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States Won't Hurt Legal Case Against Health Law By Taking Federal Money, Lawyer Says

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The lead outside lawyer in the multi-state legal challenge to the health care law said Monday that it doesn't pose problems for the suit if states apply for federal funding for implementation even as they're to kill the law in court.

David Rivkin, who's been arguing the case on behalf of the 26 states challenging the law (PL 111-142, PL 111-152), said that the decision by states whether or not to accept federal funds is a "quintessentially political decision" that has nothing to do with the lawsuit. If states don't try to recoup tax money that state citizens have paid in to the federal government, it will go to other states instead, Rivkin said.

"It does not impede the legal claims," he said in remarks at a forum at the conservative Cato Institute examining the health care law as it nears its one-year anniversary on Wednesday.

Rivkin's comments highlighted the increasingly difficult position for some states trying to follow two tracks at once in connection with the legal suit and implementation.

Federal District Court Judge Roger Vinson declared the entire health care law unconstitutional on Jan. 31 in the case filed by the states along with the National Federation of Independent Business and two individuals. The Department of Justice appealed to the Court of Appeals for the 11th Circuit, based in Atlanta, and oral arguments are expected as soon as June.

Vinson's initial ruling prompted a handful of states to say the law was no longer in effect and they were halting implementation. But Vinson later issued a stay of his own ruling, which meant work on the law could continue without legal question.

Most states are continuing to move ahead, whether a party to the suit or not, and every state except Alaska has applied for and received grant money for planning exchanges. At the same time, 26 states are also paying legal bills for the lawsuit.

In Georgia, controversy has erupted over planning for the insurance exchanges. Georgia is a party to the suit but Republican Gov. Nathan Deal, under pressure from the Tea Party, last week pulled the plug on proposed legislation to start planning for an exchange. The Atlanta Journal Constitution says that both bodies of the state legislature also have approved bills to allow Georgia to form alliances with other states on health care, part of a conservative approach to avoid the federal law.

Rivkin said he believes that the Florida case and a case filed by Virginia Attorney General Kenneth Cuccinelli on behalf of the commonwealth of Virginia will be the first to emerge from the appeals process and head toward the U.S. Supreme Court. In the Virginia case, a federal district court judge ruled the individual mandate in the law unconstitutional. The government has appealed to the Court of Appeals for the 4th Circuit.

Like many other observers of the case, Rivkin predicted that the high court will take up the health care law during its term beginning in the fall of 2011 and oral arguments would come by April, with a ruling by the high court by June, 2012.

Rivkin was scathing in his assessment of the law, saying that Congress was in such a rush to push it through that there was no legal review of it by the administration and it thus was made vulnerable to legal attack. "They just didn't care. It was arrogance. It was hubris," said Rivkin. "It was the craziest, most pathetic excuse for a legal process I've ever seen."

But Neera Tanden, chief operating officer of the liberal Center for American Progress, said while speaking on a later panel that there was a legal assessment of the overhaul prior to its passage. Tanden, who worked during the debate as a top adviser on health care to Health and Human Services Secretary Kathleen Sebelius, said that administration lawyers "did look at the individual mandate and analyze its constitutionality" before a vote on the law by the Senate in late 2009.

An administration official, speaking on background, also denied that the White House was not consulted about the mandate. Officials believed it was constitutional then and believe the same now, the administration source said.

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