The Constitutionality of the Individual Mandate May Affect the Fate of the Entire Affordable Care Act

By: *Robert R. Pohls* and *Payam Saljoughian*
Pohls & Associates
1550 Parkside Drive, Suite 260
Walnut Creek, California 94596
T: 925.973.0300 F: 925.973.0330
www.califehealth.com

March 28, 2012 – The final day of oral arguments before the Supreme Court on the constitutionality of the *Affordable Care Act* focused on two separate issues. The first issue was argued in the morning and picked up on yesterday's discussion regarding the constitutionality of the individual mandate.

If the Supreme Court decides that the individual mandate is not constitutional, the next question the Justices will need to answer--and the question the Justices grappled with today-- is whether the rest of the *Affordable Care Act* can stand on its own without the individual mandate. The Justices heard arguments that the individual mandate should fall by itself, that it should fall along with a few provisions inextricably tied to it, and that it should take down the entire Act. The main points of discussion focused on the following three issues: (1) Is the individual mandate "essential" to the rest of the act?; (2) Would severing the individual mandate alone raise problems of "adverse selection"; and (3) can the *Affordable Care Act* function financially without the individual mandate?

Is the Individual mandate "Essential" to the Rest of the Affordable Care Act?

Paul Clement, on behalf of the petitioners, argued that if the individual mandate is unconstitutional, the rest of the *Affordable Care Act* cannot stand on its own. In particular, Mr. Clement argued that without the individual mandate, the community rating and guaranteed-issue provisions would be unsustainable. Community rating prohibits issuers from pricing health insurance policies based on health factors, while guaranteed-issue mandates that insurers must provide health insurance to any person, regardless of medical history or current state of health. Congress's own findings specifically stated that the individual mandate is essential to the operation of these two reforms, and Mr. Clement argued that Congress rejected the models of some States that had tried to impose guaranteed-issue and community rating without an individual mandate.

Mr. Clement took the position that since the two reforms cannot stand without the individual mandate, they must be severed as well if the individual mandate is severed. His argument continued that, if this happens, all that is left is a "hollow shell" and that the entire Act must fall because as he expressed to the Justices: "you can't possibly think that Congress would have passed that hollow shell without the heart of the Act?"

Much of the discussion focused on Mr. Clement's question—whether the many provisions unrelated to the "heart of the act" should fall as well. Justice Scalia noted that in no other case

has the Supreme Court excised the heart of the statute, stating: “This really is a case of first impression.” Solicitor General Edwin Kneedler, on behalf of respondents, argued that if the Individual Mandate is severed, the many other provisions of the *Affordable Care Act* are completely unrelated and can stand on their own: “This is a huge Act with many provisions that are completely unrelated to market reforms and operate in different ways. And we think it would be extraordinary in this extraordinary Act to strike all of that down.”

Justice Scalia asked General Kneedler about Mr. Clement’s position, stating: “One way or another, Congress is going to have to reconsider this, and why isn't it better to have them reconsider it…in toto, rather than having some things already in the law which you have to eliminate before you can move on to consider everything on balance?” General Kneedler responded that as a matter of judicial restraint, the “limits on equitable remedial power limit this Court to addressing the provision that has been challenged as unconstitutional.”

In trying to decide whether to strike down the whole act or just the controversial provisions, Justice Kagan asked: “Is half a loaf better than no loaf?” Arguing that the whole Act should fall, Mr. Clement responded: “Sometimes a half a loaf is worse.” Mr. Clement provided the example of *Buckley v. Valeo*, 424 U.S. 1 (1976) where the court struck down part of a campaign finance law and left the rest in place. As a result, according to Mr. Clement, “for 4 decades Congress has tried to fix what's left of the statute, largely unsuccessfully.” Mr. Clement argued that as in *Buckley*, striking down the whole law and giving Congress “a clean slate” is the best option.

