

## WILL HEALTHCARE REFORM SURVIVE THE COURTS?

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Aug. 20, 2011: The legal battle over the constitutionality of the health care reform law will determine how far government can go in helping to improve people's lives. Ultimately, the Supreme Court will have to decide this question. Until then, the pileup of lower federal court rulings responding to some of the more than two dozen lawsuits filed against the law is confusing and sharply divided, especially on the requirement that individuals buy or obtain health insurance or pay a penalty.

So far, six federal judges have ruled that this "individual mandate" is constitutional while five have found that it is not. (While most of those judges appointed by Republicans ruled against the mandate and most of the Democratic appointees upheld it, two judges broke away from the partisan pattern.) Two appellate courts one in Cincinnati and one in Atlanta have reached opposite conclusions. Three other cases are now awaiting appeals court decisions. Here is a scorecard of the rulings and trends emerging in the lower courts.

### CONTESTED BATTLEGROUNDS

The core fight is whether Congress, under its powers to regulate interstate commerce, can require people to buy private health insurance if they don't want to. Although the law has many elements, the mandate is an important tool for reaching the goal of near-universal coverage and needed to make health insurance reforms work.

The new law requires insurers to accept all applicants, even those with pre-existing conditions, and prohibits charging higher rates based on health status. Those highly popular changes will drive up premiums for private policies unless healthier people are forced to take out insurance, too.

Without a mandate, many of those who lack insurance would typically end up with charity care (as they do now), where the costs are shifted to health care providers and taxpayers or are paid for through higher premiums for everyone else.

The health system's interconnectedness is central to the reasoning of the 2-to-1 majority on the Court of Appeals for the Sixth Circuit in Cincinnati, which ruled that Congress can require Americans to buy insurance as part of its power to regulate both the insurance markets and the markets for delivery of health care services that virtually everyone uses.

The concurring opinion by Judge Jeffrey Sutton, who was appointed by President George W. Bush, is particularly compelling. "No matter how you slice the relevant market as obtaining health care, as paying for health care, as insuring for health care all of these activities affect interstate commerce, in a substantial way," he wrote. Because not paying for insurance is an economic decision, Congress was within its power to regulate that action. In fact, he noted, decisions not to buy insurance have more impact on interstate commerce than some activities that the Supreme Court previously found could be regulated, such as a farmer growing wheat for his own use or an individual growing marijuana for her own use.

The 2-to-1 majority on the 11th Circuit appeals court rejected that view, ruling this

month that Congress has no authority under the commerce clause to impose the mandate. The judges called the mandate "a wholly novel and potentially unbounded assertion of Congressional authority: the ability to compel Americans to purchase an expensive health insurance product they have elected not to buy, and to make them repurchase that insurance product every month for their entire lives."

#### WOULD IT ALL COLLAPSE?

The rulings so far suggest that the rest of the law would remain standing even if the mandate was struck down only one district judge has ruled that the whole law would have to be declared unconstitutional. The 11th Circuit appellate court found that all other provisions could survive without the mandate (how well they would function is a separate question) and that Congress would likely have passed the law even without the mandate included.

#### MEDICAID EXPANSION

The law would substantially expand Medicaid, the joint state-federal health program for the poor. Twenty-six states have sued to strike down that expansion, which would enroll many millions of the uninsured, contending that it would encroach on state sovereignty and coerce them into spending more on Medicaid. That argument was dismissed by the 11th Circuit appellate court, which found that the expansion was not coercive since the federal government would pay most of the added costs and the states have ample time to set up alternative programs.

#### WHAT THE MARKET NEEDS

While the individual mandate may not be popular in opinion polls, health insurance reforms, like coverage of pre-existing conditions, are exceedingly popular. Those reforms would work far less well without an individual mandate. The Supreme Court could take up any of these issues, skirt them, base its analysis on principles that the lower courts have avoided, or even create new law transcending its own past decisions.

Health care spending now accounts for 16 percent of the national economy, yet 50 million Americans are uninsured. How strange if Congress were disempowered in this critical arena. We hope the court will show judicial restraint and let elected political leaders determine what health care reform should be.