

# Business First of Buffalo

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## Justices skeptical of individual health-care mandate

By Kent Hoover

Health care reform's individual mandate may be in trouble, if Tuesday's questioning by U.S. Supreme Court justices indicates how they'll end up voting on the case.

The individual mandate was the subject of the court's second day of oral arguments in a case challenging the constitutionality of health care reform. Four justices sharply questioned whether Congress, under its power to regulate interstate commerce, had the right to compel people to purchase health insurance or pay a penalty to the government. A fifth justice, Clarence Thomas, didn't ask any questions, but he's no fan of big government, so a 5-4 vote to overturn the individual mandate is possible.

Justice Anthony Kennedy's questions and comments drew the most attention, since he often is the swing vote on closely decided cases.

Forcing citizens to purchase a commercial product "changes the relationship of the federal government to the individual in a very fundamental way," Kennedy said. As a result, the government faces "a heavy burden" in proving the individual mandate is constitutional, he said.

Solicitor General Donald Verrilli Jr. said health care isn't like other commercial products because everyone consumes health care sooner or later. People who don't have health insurance account for at least \$43 billion of uncompensated health care costs a year, he said, and these costs are passed on to people who do have insurance.

But Justice Samuel Alito noted that everyone also eventually dies. Should people be forced to buy burial insurance then, so that others aren't forced to pick up this tab?

What about broccoli, Justice Antonin Scalia asked. Should people be forced to eat that -- after all, it's good for you, and that would reduce health care costs for everyone.

Observers noted that Verrilli was unable to give a clear answer as to what limits there were to government power if the court agrees that Congress has the right to make people buy health insurance.

"It was a good day for those challenging the individual mandate," said Ilya Shapiro, senior fellow in constitutional studies at the **Cato Institute**, a libertarian think tank in Washington, D.C.

While he cautioned that predicting Supreme Court decisions is "a fool's game,"

Shapiro said, "if this morning's argument is any indication, Obamacare is in constitutional trouble."

CNN legal analyst Jeffrey Toobin agreed.

"This law looks like it's going to be struck down," he said.

Randy Barnett, a Georgetown University law professor who represented the National Federation of Independent Business in its challenge to the individual mandate, isn't making any predictions. But, he said, "I feel very good about how the argument went. The justices appeared closely divided, with half mainly critical of the government and half critically questioning the challengers. All we can do now is wait to see which side can command at least five votes."

The other big question to be answered is this: If a majority of the court agrees the individual mandate is unconstitutional, will they overturn just that provision, or health care reform in its entirety?

On Wednesday the court will take up that issue.

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