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Are Legal Challenges to Reform Actually Making it Stronger?

by Dan Diamond, California Healthline Contributing Editor

They might be Giants, but baseball stars Tim Linecum and Buster Posey were once Grizzlies and Volcanoes.

Before they brought San Francisco a world championship, the two All-Stars had to wend their way through minor-league stops in Fresno and Salem, Ore. -- baseball's time-honored tradition of forcing players to prove and improve themselves before reaching the majors.

Similarly, challenges to the federal health reform law have followed the traditional path these past 15 months, from district to circuit court, with a Supreme Court showdown inevitably looming. Yet the vast number of lawsuits has provoked a rare response from the Obama administration: the solicitor general’s office has stepped up its commitment to fighting the lower court battles, too.

Just as Linecum, Posey and countless others got better for their minor-league moments, some lawyers suggest that the government is reaping the benefit of repetition and gaining critical experience ahead of the high court battle.

Scouting Report: Rare Challenge Leads to Rare Response

The sheer scope and volume of challenges to PPACA -- 28 states, 26 major lawsuits and numerous litigants -- can boggle a barrister's brain.

California Healthline asked a half-dozen lawyers to suggest a historic analogue for the PPACA legal battle. All were stumped.

The fight over health reform is "unprecedented," according to Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute. "I can't recall a time when there were multiple suits across the country, challenging the same thing," he told *California Healthline*.

The unique fight against health reform also brought an unparalleled response from the government's legal team. In a rare display, the Obama administration's top lawyers have been heavily involved in defending the law, even before the first lawsuit was filed.

In January 2010 -- weeks before the health reform law was to pass -- Neal Katyal of the Solicitor General's office told a fellow Justice Department official that he planned to

ensure that "our office is heavily involved even in the [district court]" cases, according to department e-mails released under the Freedom of Information Act.

In subsequent months, Katyal's colleague Ian Gershengorn, director of the Justice Department's Federal Programs Branch, became "something of a courthouse circuit-rider," according to the *New York Times*, traveling to Virginia, Florida and Michigan to argue in favor of the law's individual mandate.

More recently, Katyal has been the administration's public face in the health reform fight, having argued the government's case before three appeals courts this year. While it's unusual for the acting solicitor general -- a position that Katyal held through last week -- to argue one case on the appellate level, let alone three, that continuity among the three courts ultimately strengthened the administration's argument, top lawyers told *California Healthline*.

Government Shows Improvement in 11th Circuit

For example, Katyal showed greater nuance in advancing the government's position last week before a three-judge panel at the 11th U.S. Circuit Court of Appeals in Atlanta.

At the hearing -- over the multistate lawsuit challenging the constitutionality of the federal health reform law and its individual mandate -- Katyal was opposed by Paul Clement, the solicitor general in the George W. Bush administration, perhaps the first time that two solicitors general have met in a court of appeals argument.

Writing in *Health Affairs* , Washington & Lee law professor Timothy Jost noted that the judges focused on three main issues: the constitutionality of the individual mandate, the law's Medicaid expansion and whether PPACA should be entirely struck down if the mandate is found to be unconstitutional. According to Katyal, Congress can exercise its power to regulate commerce if it would resolve a national problem, not a local one. He insisted that in this case, Congress is authorized to require health insurance for most uninsured individuals because they shift an estimated $43 billion in medical costs annually to taxpayers.

Looking at last week's hearing, Jost told *California Healthline* that it demonstrated Katyal's "fantastic job of sharpening the [government's] argument ... particularly compared to the district court level." Jost noted that Katyal sculpted his defense of the law around regulating access to health care as opposed to a trickier defense based on access to health insurance.

Randy Barnett, a Georgetown University law professor who has been a prominent critic of PPACA, also acknowledged that Katyal "clearly did benefit" from having previously argued the case.

Making it to the Show

Although Katyal's improvement in the appeals courts is heartening, it isn't the government's endgame.

Linecum and Posey's minor league numbers were very good -- but their legacy will be defined by their major league careers, not their triple-A statistics. And while the Obama administration is hoping for lower-court victories, it's the Supreme Court that matters most.

Not all lawyers expect the government team to benefit from its growing familiarity with the case. In front of the high court, the administration's extra experience won't be "a significant factor," Cato's Shapiro told *California Healthline*. While the solicitor general's office may be getting more repetition and potential plaintiffs like Virginia Attorney General Ken Cuccinelli will "only have one case ... as good lawyers, [everyone's] reading everyone else's briefs," Shapiro noted.

The administration also will be losing some of that added experience, as a new solicitor general is about to take the reins. Katyal's replacement -- Donald Verrilli -- was sworn in last week.

Just like his predecessor, Verrilli is expected to step in and personally argue upcoming cases over health care, likely ensuring that he has some experience before going in front of the Supreme Court. Verrilli may well take up the government's oral argument in front of the District of Columbia Circuit Court, which has scheduled a hearing on the American Center for Law & Justice's challenge for September.

We're looking forward to typical summer pastimes -- whether watching baseball or the health reform fight -- across the coming months. Meanwhile, here's what made news in reform circles this past week.

Administration Happenings

- On Monday, **HHS Assistant Secretary for Planning and Evaluation Sherry Glied** said the agency has given the **House Energy and Commerce Subcommittee on Oversight and Investigations** a list of companies and unions that were denied waivers from coverage-level mandates in the federal health reform law. At Monday's hearing, Glied said the waivers are "under discussion right now" at HHS. She added that the mini-med waivers are needed to help some companies maintain insurance benefits and to provide a bridge to more sweeping coverage mandates for employers that take effect in 2014 (Norman, *CQ HealthBeat*, 6/13).
- The **Federal Coordinated Health Care Office** established under the federal health reform law is working to reduce costs and improve care for beneficiaries dually eligible for Medicaid and Medicare. The office's director, **Melanie Bella**, is scheduled to speak before the **House Energy and Commerce Health Subcommittee** this month, and lawmakers are likely to ask for recommendations about how to reduce costs associated with dual eligibles. According to Bella, the

office plans to leverage regulatory changes to reduce duplication of services, avoid complications and reduce hospitalization rates (Adams, *CQ Today*, 6/12).

