

Is the PPACA constitutional? The Supreme Court weighs in.

On Monday, March 26, 2012, the Supreme Court began hearing arguments on the constitutionality of portions of the Patient Protection and Affordable Care Act (PPACA).

Since the PPACA was signed into law on March 23, 2010, there have been numerous legal challenges to this law — especially the individual mandate, which will require most Americans to buy health insurance or pay a penalty, starting in 2014.

Unum U.S. Senior Vice President and General Counsel Chris Collins has been closely tracking the PPACA, the court decisions and many opinions surrounding the law. He has written an insightful and informative article about the Supreme Court review. We have included portions of his review in the following Executive Summary.

This summary is part of Unum's ongoing dedication to help brokers and employers stay up to date on the latest news in health care reform. We remain committed to providing practical and impartial analysis, so you have the information you need to know. You can access Chris' full article at the end of this summary.

Why is the PPACA being reviewed by the Supreme Court now?

Since the enactment of the PPACA, 26 states and numerous special interest groups have challenged its constitutionality. What is especially interesting is the divide this issue has caused among our lower courts. Here are two examples:

- Last year, the Sixth Circuit Court ruled in favor of the PPACA, stating the individual mandate was constitutional.
- However, on August 12, 2011, the 11th Circuit Court of Appeals ruled against the individual mandate, stating Congress had exceeded its powers under the U.S. Constitution's Commerce Clause. The 11th Circuit also declared the mandate was "severable" — able to be removed — from the remainder of the PPACA.

An appeal of the 11th Circuit's decision brought this law to the Supreme Court.

What are the major issues before the Supreme Court?

Four major issues are being reviewed:

- **Whether the court has jurisdiction to decide the matter before 2014.** Under the PPACA, taxpayers who do not buy health insurance would have to report the omission on tax returns for 2014. This has created confusion as to whether the penalty should actually be considered a tax. According to the federal Anti-Injunction Act, 26 U.S.C. §7421(a), federal courts are prohibited from challenging taxes before they go into effect. If this act is upheld, it would mean the Supreme Court would not be able to hear and decide the challenges to the individual mandate until the first person is asked to pay the penalty (after 2014).
- **The constitutionality of Medicaid expansion.** This coverage expansion for low-income individuals was mandated under the Affordable Care Act. Now, the Supreme Court needs to decide whether this expansion exceeded Congress' powers under the spending clause of the U.S. Constitution. (This was a claim made by the 26 states, and the 11th Circuit Court of Appeals ruled against them, upholding the constitutionality of the Medicaid expansion.)
- **The constitutionality of the individual mandate** or whether it exceeds the authority given to Congress to regulate interstate commerce under the Commerce Clause of the U.S. Constitution.
- **Whether the individual mandate is severable from the remainder of the law.** This would allow the remainder of the PPACA to remain in effect if the individual mandate is struck down as unconstitutional.

Unum is especially interested in the decisions related to the individual mandate and the severability of the mandate. These two issues also seem to be the most highly debated concerns in the public forum.

When the Supreme Court is considering a case, it often allows the submission of briefs from "amicus curiae" — a Latin term meaning "friend of the court." Typically, these briefs come from individuals, groups, associations and corporations who are not involved in the case, but who are very interested in the outcome. A typical case before the Supreme Court

will usually receive between five to ten amicus briefs. This case has received 136 amicus briefs — and most of these briefs have been related to the individual mandate and its severability from the remainder of the law.

What are the arguments for and against the constitutionality of the individual mandate?

There are two important pieces of background that impact the individual mandate:

- **The PPACA prohibits medical underwriting** — which means medical insurance companies will be required to cover individuals with pre-existing conditions. As a result, more unhealthy people will be covered, and health insurance companies will be responsible for additional costs. The individual mandate ensures healthy people will also have insurance coverage, so the financial burden is spread more evenly.
- **The individual mandate is intended to help provide funding for health care reform.**

Those against the mandate argue that Congress does not have the power under the Commerce Clause to require a person to purchase a product, whether it is insurance or any other type of merchandise. A common belief is that if the Supreme Court allows the PPACA's individual mandate to stand, it will set the stage for unconstitutional expansion of Congressional power.

Those in favor of the mandate believe Congress has the power to enact this law — since it should be able to regulate health care, which has such a large impact on our economy and relates to "commerce" among our states. Supporters also believe Congress should be able to use the individual mandate to ensure adequate funding exists to support health care reform.

From a business perspective, supporters believe the individual mandate is essential to protect health insurance companies. Many of the amicus briefs cited examples in which states did not require an individual mandate, but also forbade insurance companies from turning down applicants based on pre-existing conditions. As a result, more unhealthy people purchased coverage, while healthy people chose not to get coverage until they needed medical care.

What are the arguments for and against severability?

If the Supreme Court rules the individual mandate is unconstitutional, it will need to decide if the remainder of the PPACA should be upheld or struck down.

Neither side wants the law unchanged if the individual mandate is struck down.

Those against the law believe that if the individual mandate falls, the entire Act should be declared null and void. These parties say the individual mandate is necessary for the survival of the private health insurance market, which relies on a careful balance of actuarial assumptions, pricing, underwriting and risk selection.

Those in favor of the law believe the court can decide what parts are financially unworkable without the mandate, and what parts of the legislation can survive.

When will the Supreme Court reach a decision?

The Supreme Court is expected to hear arguments for a three-day period, from March 26 to 29. It is expected to make a decision by late June.

For more detailed analysis from Unum, please review the [Executive Report](#) written by Chris Collins, SVP and General Counsel Unum U.S.

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