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Wisconsin to fight health reform law

Leaders plot strategy to challenge federal overhaul

By [Guy Boulton](#) of the Journal Sentinel

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At some point after Jan. 3, when Scott Walker becomes governor, Wisconsin will challenge the constitutionality of the federal law to overhaul the health care system.

Wisconsin Attorney General J.B. Van Hollen has not decided whether the state will join the lawsuit filed in Florida by 20 other states, the National Federation of Independent Business and two uninsured individuals, or file its own lawsuit.

"That work is under way," Van Hollen said. "I have been in discussions not only with my staff but also with staff of both the Florida AG's office and the Virginia AG's office."

Joining a lawsuit filed by the Virginia attorney general would be more difficult because that case includes legal issues surrounding a state law.

Van Hollen expects to make a decision in the next month or so.

The key issue in the legal challenges is whether the federal government can require people to buy health insurance or fine them for failing to do so. That requirement is considered essential if health insurers must cover people with pre-existing health problems.

Wisconsin joining the legal challenges to the law would fulfill a campaign promise by Walker while making the state a participant in a historic case almost certain to be settled by the Supreme Court.

"It is the biggest ongoing constitutional law dispute in the country, certainly the one with the most far-reaching effect," said Andrew Coan, a professor at the University of Wisconsin Law School.

More than 20 separate challenges to the law, including lawsuits by conservative groups and individuals, have been filed in federal courts throughout the country. And most legal experts agree that both sides raise valid questions.

"This case could be decided either way without overturning any existing Supreme Court precedents," Coan said.

So far, federal judges have dismissed two of the lawsuits - one filed in Virginia by Liberty University, founded by Jerry Farwell, and the other filed in Michigan by the Thomas More Law Center, a public interest law firm that focuses on defending the religious freedom of Christians, family values and other issues.

But federal judges in Florida and Virginia have denied the federal government's motions to dismiss the lawsuits by the states.

Van Hollen, a Republican, wanted to challenge the health care law immediately after it was passed but needed Democrat Gov. Jim Doyle's approval - and the governor in a strongly worded letter made clear that wasn't going to happen.

"The State of Wisconsin will not enter into litigation intended to deny health care for tens of thousands of residents," Doyle wrote in March.

The state also has estimated that the law would save Wisconsin \$745 million to \$980 million from January 2014 through June 2019 as the federal government picks up a larger share of the cost of insuring residents with limited incomes.

But Van Hollen said Wisconsin should bring a lawsuit to protect the balance of powers between the federal government and states.

"This is an issue that needs to be clarified one way or another," he said.

If people are not required to buy health insurance, they could wait until they are sick to buy it. Health insurers regularly liken it to being able to buy homeowner's insurance while your house is on fire.

Subsidies

The health care law provides subsidies for people and families with low to moderate incomes to buy insurance, if they don't get affordable health benefits from an employer. The legislation specifically notes that people who don't buy insurance - out of choice or necessity - saddle hospitals and doctors with large unpaid bills that raise costs for people with insurance.

That's one reason for the so-called individual responsibility requirement.

But the uninsured population disproportionately includes people in their 20s and 30s. Many of them could afford to buy insurance. Economists call them "free riders." They also tend to be healthy - and their premiums are needed to offset the cost of providing health insurance to people who are sick.

People with health problems who don't get health benefits from an employer now are effectively locked out of the insurance market in many states because health insurers will not cover them. Changing that is one of the key provisions in the new law.

States can require people to have health insurance; Massachusetts does so now. And the federal government's right to regulate the insurance industry is clear. The issue is whether that right also gives it the authority to require people to buy health insurance.

Opponents note that the federal government has never passed a law requiring citizens to buy a private product or service or pay a penalty.

Congress passing a health care law requiring people to buy health insurance, opponents contend, is no different from requiring people to buy vitamins or join a gym.

Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, a libertarian think tank in Washington, D.C., said no principled limits on federal power will exist if the health care law is allowed to stand.

Economic activity

The legal arguments hinge at least to some extent on whether deciding not to buy health insurance is an economic activity.

Here's why:

Since the 1940s, the Supreme Court has given broad authority to regulate interstate commerce under the Commerce Clause of the Constitution.

Those powers, though, are limited to economic activities.

The Constitution, under the Necessary and Proper Clause, also gives Congress the authority to enact regulations needed to regulate interstate commerce.

The Department of Justice contends that the decision not to buy health insurance is an economic decision that affects the entire health care system. It also contends that everyone, even people who are healthy, is part of the health care market.

But Shapiro and other opponents contend this reasoning would lead to a federal government of unlimited powers.

"Everything is an economic decision in some way," he said.

Opponents contend that requiring people to buy health insurance regulates an economic inactivity.

To Coan, the UW law professor, this isn't the key issue in the case.

"If Congress needs to regulate inactivity to make its regulation of commerce effective, the Necessary and Proper Clause gives it that power," Coan said. "That's how I would analyze the case."

The federal judges in the lawsuits brought by the Thomas More Law Center and Liberty University agreed.

But Shapiro has noted that there are "many, many rulings yet."

The lawsuits raise other issues - including complex tax issues - but more legal experts have said the most important issues involve the mandate to buy health insurance.

No one expects that issue to be resolved until 2012 at the earliest.

Deciding what to do

Van Hollen now must decide how to proceed.

Joining other states in the Florida lawsuit would give Wisconsin less control over the direction of the case.

The Florida case also may be too far along for Wisconsin to intervene.

The state also could file a friend-of-the-court brief. That would give it more flexibility in its arguments. It also could file its own lawsuit.

"We, in further analysis, may decide we want to take a little different legal or augmentative tack than them," Van Hollen said. "There are a number of different considerations and, once again, we've got a little bit of time to figure out which ones prevail."

The cost of challenging the law will depend on whether the lawsuit is handled by his staff and how the state proceeds.

Van Hollen acknowledged people have asked what difference Wisconsin could make in the outcome given the number of lawsuits already filed. But he said a multitude of parties can give a position more legal authority.

"I really do believe it makes a difference," he said.

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