

# GOVERNMENT HEALTH IT

## High court decisions hang over ACA

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June 23, 2014

For the Obama Administration, healthcare rights advocates, and insurers, the stakes are high in the pending Hobby Lobby case.

The arts and crafts company is seeking an exemption from the Affordable Care Act's preventive services requirements because of the owner's personal religious beliefs and opposition to birth control.

The Department of Health and Human Services included certain forms of contraception on the list of preventive services health plans must make available to members without cost-sharing, sparking a wave of lawsuits from companies and organizations owned by individuals with various religious beliefs or by religious institutions, including many Catholic nonprofits like the University of Notre Dame.

In 2012, before the fall elections, the Obama Administration offered a compromise with rules that put the onus on health plans to administer contraception services without direct involvement of employers, although that was limited specifically to faith-based institutions run by churches and religious orders. It didn't extend to employers whose owners happen to have certain religious beliefs, and in any case, it hasn't satisfied institutions like Notre Dame.

This spring, Oklahoma City-based Hobby Lobby, along with Lancaster, Pennsylvania-based Conestoga Wood Specialties, tried to convince the Supreme Court that the mandate, including coverage for emergency contraceptive pills and intrauterine devices, "substantially burdens" the religious rights of their owners as established under the Religious Freedom Restoration Act of 1993.

The Supreme Court's decision could have some wide-ranging implications on group health insurance markets; it might even increase the prospects of Congress ending the employer mandate altogether and bringing millions more people into individual health plans.

If the court rules against Hobby Lobby and forces it to comply with the contraceptive mandate, companies could choose to stop providing employees with health insurance (something Hobby Lobby's owners say they are religiously-inspired to do) and pay a fine of \$2,000 per employee, with the workers then buying coverage in exchanges.

The option of ending coverage is not unreasonable for employers who want to hew to strict religious beliefs, as Justice Sonia Sotomayor said in oral arguments, although the fact that the fine is not tax deductible like employer-sponsored insurance would leave some feeling they are still being penalized.

But it could also be unfair to workers if the Court rules in favor of Hobby Lobby and grants virtually any company whose owners object to contraception the right to exclude those services from health plans that employees are largely forced to use — along with raising new questions in business law for what company owners can and can't do.

For insurers with risk-based group plans and self-insured clients receiving third-party administrative services, a decision in favor of Hobby Lobby would mean more-involved plan design on the part of employers. Insurance companies could also face public backlash for working with companies that deny their employees contraception coverage.

The contraception mandate dispute also seems to bolster the case for ending the employer mandate, and giving individuals more options to buy their own health plans and making it easier for companies to contribute to but not directly sponsor health plans for their workers through exchanges.

### **Wither the federal exchange?**

Another legal dispute, though, may complicate the future of public exchanges and possibly derail some of the ACA's central programs, the individual mandate and tax credit subsidies.

Those who have read the ACA in exquisite detail may or may not have come to the conclusion that Cato Institute health policy analyst Michael Cannon and his colleagues arrived at after the section on exchanges. In four separate lawsuits against the federal government, they argue that subsidies and penalties can only be administered in states that have created their own marketplaces and thus are not valid through federal exchanges.

“A State may elect to authorize an Exchange established by the State under this section to enter into an agreement with an eligible entity to carry out one or more responsibilities,” the ACA reads.

The phrase “established by the state” appears 10 times in the law and is Cannon et. al.'s main evidence for the argument that HHS and the IRS cannot administer subsidies and taxes in states that declined to set up exchanges.

That wording is a drafting oversight, and Congress intended for every American to have access to exchange subsidies, supporters of the ACA respond. Cannon and his colleagues who conducted the research backing up the lawsuits argue that Congress intentionally used the wording as a way of conditioning subsidies on active state participation, in a bet that no Governor would deny a healthcare entitlement to its citizens.

District Court judges have dismissed two of the lawsuits, both on appeal, and the other two are pending initial decisions. But some ACA supporters are worried.

If the issue is taken up by the Supreme Court, and if the high court decides the “established by the state” language “doesn't seem to be malleable in any way,” as an appeal judge put it, the insurance expansion goals of the ACA could be unravelled, with states effectively able to opt out of both the subsidy program and the individual mandate, along with Medicaid eligibility expansion.

As numerous states are finding the work of running their own exchange websites too expensive and complicated, some are planning transitions to the federal marketplace. By 2020, **most states** will be served by the federal exchange, consultant John Gorman argues.

While Cannon and others involved in the suit would like to see the ACA replaced entirely, they argue that an invalidation of the federal exchange wouldn't necessarily end the insurance programs, but rather create an impetus for changes. It "would finally allow states to expose the full cost of the PPACA to insurers, consumers and the health care industry," Cannon wrote recently.