to pass a budget bill that would greatly diminish the increasingly worrisome debt financing to which the U.S. has resorted, with each Party beating its predictable drum ("raise taxes on the rich," cried the Ds; "cut spending," replied the Rs).

Neither side acceded one whit to the other's demands, leading to agreement to establish a super Congressional committee equally divided between Rs and Ds from both Houses, which proceeded to reach the same deadlock of the full Congress, on precisely the same incompatible grounds, the consequence of which was to default into a so-called "sequestering" of funds, that is, cutting the entire federal budget by an inflexible across-the–board percentage on every line of the expense budget. At least one of the other two rating agencies has let it be known that it was keeping an eye on this process.

The President too made it clear that he was keeping an eye on this process, as, borrowing a phrase from a previous Democratic warrior in the Oval Office, he went around the country decrying the "do-nothing" Congress (at least, the Republican half of it), with his other eye firmly on the prize (the upcoming November election, need I add?). If he thought that he could forget about the health care issue, I submit that was wishful thinking. I would guess that once the Republicans sort out their selection of his challenger, their designated standard bearer will sharpen his full sheath of arrows for doing battle with the President; and chief among that armory will be missiles directed at the Affordable Care Act. One need only observe how often the pack of Anyone-but-Romney candidates has gone after said Romney in the Republican debates, for his identification with the Massachusetts law that is viewed as the precursor of the federal law, to know how dear that issue is to the core of the Republican strategy for 2012. Even Mitt can be expected to demonstrate how far ObamaCare is from the Massachusetts model, if he emerges as the candidate.

High Court in High Peril

That brings us back to the point near the top of this commentary, where discussion was interrupted of the potential damage of the health care reform issue to the authority of the Supreme Court itself, to permit me to first lay out a brief review of the health care struggles in the other branches of government that preceded the Court's agreeing to the grant of certiorari. Until the Affordable Care Act became law there was, of course, no role for the federal judiciary in respect of federal health reform, let alone for the Supreme Court as the court of last resort in this country, which in all but very rare instances takes a case only if it determines to exercise jurisdiction (the grant of certiorari), and only after determination in the trial court and decision by an appellate court on review of the trial judge. Its decision to grant certiorari in the case entitled State of Florida v. U.S. Dept. of Health & Human Services came only in the middle of November this year, but the question of legality of the federal health law had worked its way through at least 10 trial courts and four Circuit courts in the past couple of years, albeit relatively below the radar screens of most Americans, and with no evidence that this outbreak of litigation was even on the screens of Congress or the White House while all the above mentioned battling within Capitol Hill and between Congress and the White House was going on.

There was, however, one large segment of government that was very much aware of and troubled by the federal reform act. That was governments in the state capitals, principally the attorneys general of numerous states, both because the Affordable Care Act laid costly burdens on the states to fulfill obligations that the new law imposed on the states themselves, and mandates on individuals to purchase and on businesses to provide health insurance. Shortly after enactment of the law in March 2010, cases were commenced by attorneys general around the country, challenging the constitutionality of the law under the Commerce Clause, by reason of its imposing an unfair burden on commerce between the states. The Florida Attorney General appears to have been the first to institute suit. At least his case became a magnet for many other state AGs, and, in ensuing months, the number of others joining that litigation grew, finally swelling to 25 in addition to the Florida suit. That is the case in which the Supreme Court has now agreed to hear the appeal.

It is not the first in which the High Court has had the opportunity to have its say on the law. There was an earlier case when it ducked the issue, declining to grant certiorari where a California judge had dismissed a challenge to the law on the ground that plaintiffs lacked standing to sue. But since that time a welter of judicial activity has broken out, at least 10 district court decisions and four decisions in as many Circuit courts of appeals. The decisions run the gamut of possible outcomes, the principal issue relating to the constitutionality of the insurance mandate provided for in the Affordable Care Act (hereafter "ACA"). Of the four Circuit court decisions, two sustained its constitutionality (6th Circ. and DC. Circ.), one rejected it (11th Circ.), and one (4th Circ.) held the issue was not yet ripe for adjudication because of being barred by a federal anti-injunction statute that prevents a tax statute from being challenged before it takes effect (the insurance mandate will not come into force until 2014).

Cutting the Baby in Half or in Pieces?

Since the ACA in its thousands of pages provides an enormous number of rules directly impacting the provision of health care, the equally important question is whether the different parts of the law are severable, so that, were the mandate to be struck down, the rest of the law must also be ruled unlawful, or, if not, what parts can stand and what must fall. The question is moot for the courts which have sustained the constitutionality, the 6th and DC Circuits; and the 11th Circuit ruled that the mandate, though unconstitutional, does not taint the balance of the ACA. Note, however, that the district court in the 11th Circuit case, that had also ruled that the insurance mandate was not sustainable under the Commerce Clause, determined that requirement to be "so inextricably bound" to the other provisions of the law as to require invalidation of the entire statute.

