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what happens now with the Affordable Care Act?

After three days of riveting hearings at the Supreme Court concerning various aspects of the Affordable Care Act, we are left waiting, probably until the last week in June, to see what, if any, portions of the act will be struck down by the

There has been a lot of commentary on whether the Affordable Care Act can or should proceed without the mandate. I will offer my own opinion on that. First, however, I want to focus on what I believe is the most significant part of the act. It is the expansion of Medicaid to everyone under 133 percent of the poverty line, and the subsidies to purchase group insurance in the state health insurance exchanges to be given to everyone under 400 percent of the poverty line who is not eligible for employer-sponsored insurance or other public programs. Although the question of whether the provisions relating to the Medicaid expansion amount to coercion of the states received some attention on the third day of the hearings, most of the attention seemed to be on the constitutionality and centrality of the individual mandate.

What the Act Accomplishes

Beyond the well-founded criticisms that the Affordable Care Act does not do enough to reform the delivery system or to make entitlements more sustainable, the act does substantially expand the number of people who will have some type of insurance. The estimates are that when the Medicaid expansion and the subsidies for purchasing private insurance in the state exchanges begin in 2014, about 16 million more people will be eligible for Medicaid and about the same number will be eligible for the subsidies.

I wish that people near the poverty line had also been offered the opportunity to buy insurance in the state exchanges if they wished to do so, rather than be forced to remain on Medicaid. But for a country that has had about 15 percent of its population uninsured, reducing that number by 32 million is a significant accomplishment—even if it is the easier part of healthcare reform.

Legal Challenges

To a certain extent, I am mystified by the legal challenge to the Medicaid expansion. The current requirement to expand coverage seems similar to requirements imposed on states in the past, such as requiring coverage for all children under the age of 18 who are below the poverty line or coverage for all pregnant women who are below 200 percent of the poverty line. This requirement is more sweeping in terms of numbers of people affected, but it also comes with much more generous federal financial support.

Of course, the major legal challenge has focused on the individual mandate. At issue are three major concerns: whether the mandate is constitutional under the commerce clause, whether the lack of a severability clause could take down the entire bill, and even aside from the severability issue, whether the mandate is so central to the legislation that eliminating it would unravel the whole legislation.

Perplexing Logic

I understand the concerns about adverse selection and the prevention of "free riders." Clearly, requiring everyone to have coverage equivalent to the "essential benefit package" or pay a "penalty" is one way to address these concerns effectively. Ensuring the participation of low-risk, healthy young adults who might not be inclined to buy insurance unless it is heavily subsidized—especially if it is priced higher than is actuarially fair,

as would occur under the act—lowers the cost of insurance for everyone in the insurance pool.

The relevant question is: What happens when you don't have such a requirement and when you require guaranteed issue and don't let insurance companies price insurance to reflect expected use—because of preexisting conditions or age?

Two perspectives on this question come to mind.

First, consider what happened when New York and Massachusetts (prior to their reform legislation in 2006) instituted community rating and guaranteed issue without a mandate. Both states had high premium costs, but because both states also had extensive mandated benefit packages, which clearly drive up the cost of insurance, it's hard to know what the premiums would have been with a more modest requirement of benefits. The final rule under the Affordable Care Act defining the "essential benefit package" has not yet been released, but it appears that the administration is being sensitive to concerns that making the required benefit package too expansive would make the insurance unaffordable. Loosening some of the constraints on the insurance companies could also ease these concerns regarding pricing, although it raises other concerns.

Second, consider what we know about the willingness of people to purchase insurance when they have the option to obtain subsidized insurance in a group market. This idea more or less describes the world of employer-sponsored insurance. The main subsidy is what workers get from the tax system by not having to count the employer contribution as part of their taxable income. Because of the way premiums are typically calculated, lower-income workers also can be subsidized by higher-income workers who work for the same company. Most people who are offered employer-sponsored insurance take it. Consider also, then, that these forms of subsidy are substantially less than the subsidies that most people below 300 percent of the poverty line would be receiving in the state health insurance exchanges under the Affordable Care Act, and that the act also offers a choice among at least four levels of insurance coverage.

The notion that large numbers of people being offered access to group insurance and substantial subsidies for the purchase of insurance might be in the "thanks-but no thanks" category unless there is a mandate makes no sense. If the age-band were made actuarially sound, even some of the "young immortals" could be enticed to participate. Furthermore, the current legislative language has such stringent restrictions on insurance companies and such light penalties on individuals who don't purchase it that the legislation could exacerbate the adverse selection problem as much as prevent it.

If the Supreme Court decides the mandate is unconstitutional, I hope the Court will leave it to Congress to decide what should happen next. The Court has no way of knowing what Congress would have done differently had it anticipated that this version of a mandate would be deemed unconstitutional, so the Court should not venture into guesswork in this area. In any event, such an exercise would be unnecessary because most of the significant changes in coverage under the current legislation are not due to happen until 2014.

If Congress were to determine that the bill could not stand without a mandate, let it repeal the legislation as it repealed the 1989 Medicare Catastrophic Act. Or, better yet, let Congress take a page from the Medicare book and not require coverage—just charge people a penalty if they don't purchase insurance in the year it is offered without discriminatory features, and simply treat it as an incentive to participate, rather than as a "mandate." Seems to work just fine for Medicare. ●

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