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Cuccinelli touts way of fighting health law

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Ken Cuccinelli, the first state attorney general in the nation to sue over the federal health care law, has hit upon a new strategy that is much easier than going to court: do nothing.

Virginia and other states can shield businesses from hefty fines for not providing adequate health insurance for employees, he contends, simply by refusing to set up their own state-based insurance exchanges.

Cuccinelli bases that legal theory on a quirk in the law, one variously attributed to sloppy drafting, political miscalculation or both: It includes a provision to impose those fines under state-based exchanges, but not under a federal one.

"In the law, it says those penalties don't apply if the federal government sets up the exchange," he told a tea party gathering in Henrico County last week. "Whoops!"

Supporters of the law acknowledge the wording glitch but say the matter has been clarified through regulations subsequently issued by the Internal Revenue Service. They dismiss Cuccinelli's line of attack as wishful thinking or willful distortion.

"That argument is effectively null and void, but it's not stopping people from making it," said Chad Shearer, deputy director of Princeton University's State Health Reform Assistance Network.

Crafted by a Cato Institute scholar about a year ago, the theory started quietly making the rounds among conservative think-tank scholars, attorneys general, lawyers and bloggers while the matter was before the Supreme Court. It has picked up steam since the court upheld the law in June.

For Affordable Care Act foes who first tried to kill the law in the courts and now aim to do so by electing Republican Mitt Romney president, the do-nothing approach is a long-range Plan C.

"This could bring down the entire law," said Michael F. Cannon, the Cato Institute's director of health policy studies who crafted the argument and urged Cuccinelli, a longtime friend, to pick up on it. "If Virginia just sits on its hands and does not implement 'Obamacare,' then state officials will protect Virginia employers from a \$2,000-per-worker tax."

Even the law's most ardent supporters admit it was hurriedly and inartfully drafted. It was riddled with errors that would have been cleaned up if, after the U.S. Senate passed what was supposed to be a draft, the Democrats hadn't lost their filibuster-proof majority in the upper chamber with the election of Scott Brown, R-Mass., in January 2010.

Some of those supporters acknowledge that a plain reading of the text Cuccinelli points to would seem to support his argument about the exchange, an online marketplace to shop for health insurance provided by law. But they also contend that given the broader context of the law, and how the IRS has interpreted it, it's clear that businesses cannot escape the fines no matter who runs the health care exchange.

"It's not a legal threat. I don't think it's going anywhere in court," said Timothy S. Jost, a health care law expert at the Washington and Lee University School of Law. "But it's a potential threat to the extent that Cuccinelli and others like him can convince state legislators and governors that they can just forget about this law and make it go away. That's unfortunate."

Cuccinelli and others pushing the theory hang their hat on Section 36B of the IRS code, created under the law, which defines who is eligible for insurance premium tax credits, Jost said. The code refers to people enrolled in health plans "through an Exchange established by the State." A large business that provides its workers with no health insurance, or coverage that the law deems inadequate or too expensive, would be fined if its employees qualify for that credit.

But because the code refers only to people enrolled in state-based exchanges, the argument goes, those fines could not be imposed on businesses in states with federal exchanges. And that could be the vast majority of states. Only 14 states and the District of Columbia are trying to set up their own exchanges, Cannon said, and even some of those are scrambling to meet deadlines for doing so.

"It says 'established by a state,' " Cuccinelli said. "It's kind of hard to get around that."

Jost concedes that the law can be read that way "if you were just reading that language in isolation and not the rest of the statute and didn't understand the history of the statute and didn't understand the structure of the statute." But Jost said that take isn't valid because the IRS has interpreted the law to apply to state-based and federal exchanges.

Cuccinelli has an answer for that: "Laws trump regulations."

Jost acknowledges that laws generally do trump regulations. But he said that's not the case here precisely because the law is unclear.

"Where a law is perfectly clear, it does trump regulations," he said. But when it is unclear, Jost said, the relevant government agency - in this case, the IRS - has the authority to interpret it.

Cuccinelli invoked the comic strip "Calvin and Hobbes" to turn this arcane legal back-and-forth into something entertaining for his tea party audience.

"Remember Calvinball? The rules of Calvinball were whatever Calvin said they were," he told the crowd. "And Calvin made them up on the fly. Well, we have President Calvinball."

In March 2010, Cuccinelli dispatched aides to file a lawsuit against the health care law less than five minutes after President Barack Obama signed it into law. He is not racing to the courthouse to try out this latest line of attack.

It would be up to a business to challenge any fines imposed on it, said Cuccinelli, whose first-in-the-nation lawsuit was ultimately thrown out and, therefore, not part of the Supreme Court case. No business would have standing to sue over fines until they are imposed, something not expected to happen before 2015.

So, for now, Virginia's out-front attorney general says the best course is to sit tight.

"Some people find that a rather novel direction for me," he said.

Not that Cuccinelli is actually doing nothing. He is busy pushing the do-nothing strategy, advocating that the state not set up an exchange, even if Obama is re-elected and the law fully takes effect.

That stance puts Cuccinelli at odds with most of the state's Republican leaders, including Gov. Bob McDonnell, who fiercely oppose the law but also say that if an exchange is needed, the state doesn't want one dictated by Washington.

"I am shocked that somebody like Ken Cuccinelli would be advocating that the state go under a federal system," said state Sen. John Watkins, R-Powhatan, who has urged creation of a state exchange.

"I personally feel Virginia can do a better job of it than the federal government can. All you have to do is look at the existing Medicare program, Social Security program, immigration program - you name it - the post office. Give me a break," he said.

The irony is not lost on Cuccinelli, who never has been eager to cede more power to the federal government. But on this one, he thinks letting federal officials in will ultimately limit their reach.

"Let them do it," he said. "And we'll see what happens."