Surprisingly, the White House has been reported in the press to have made a comparable analysis of the interaction of the insurance requirement with at least two other central provisions of the ACA: one, forbidding insurance carriers to refuse to issue policies to certain applicants; and, two, barring carriers from taking preexisting conditions into account. One may be permitted to speculate that the Administration has calculated this might be a scare tactic to persuade a court from striking down the insurance requirement. It will be interesting to see whether this position makes its way into the Government's briefs. It is

not to say that the argument lacks merit. Other provisions can be pointed to where the question may fairly be asked whether Congress would have intended the provision to be effective absent the individual or employer mandates.

The Case before the Court

The 11th Circuit case is the one in which the Supreme Court has granted certiorari; so the issues in that case can be assured of full development in the briefs and arguments of the parties and of the numerous amici briefs. But the Court will also have a wealth of other materials to draw upon, because of the large body of judicial learning on the ACA that has accumulated in the twenty months that have elapsed between its enactment and the Court's announcement on November 14 to hear the Florida case, that can be gleaned from the opinions of the other district and Circuit courts -- not least a 37-page majority opinion and a 65-page dissent in Susan Seven-Sky v. Holder, decided by the D.C. Circuit Court of Appeals shortly after the grant of certiorari in Florida.

It is doubtful that an issue relevant to the complete disposition of the questions that have arisen, or conceivably could arise, under ACA has not been aired in this large body of work. That is far different than the state of the law when an unsuccessful effort had been made a year ago by the Virginia attorney general to obtain quick review by the Supreme Court of a case in which he had been successful in getting the district court sitting in Richmond, Virginia to strike down the ACA provisions mandating health insurance for employees of businesses and all other individuals, on the grounds of exceeding Congress' authority to regulate interstate commerce, but he had failed to convince the district judge to invalidate the rest of ACA. He thus sought to expedite review by the Supreme Court by means of a direct appeal to it, bypassing the Circuit court, a procedure technically available but rarely granted. He cited the confusion in legal and government circles that would be engendered by the predictable proliferation of conflicting decisions in the courts. The Justice Department opposed, contending that arguments should be fully developed before the case was presented to the Justices of the Supreme Court for decision.

An Historic Event, an Historic Court

That desirable precondition to deliberation by the High Court has now

occurred. The Court itself, in announcing its determination to take the appeal of the Florida case, has set up unusual special measures to assure that it receives maximum argument on the issues involved, not just those asserted in the applications for certiorari by the parties, but others that the Court itself has signaled it intends to address in its decision. First, instead of the normal one hour of oral argument, equally divided between the parties, the Court has assigned an almost unheard of 5 and 1/2 hours for oral argument, and directing that 90 minutes thereof be devoted to severability and one hour to the Anti-Injunction Act. Even more unprecedented, it has appointed two lawyers not associated with the parties to make arguments by briefs and oral arguments, as friends of the court, one to speak to the severability issue, and one to argue for the position that the anti-injunction law prohibits legal challenge of the insurance mandate before the penalty sanction for failing to obtain insurance is operative under ACA.

The Court has let it be known that it will hear oral arguments next March, with decision to be expected before July 4th, 2012. The decision would be monumental whenever handed down, and will seal the fate of the ACA. Coming in the very critical months before the election in November, it will doubtless seal the fate – in the election and in the history books – of the man for whom the term ObamaCare was coined. One can be certain that the Court is more aware than any that the decision will also cast a long shadow over the regard in which its Justices are held by their countrymen, to say nothing of the Court's place in history, both of the law and of the Nation.

But Politics Can Overrule the Court

One must not fail to note that, now that the Court has agreed to resolve this issue that has so riven the body politic, it might not really have the last word. Much will depend on the interaction of how the majority of the Court votes and how the public votes in the election to follow in the immediate wake of the Court's decision. Indeed, the decision might even precipitate a reaction among blocks of voters sufficient to change the election outcome. Most observers expect a 5-4 split in the Court, but are doubtful which group of Justices will comprise the 5. The common wisdom (probably less reliable in this instance even than it ever is) is that there are two easily predictable blocks of 4 – Breyer, Ginsburg, Kagan and Sotomayor in one camp, Alito, Roberts, Scalia and Thomas in the other – which makes Kennedy the man in the middle, whose

predilection at this time is unknown, perhaps even to himself.

The other unknown is who will win the elections for president and control of the two Houses of Congress. If the Democrats were to retain the presidency and their slim majority in the Senate, the Supreme Court decision might stand whichever way the majority of the Justices vote. That is almost foregone if the Court upholds the constitutionality of the Affordable Care Act, or even all of ACA except the insurance mandate.

But even were the Court to strike down the entire law, it is doubtful the Democrats would have the stomach to renew the health care war again in the next Term of Congress. Conversely, if the Republicans retain the House and win the Senate, and the Court were not to strike down the law branch and root, or even if only the insurance mandate were stricken, one could expect the Republicans to repeal the portion of the law left standing, even if Obama retained his office. A more serious obstacle to their success might be a Democratic filibuster in the Senate, unless they could engineer a change in the Senate rules of the 112th Congress.

Like so many wars this country has been embroiled in for the past several decades, this war will not be over until it's over.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Al Lurie

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LISI Estate Planning Newsletter #1910, December 27, 2011, at http://www.leimbergservices.com/