

Supreme Court Likely to Move Forward on *Affordable Care Act* Cases

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 26, 2012 – The first day of oral arguments before the Supreme Court on the constitutionality of the *Affordable Care Act* addressed whether the challenges to the *Affordable Care Act* are barred by the *Tax Anti-Injunction Act*, a statute which provides that “no suit for the purpose of restraining the assessment or collection of any tax may be maintained in any court by any person.” 26 U.S.C. § 7421(a). If the Court concludes that the *Tax Anti-Injunction Act* does not apply, the cases challenging the *Affordable Care Act*’s constitutionality may proceed. Otherwise, the Court may be required to defer its ruling on those issues until 2014.

As expected, a substantial portion of the oral argument addressed the question of whether the penalty individuals must pay if they have no health insurance is a “tax” within the meaning of the *Tax Anti-Injunction Act*. However, the arguments also addressed a related question: whether the *Tax Anti-Injunction Act* deprives courts of jurisdiction or is simply prescribes rules for how the pending cases may proceed?

Is the *Tax Anti-Injunction Act* a Jurisdictional Bar?

Much of the focus during oral argument regarded whether the Anti-Injunction Act is a jurisdictional bar to challenges, or whether it is a claim-processing rule that does not delineate what cases courts are competent to adjudicate. In *Helvering v. Davis*, 301 U.S. 619 (1937), the government was allowed to waive the *Tax Anti-Injunction Act*. The respondents in the pending case (*DHHS v. Florida*) therefore argued that since jurisdictional bars cannot be waived, the *Davis* case stands for the proposition that the *Tax Anti-Injunction Act* is not jurisdictional. Chief Justice Roberts asked court appointed Amici Robert Long whether he was asking the court to overrule *Davis*. Mr. Long and Solicitor General Verrilli both took the position that, at the time of *Davis*, the *Tax Anti-Injunction Act* simply codified pre-statutory equitable principles. However, both Mr. Long and General Verrilli also argued that more recent Supreme Court cases have already overruled *Davis*.

The respondents offered that the relevant text of the *Affordable Care Act* is indistinguishable from the text of a statute held to be non-jurisdictional in *Reed-Elsevier*. In that case, the statute required people to register their copyright before maintaining a suit for copyright infringement. The respondents attempted to draw an analogy between the precondition to filing suit in *Reed-Elsevier* and the payment of taxes here. The Justices seemed skeptical of Mr. Katsas’s analogy, and Justice Breyer even mentioned that he was leaning in favor of finding the *Tax Anti-Injunction Act* to be jurisdictional.

Is the Payment for Violating the Individual Mandate a “Tax” Within the Meaning of the *Tax Anti-Injunction Act*?

Even if the *Tax Anti-Injunction Act* is jurisdictional, it would not bar the Court from hearing the rest of the constitutional challenges if the penalty for failure to comply with the *Affordable Care Act*’s

individual mandate is not a tax. Therefore, while most of the discussion during the first day of oral argument involved the Court's jurisdiction to proceed, the more substantive question involved whether to characterize the payments associated with the *Affordable Care Act's* individual mandate as a tax or penalty.

Mr. Long argued that, since Congress directed that the penalty be assessed and collected in the same manner as taxes, the *Tax Anti-Injunction Act* bars the challenges. Justice Breyer stated that "being collected in the same manner as a tax doesn't automatically make it a tax, particularly since the reasons for the [*Tax Anti-Injunction Act*] are to prevent interference with revenue sources. And here, an advance attack on this does not interfere with the collection of revenues." Justice Scalia separately remarked that "unless it's clear, courts are not deprived of jurisdiction. And I find it hard to think that this is clear."

Justice Breyer also expressed some concern for the potential problems with having 500 federal judges deciding the constitutional question, rather than the Supreme Court. In response to the Justices' concern about a flood of litigation after the penalty takes effect, General Verrilli explained that there would still be a requirement to exhaust all administrative remedies, and that the United States would rely on these doctrines in such this circumstance.

In conclusion, the Supreme Court appeared reluctant to find that the payment associated with the individual mandate penalty is a tax. If so, the arguments about the Court's jurisdiction to proceed likely will be purely academic. Acknowledging that possibility, Justice Kennedy jokingly asked General Verrilli, "Don't you want to know the answer?"

What is Next?

Oral arguments will tomorrow (March 27, 2012), when the Court is scheduled to consider the second question before the Court: whether Congress had power under the Commerce Clause to enact the individual mandate.

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.