

Affordable Care Act Arguments: Severability

March 29, 2012

[Gregory Pemberton](#), [Taryn Stone](#)

On Wednesday, March 28, 2012, nearly two years to the day after 26 states, four individuals and the National Federation of Independent Business (collectively, the petitioners) filed a lawsuit challenging the constitutionality of several provisions of the Patient Protection and Affordable Care Act of 2010 (the Act), including, perhaps most importantly, the minimum coverage provision (commonly referred to as the individual mandate), the Supreme Court of the United States (the Court) held the third day of oral arguments. The first session focused on a determination of whether, in the event the individual mandate was found to be unconstitutional, the rest of the Act is severable and can stand alone.

The Parties' Positions on Severability

In the event that the individual mandate is found to be unconstitutional, the federal government argues that the Act, minus the guarantee issue and community rating provisions, should stand. The "lion's share of the Act," the government argues, has nothing to do with the individual mandate provision. The guarantee issue and community rating provisions, the government concedes, are essential to the individual mandate provision because, without it, insurers would have an adverse selection problem. Additionally, Congress explicitly noted in the Act that the guarantee issue and community ratings provisions were essential to the individual mandate provision. The other provisions, many of which are already in effect several years before the individual mandate provision is scheduled to take effect are not essential, the government argues, and wholly unrelated to the individual mandate. The government noted that the word essential was conspicuously left out of the Titles of the Act that address these other wholly unrelated provisions. Thus, they argue, Congress could not possibly have intended the *extraordinary* disruption that a finding of total inseverability would have on these provisions if the individual mandate, not scheduled to take effect until 2014, was invalidated.

In the event that the individual mandate is found to be unconstitutional, the petitioners argue that the entire Act should be invalidated because the individual mandate was the core or heart of the Act. All of the other provisions, they argue, were included to strike a balance between the provisions designed to ensure a supply adequate to meet the demand created by the mandate, all enacted in an effort to achieve "Congress' overarching objective of near-universal insurance coverage." On the demand side, the petitioners argue that Congress enacted the individual mandate to force individuals who do not want insurance to obtain it, even if they are unlikely to need it, making it more affordable for insurers to provide insurance to higher risk, higher cost individuals because everyone is in the risk pool. On the supply side, the petitioners argue that Congress enacted a series of measures that included insurance market regulations (including the guarantee issue and community rating provisions), health insurance exchanges, subsidies, employer regulations and an expansion of Medicaid to increase the supply of a combination of private, employer-based and public insurance, guaranteeing that everyone, including individuals who have historically been unable to obtain insurance, would have insurance coverage available to them. Petitioners point to the text of the Act which deemed the mandate essential to the regulatory scheme it intended to create. Petitioners argue that even seemingly unrelated aspects of the Act all work together to achieve Congress' goal of near-universal coverage because these provisions and the series of revenue offsets they create are part of the delicate fiscal balance that Congress designed the Act to achieve.

Ultimately, the challenge to the severability of the individual mandate provision from the rest of the Act is fundamentally a question of congressional intent. Would Congress have intended the entire Act to fall if the individual mandate is found unconstitutional? Are all of the provisions so inextricably intertwined that Congress could not have intended any of the provisions to survive if the individual mandate is struck down or should some of the provisions be saved? Or, did Congress explicitly show its intent that certain provisions are wholly unrelated by allowing these provisions to function independently of the individual mandate as evidenced by the fact many of these provisions are in operation now, years in advance of the 2014 scheduled effective date of the individual mandate?

If you gut the heart of the Act, should you save the hollow shell?

Several of the Justices appeared to be open to petitioners' argument that the individual mandate provision was the heart of the Act and if the individual mandate provision was severed only a hollow shell of the Act

would remain. During the government's oral argument Justice Scalia noted, "Many people in Congress might not have voted for those provisions if the central part of this statute was not adopted....Once you've cut the guts out of it, who knows, who knows which of them were really desired by Congress on their own and which ones weren't." However, Chief Justice Roberts noted, "[Congress] would have passed parts of the hollow shell...a lot of [the other provisions] are the reauthorization of appropriations that have been reauthorized for the previous five or 10 years and it was just more convenient for Congress to throw it in the middle of the 2700 pages than to do it separately." He, Justice Ginsburg and Justice Breyer also noted that the Black Lung Benefits Act, the Breast Feeding Act, the Indian Healthcare Improvement Act, as well as many other miscellaneous provisions have nothing to do with the individual mandate provision. Chief Justice Roberts also stated that the reality of the passage of this piece of legislation was that there "had to be a concerted effort to gather enough votes so that it could be passed. And I suspect that a lot of these miscellaneous provisions...that was the price of the vote. Put in the Indian health care provision and I will vote for the 2700 pages. Put in the Black Lung provision, and I'll go along with it."

A choice between a wrecking operation or a salvage job

Several of the Justices also appeared open to the government's position that the Court should salvage those wholly unrelated provisions of the Act that were not intended by Congress to be tied to the individual mandate provision. During the petitioners' oral argument, Justice Ginsburg stated there are so many things in this Act that are unquestionably okay so that it is a question of "whether we say everything you did is no good, now start from scratch, or, to say,...there are so many things in here that have nothing to do, frankly, with the affordable healthcare...it's a choice between a wrecking operation, which is what you are requesting or a salvage job." Justice Kagan noted, "I mean, we never suggested that we're going to say, look, this legislation was a brokered compromise, and we're going to try to figure out exactly what would have happened in the complex parliamentary shenanigans that go on across the street and figure out whether they would have made a difference. Instead, we look at the text that's actually given us." The government agreed arguing that it is a matter of statutory construction and that if Congress had intended for the wholly unrelated provisions to be intertwined with the individual mandate they would have used the term essential as they had done with the guarantee issue and community rating provisions. The fact that many of these provisions are already in effect, however, lends support, the government argues, to the fact that they were intended to be separate from the individual mandate because they operate independently and without the individual mandate right now. However, Justice Kennedy expressed his concern about the financial effects and risks that would be caused by the severing of the individual mandate from the rest of the Act and the Court's failure to consider the risks an awesome exercise of judicial power. In response, the government argued that the Court's function is to look at the text and structure of the Act and what the substantive provisions of the Act mean. To look at monetary consequences, the government argued, would be to look through or behind the Act.

The Decision

The Court's final decision on this issue, as well as the other legal issues surrounding the Act, is expected in June 2012. At this point, there is no clear indication on how the Court will rule. Lawyers from Ice Miller's Health Care Group are closely monitoring all developments on this and related matters and will be preparing future updates as issues arise.

For answers to your health reform and other health care questions, please contact [Greg Pemberton](#) at (317) 236-2313 or Gregory.Pemberton@icemiller.com or any member of the Ice Miller [Health Care Reform](#) Group.

This publication is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader must consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.