- Last week, **CMS** announced a new demonstration project that will award $42 million over three years to as many as 500 community health centers that treat Medicare beneficiaries. The grants -- which come from the federal health reform law -- aim to help federally qualified health centers improve quality of care, lower costs and coordinate patient care. Participating centers will be required to adopt electronic health record systems and help patients manage chronic conditions. Applications for the program are due Aug. 12 (Adams, *CQ HealthBeat*, 6/6).
- The Obama administration is facing growing opposition to the **Independent Payment Advisory Board**, which was created under the federal health reform law to make recommendations to Congress on reducing Medicare spending growth. Seven House Democrats have co-sponsored Republican legislation (HR 452) that would repeal IPAB, and **Rep. Allyson Schwartz (D-Pa.)** is recruiting other Democrats to join in the attempt to repeal the board. Meanwhile, the **National Committee to Preserve Social Security and Medicare**, a prominent supporter of the federal health reform law, now is lobbying for the repeal of IPAB (Haberkorn, *Politico*, 6/8).
- Consulting firm **McKinsey** has refused requests from the Obama administration and congressional Democrats to release the methodology and other details of the firm's new survey, which found that nearly 30% of U.S. employers might stop offering their workers health insurance in 2014 when the federal health reform law is fully implemented. Critics of the study noted that it contradicted a number of other studies. They also argued that it is impossible to measure the validity of the findings because McKinsey did not release key aspects of the study's methodology (Sargent, "The Plum Line," *Washington Post*, 6/10).

Spotlight on ACOs

- While many health care providers are wary of the Obama administration's plans to establish accountable care organizations under Medicare, some plan to apply the basic ideas via Medicare Advantage plans. Through Medicare Advantage, hospitals and physicians are able to negotiate fees with private insurers for providing coordinated care, thereby reducing costs. **Presbyterian Healthcare Services** in New Mexico currently runs its own 30,000-member Medicare Advantage plan and intends to incorporate ACO principles into the plan to generate more profits (McCarthy, *National Journal*, 6/9).
- The **Medical Imaging and Technology Alliance** -- which represents manufacturers of MRI, CT, PET scans and other high-tech imaging equipment -- has called on **CMS** to extend contracts with accountable care organizations beyond the three-year period, noting that an ACO could try to produce savings by reducing its use of imaging services. MITA argued that doing so would result in higher health care costs over the long term because physicians would be forced to diagnose patients without enough information (Reichard, *CQ HealthBeat*, 6/7).
- The **Association of American Medical Colleges** has urged **CMS** to omit certain Medicare payments to teaching hospitals to the total of how much accountable

care organizations spend on care. Specifically, AAMC asked CMS not to count payments for direct medical education, indirect medical education and disproportionate share hospital payments. AAMC said including such payments could encourage ACOs to advise their patients to avoid teaching hospitals altogether. In addition to undermining the goals of teaching hospitals, those types of payments could affect the training of health professionals, discovery of advanced treatments and access to care in some communities, according to AAMC (Reichard, *CQ HealthBeat*, 6/7).

- Meanwhile, **AARP** has urged **CMS** officials to stay committed to the accountable care organization program, which it considers a crucial part of keeping the Medicare sustainable. The group added, "AARP feels strongly that a combination of requirements and incentives must compel hospitals and providers to move away from 'business as usual' while permitting enough flexibility to allow diverse models to develop in the" ACO program (Reichard, *CQ HealthBeat*, 6/7).

In the States

- On Monday, **New York Gov. Andrew Cuomo (D)** proposed legislation that would create a statewide health insurance exchange. The legislation would establish a "centralized customer-service oriented marketplace" where individuals and small groups could choose from plans rated by quality and price. It also would create a board of directors and an 18-member advisory board. New York is eligible for up to $28 million in federal grants through December 2014 to get the exchange up and running (Matthews, Binghamton *Press & Sun-Bulletin*, 6/13).
- A new state law will expand Kansas' high-risk insurance pool to allow uninsured children to gain coverage. State residents under age 19 will be eligible to apply to the **Kansas Health Insurance Association** program, which will allow children to be insured if they are able to show that they cannot afford private insurance or that they were denied coverage. The program will provide coverage until 2014, when provisions of the federal health reform law will require insurers to cover children and other high-risk beneficiaries (Vesely, *Modern Healthcare*, 6/11).

In the Courts

- On Thursday's edition of **NPR**'s "Tell Me More," **Caroline Fredrickson**, executive director of the **American Constitution Society for Law and Policy**, and **Michael Cannon**, director of Health Policy Studies at the **Cato Institute**, reviewed oral arguments in a multistate lawsuit against the federal health reform law that began last week in the **11th U.S. Circuit Court of Appeals in Atlanta**. Fredrickson argued that the Commerce Clause of the Constitution permits Congress to regulate the health insurance industry, while Cannon said that the clause "clearly does not give Congress the power they're claiming" (Martin, "Tell Me More," NPR, 6/9).

Read more: http://www.californiahealthline.org/road-to-reform/2011/are-legal-challenges-to-reform-actually-making-it-stronger.aspx#ixzz1PMbBILBx