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yet one more legal attack by Republicans on the ACA

In what many have regarded as strange timing, the U.S. Department of Justice (DOJ) filed a brief the first week in June challenging the constitutionality of the Affordable Care Act (ACA).

This action was triggered by the repeal of the insurance mandate included in the December 2017 Tax Cuts and Jobs Act. Two months after the bill's passage, the Texas attorney general, with the support of Republican attorneys general from 19 other states, filed suit in Federal District Court in Dallas asserting that the mandate could no longer be justified as a tax and therefore should be struck down—and that, with it, the rest of the act should be invalidated.

The Legal Arguments

The DOJ did not accept the full reasoning of the states but did agree that the judge should void both the mandate and the preexisting-condition exclusion protections as well as the provision of the law that limits an insurer's ability to charge sick customers more than healthy ones. The legal arguments are a little hard to follow for those of us not trained in the law, but they recently were clarified by Christopher Condeluci, an attorney who was part of the Republican staff for the Finance Committee when the ACA was being debated.[a]

The 2012 Supreme Court ruling hinged on Justice Roberts' view that the mandate was a tax, rather than a fee, as the Democrats were attempting to label it in their talking points. The argument was that the enactment of the individual mandate penalty was a lawful act of Congress and the mandate (and therefore the ACA) was constitutional because Congress has the power to tax. The interesting twist is that the current challengers are arguing that the individual mandate is unconstitutional because it will no longer generate revenue for the government after 2019.

Condeluci argues that the Republicans eliminated the penalty tax when they passed the 2017 tax reforms, but that the individual mandate section of the tax code remains on the books. As a result, a future Congress could amend the tax code and raise it from zero dollars to a specified dollar amount or percentage of income, such as the 2.5 percent of income that exists today. Although this sounds like a technicality to those of us not trained in the law, it apparently was critical to the

a. Condeluci's comments cited here were included in a policy and regulatory update sent by email March 9.

previous ruling by the Supreme Court upholding the ACA's constitutionality.

Questions About Timing

The timing of this challenge is proving troublesome for moderate Republicans, particularly those in competitive races. The outcome of the challenge will not be known until after the Nov. 6 midterm election, yet it clearly gives Democrats an important talking point to use in the run-up to the election. Both the timing and the administration's support of the challenge are perplexing because protection from pre-existing conditions is one of the features that President Trump has publicly supported, and it was included in the Republican proposals considered in 2017 as replacement bills for the ACA.

Protection against the exclusion of pre-existing conditions has been available to people in plans with two or more people since the Health Insurance Portability and Accountability Act was passed in 1996. Some states, including Massachusetts and New York, also had adopted similar protections for individuals in nongroup plans, but most individuals who purchased their own insurance were subject to pre-existing condition exclusions prior to the passage of the ACA.

Although the current case has been brought by states attorneys general and not the Trump administration, the DOJ is not defending the relevant provisions of the ACA. Nonsupport of an existing federal law by the DOJ has precedence. In 2011, the Obama Administration decided to stop defending the constitutionality of the Defense of Marriage Act. This legislation barred recognition of same sex unions that were lawful at the state level and was later voided by the Supreme Court.

Likely Outcomes

The decision process will require several levels of judicial review, and although most anticipate that it eventually will go to the Supreme Court, there already is disagreement about whether the Supreme Court will be interested in taking up this issue again. There also are those who suggest that Congress's decision to remove the penalty while leaving the rest of the plan in place negates any argument that the mandate is critical to the rest of the ACA. Even the Congressional Budget Office seems to be taking a position that the removal of the mandate is less critical to the functioning of the ACA than it had determined earlier. The CBO now estimates that the number of uninsured it expects from the elimination of the mandate will be 8 million rather than the 13 million it previously estimated.

What we can expect is that the currently scheduled elimination of the mandate in 2019 along with the Administration's stance in this newest legal challenge has added more uncertainty for insurers as they prepare to file their 2019 exchange premium rates. Eight states—Maine, Maryland, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington—plus the District of Columbia have already filed their rates, with requested premium increases ranging from 7 percent to 36 percent, according to the Kaiser tracker of 2019 marketplace premiums.

Adding to the uncertainty from the legal challenges, the availability of short-term, limited duration (STLD) plans may divert some of the healthier individuals currently buying insurance in the exchanges from continuing to do so because of the STLD plans' lower premiums.

However, because most of the people who have gained coverage under the ACA have done so as a result of either the expansion of Medicaid or the receipt of substantial subsidies to purchase insurance in the exchanges, it is not clear that these events will materially reduce the gains in coverage that have occurred to date. One thing is absolutely clear, however: The Trump administration's decision not to defend the pre-existing condition exclusion will be receiving a lot of attention during the run-up to the midterm elections.

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