



Trump Teases Executive Order On Pre-Existing Protections, I Suspect, To Help With ACA Litigation

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August 8th, 2020

On Friday, President Trump teased a new executive order on healthcare:

"That's a big thing. I've always been very strongly in favor. We have to cover pre-existing conditions so we will be pursuing a major executive order requiring health insurance companies to cover all pre-existing conditions for all of its customers. This has never been done before."

Of course, the media pounced and said the ACA—the law Trump is trying to destroy—already requires insurers to protect people with pre-existing protections. Specifically, the law's *guaranteed issue* and *community rating* provisions (GICR) bar insurers from denying coverage, or charging higher premiums, to people with pre-existing condition.

So what is Trump up to? I can offer some uninformed speculation.

Ilya Shapiro and I filed the Cato Institute's amicus brief in *California v. Texas*. We proposed that the Trump administration could require, by executive action, insurers on the ACA exchange to comply with guaranteed issue and community rating. But why would such an executive action be needed if the ACA is in place? Well, the ACA is currently being challenged. And perhaps one factor that could aid the Court's deliberations would be an assurance that people with pre-existing protections could still obtain coverage on the exchanges, even if *guaranteed issue* and *community rating* (GICR) were found to be inseparable.

Here is an excerpt from our brief.

The analysis for individual market, on-exchange policies is different. Hurley and Nantz are not eligible for subsidies. Declarations, *supra*. But they could still purchase an unsubsidized plan on the exchanges. Halting GICR with respect to policies sold *on* the exchanges would be an unnecessarily overbroad remedy. So long as the plaintiffs can purchase off-market non-compliant plans, or none at all, their injuries will be remedied. Plaintiffs cannot demand a greater remedy to alter *all* policies offered on government exchanges. Moreover, people who seek to buy a government-sponsored product on a government exchange cannot complain about cumbersome regulations. [FN 12] Courts need go no further than issue a declaration with respect to individual market, off-exchange policies. "[T]he judicial power is, fundamentally, the power to render judgments in individual cases." *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). No more, and no less. Hurley and Nantz, meanwhile, and all those who object to being forced to purchase unwanted policies, will have other options.

[FN12]: This narrow remedy would address concerns raised by the Federal Respondents about creating a "potentially unstable insurance market." See Brief for the Federal Respondents at 44–45. **The executive branch could also require insurance providers on the exchanges to comply with the ACA's GICR provisions, regardless of the outcome of this litigation.**

Let's see if the Trump executive order reflects the strategy in our brief. I have no inside information. But I wouldn't be surprised if the SG uses a similar strategy.

I will have much more to say about our amicus brief, as well as the Court's recent severability decisions (*Seila Law* and *AAPC*), as the arguments draw near.

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