Court Appointed Expert Bartow Farr argued that in saying that that the individual mandate is essential to the operation of the two reforms, Congress did not use “essential” to mean inextricably linked. Instead Farr stated that in this context, “essential effectively means useful.” Farr concluded that the two reforms can stand without the individual mandate. Questioning Mr. Farr’s argument, Justice Sotomayor stated: “Counsel, the problem I have is that you are ignoring the congressional findings and all of the evidence Congress had before it that community ratings and guaranteed-issuance would be a death spiral -- I think that was the word that was used -- without minimum coverage.”

In trying to decide what should happen to the provisions that are not severed, Justice Kennedy asked Mr. Clement for guidance about the standard that should be applied. Mr. Clement argued that rather than looking at congressional intent, a better approach would be to focus on an objective textual inquiry. Under such a test, the question would be whether the remaining provisions could still function in the absence of the severed portions. However, as Chief Justice Roberts pointed out, many of the other provisions in the *Affordable Care Act* were likely put in, not because they were unobjectionable, but because they were the price of a vote.

Would Severing the Individual Mandate Alone Raise Problems of “Adverse Selection?”

General Kneedler, arguing that the two reforms should be struck down with the individual mandate, noted the problems of adverse selection that would be present if only the individual mandate was severed: “If you took the minimum coverage provision out and left the other two provisions in, there would be laid on top of the existing shifting of present actuarial risks an additional one because the uninsured would know that they would have guaranteed access to

insurance whenever they became sick." General Kneedler argued that Congress specifically intended that the individual mandate and the two reforms must "rise or fall in a package"

Mr. Farr, arguing that only the individual mandate should be struck, argued that the concerns of adverse selection are exaggerated. According to Mr. Farr, Congress included at least a half dozen other provisions to deal with the adverse selection concern. As an example, Mr. Farr explained that the *Affordable Care Act* authorized annual enrollment periods, so that people can't just show up at a hospital, but rather have to wait until a specific time the following year.

Can the *Affordable Care Act* function financially without the individual mandate?

The individual mandate is essential to the rest of the *Affordable Care Act* in yet another way. Without the individual mandate, many economists argue that the Act will be financially unsustainable. Mr. Clement stated: "If you do not have the individual mandate to force people into the market then community rating and guaranteed-issue will cause the cost of premiums to skyrocket. We can debate the order of magnitude of that but we can't debate that the direction will be upward."

General Kneedler, on the other hand, argued that it isn't in the Court's place to look at budgetary implications: "For the Court to go beyond text and legislative history to try to figure out how the finances of the bill operate, it -- it's like being a budget committee." Justice Sotomayor appeared to agree with General Kneedler on the point, stating that while Mr. Clement's point may be true, the Supreme Court is "not in the habit of doing legislative findings."

In conclusion, the oral arguments on this issue may be meaningless if the individual mandate is found to be constitutional. However, the demeanor and interest shown by the liberal justices today suggests that the question of severability may very well be one that the court has to decide. Of the three issues before the court thus far, this one appears to be the closest.

What's Next?

In the final session of oral arguments (March 28, 2012), the Justices will consider whether the expansion of Medicaid to make health care available to more Americans under terms that will increase the costs borne by the states violates state sovereignty.

About the Authors

Robert R. Pohls is the Managing Attorney of *Pohls & Associates*, a California firm that he established in 1999 to represent life, health, disability and long term care insurance companies in bad faith, ERISA and other complex forms of litigation. Rob is a DRI Spokesperson on Health Care Reform and an active member of DRI's Life, Health and Disability Committee. He also is a former chair of the ABA's Health and Disability Insurance Law Committee, a member of the Association of Life Insurance Counsel, the International Claim Association, and the Northern California Life Insurance Association.

Payam Saljoughian is an Associate Attorney at *Pohls & Associates* who graduated from the University of California, Hastings College of Law in 2011. Prior to joining the firm, Payam

worked as a Post-Graduate Legal Intern at the U.S. Court of Appeals in and for the Ninth Circuit. Before entering private practice, he also worked as a Legal Intern in the Office of the General Counsel for the *Department of Health and Human Services*. Payam is a member of DRI's Life, Health and Disability Committee.