Health care reform efforts won't end with Supreme Court decision

By Lois M. Collins  Deseret News
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SALT LAKE CITY — Regardless of what the U.S. Supreme Court rules on the question of the Affordable Care Act today, health care reform efforts are just getting started, say those who have closely followed the issue.

"This does not mean the end of the health care debate if it is struck down," said Robert F. Bennett, former U.S. Senator from Utah, who is a teacher, researcher and lecturer at the University of Utah’s Hinckley Institute of Politics and a Fellow at George Washington University’s

School of Media and Public Affairs. "However, the Obama (law) itself cannot survive long-term even if it is entirely upheld. The finances don't work and it's unsustainable."

"The way we look at it, this is not the end of the fine-tuning process of the (law)," said Judi Hilman of the Utah Health Policy Project. If the entire law is struck down, she predicts that whoever wins the presidency will find "no turning back on comprehensive reform. Both parties, I think, know that .... What I would like to see if it's all struck down is a serious call for bipartisanship. If you look at health care costs, we are heading toward a train wreck."

The assumption around the Beltway, said Bennett, is that the court will either strike the 2010 Patient Protection and Affordable Care Act, which some call Obamacare, by a 5-4 vote, or it will be upheld 6-3. The rationale is this: Three associate justices are clearly opposed to the law: Clarence Thomas, Antonin Scalia and Samuel Alito. Four — Ruth Bader Ginsburg, Steven Breyer, Sonia Sotomayor and Elena Kagan — support it. The two in the middle, expected to decide the outcome, are Anthony Kennedy and Chief Justice John G. Roberts. It's expected those two will stick together, with Roberts writing the majority opinion however it comes out.

Twenty-six states challenged the act on the basis that individuals can’t be forced to buy insurance they may not want or need. The Justice Department has defended the act, maintaining that every American will need medical care sometime, so they don't "choose" to be part of the health care market.
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It may not be an all-up or all-down decision. The justices must decide whether the mandate requiring individuals buy insurance is constitutional. If that part of the law is struck down, the next question is one of "severability." As in, can the other parts of the law exist without it or would striking the mandate effectively sink the entire law? That issue took up one of the three days the law was argued before the court in March. There's also a question of whether the law can even be considered by the Supreme Court before it takes effect in 2014.

Different scenarios are getting plenty of discussion, four of them most prominently.

Some are predicting the individual mandate will be struck down and the rest of the act upheld.

Sen. Mike Lee, R-Utah, who clerked for Alito, told the Washington Examiner he thinks the individual mandate will fall as unconstitutional. If this happens, supporters of the mandate worry that those who are healthy will not buy insurance, which would drive up the cost for others. The mandate was enacted as a way of spreading the risk and reducing costs, they say. But critics maintain that it's unfair to force anyone to buy insurance and question whether it's legal to demand it.

An analysis published online at the Urban Institute Health Policy Center predicted overturning the mandate would leave insurers "up in arms" without a mandate for people to buy coverage. "Insurers would end up with a smaller, sicker pool of enrollees than would have occurred with the mandate."

Then again, the law could be upheld, or it could be struck down in its entirety as unconstitutional.

There's also the question of whether the expansion of the Medicaid program to provide coverage to lower-income Americans will survive the decision. The court could rule on a challenge by states that this aspect of the law is "coercive and therefore unlawful." No Medicaid expansion has been struck down before, so that would be "truly astonishing in that it defies years and years of precedent," said Hilman, who described the implication of striking the Medicaid expansion as "devastating" for the nation's safety net programs. But critics say expanding Medicaid places yet another burden on the backs of taxpayers and it could devastate state budgets, which share costs of Medicaid with the federal government.

And there remains the possibility that no decision will come down today, either because it's been postponed until the Supreme Court returns in October or because the court declares itself unable to rule before the law is being enforced, which would mean no sooner than 2015. That question has been raised under the Anti-Injunction Act.

"If they strike the individual mandate, there are still seven major changes most Americans are looking for," including guaranteed issue, nondiscrimination on insurance pricing, keeping dependents on their parents' policies until age 26 and others, Hilman said. "The mandate is not the heart of the law. It is the other changes that are going to mean the most to most Americans, especially those with any kind of health issues going on."

Bennett said when it comes to the Supreme Court, he's learned to pay particular attention to those who have clerked at the Supreme Court itself. They know the justices and how it works.
"People who have watched this court and clerked for some of its sitting justices are telling me the whole law is going to be struck down, on the basis of the way the justices behaved during the oral arguments," Bennett said. "Some are impossible to read and almost take delight in throwing people off track."

On the other hand, he said, others who are extremely well-versed in health care reform issues and the legal arguments predict it will be upheld.

Whatever happens, America's health care system needs help, he added. "The pre-Obama system that the Tea Party people are saying is the best in the world and you shouldn't fiddle with is, in fact, in desperate need of change."

Virtually everyone agrees that both political parties will spin whatever ruling comes down to further their political positions leading into the November presidential election.

Democrats point out that people like being able to keep their kids on their insurance until age 26. And it's true, Bennett said. Republican pollsters say there has never been a less popular piece of legislation. "And they're right, too."

But given the price tag either way, it will be revisited, he said.

If it's upheld, it's not affordable, he said. If it's struck down, "We will start over again. But we cannot say as we did in 1994, when Hillarycare died, that we will keep going the way things are. We can't. ... Either way, it has to be reopened. We are going to have to deal with health care in a meaningful way."

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Ruling expected around 8 a.m.

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