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From Medscape Medical News

Ruling Against Individual Mandate Could Slow ACA Roll-Out

Robert Lowes

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December 14, 2010 — Implementation of the nation's healthcare reform law could slow down in the wake of yesterday's ruling by a federal judge in Richmond, Virginia, that the law's requirement for individuals to obtain insurance coverage is unconstitutional.

US District Judge Henry Hudson did not invalidate the entire law, known as the Affordable Care Act (ACA), nor is his ruling the last word on the individual mandate. Two other federal judges have upheld its constitutional soundness, and legal experts expect the US Supreme Court to eventually clear up the conflict between the lower courts.

Nevertheless, some observers say that Hudson's decision, the first significant legal defeat for the ACA, could be a speed bump for the Obama administration's roll-out of the law.

"The decision will make providers and payers preparing for 2014 (when the individual mandate kicks in) commit less to the planning for that time during this period of uncertainty," Paul Ginsburg, PhD, president of the Center for Studying Health System Change, told *Medscape Medical News*.

"No doubt some state officials will agree with the ruling and see it as a reason to delay or defer implementation," added Richard Cauchi, program director for health at the National Conference for State Legislatures.

Rep. John Boehner (R-OH), who will become Speaker of the House in January, suggested that state officials drag their feet in a statement he posted on his Web site today about the Hudson ruling, which he applauded.

"Cash-strapped states should carefully weigh the benefits of investing time and resources in ObamaCare's implementation now that its central mandate has been ruled unconstitutional," stated Boehner.

Legal Questions Could Scare Insurers Away From Individual Market

Michael Leavitt, the former secretary of the Department of Health and Human Services under President George W. Bush and a former governor of Utah, told *Medscape Medical News* that the Hudson ruling probably will not dissuade states, for the most part, from expanding their Medicaid programs and setting up health insurance exchanges as required by the ACA.

"There was legal uncertainty about the law before the ruling, and people were moving forward despite that uncertainty," said Leavitt, who heads a consulting group called Leavitt Partners that advises state governments on complying with the ACA. He also said that despite heightened uncertainty on account of yesterday's court decision, states still need to play it safe.

"There's some chance the law could be repealed," said Leavitt. "There's also a chance it won't. If you run a state, you have to be ready for either eventuality."

Leavitt said the legal cloud hanging over the ACA may exert more of a negative influence on insurers, which have the opportunity to offer coverage to individuals through state exchanges beginning in 2014. If the Supreme Court eventually strikes down the individual mandate and healthy people forego coverage, insurers face the prospect of shrunken risk pools dominated by the ill, who will no longer be forced to pay higher premiums because of preexisting conditions. Rather than risk losing money under such conditions, insurers would pull out of the individual market on a state-by-state basis, leaving people with fewer coverage options, Leavitt predicted.

Insurers cannot withdraw from state markets at the last minute, Leavitt added, meaning they must reach their decisions during the next 2 years as opposed to in 2013, a year before the exchanges make their debut.

Reaction From Organized Medicine Mixed

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The reaction from organized medicine to yesterday's decision varied along political fault lines in the profession. Robert Doherty, senior vice president of governmental affairs and public policy for the American College of Physicians (ACP), told *Medscape Medical News* that Hudson's ruling carries no more weight than the rulings by 2 other federal judges who upheld the ACA. The ACP is one of several large medical societies that lobbied for the law in the legislative battle of 2009 and 2010.

"The law is the law, and it will remain in effect until it is amended or repealed by Congress, or you get a definitive opinion at the highest level," Doherty said on the subject of implementation. "Prudence dictates that you make plans based on what the law says, not on what a court might say down the road."

The ACA, he added, is "not likely to be repealed."

On the other end of the spectrum, M. Todd Williamson, MD, a past president of the Medical Association of Georgia, hailed Hudson's ruling as a blow for liberty. The Medical Association of Georgia belongs to a coalition of state and specialty medical societies that campaigned against the ACA.

"This is a very positive thing for patients and physicians," said Dr. Williamson. "Clearly, insurance reforms are needed, but the individual mandate puts the federal government in charge of defining what insurance should look like."

Some Reactions Predictable

Other reactions to the decision from the federal court in Richmond, Virginia, have been just as predictable.

In his written statement, Rep. John Boehner used the phrase "job-killing health care law" 3 times in a paragraph.

The White House waxed sanguine.

"We're confident that when all is said and done, the courts will find the [ACA] constitutional," stated Stephanie Cutter, a special-projects assistant to President Barack Obama, in a blog posting yesterday. "History and the facts are on our side." Cutter noted that other landmark pieces of legislation such as the Social Security Act and the Civil Rights Act of 1964 successfully withstood court challenges.

The administration, she said, is considering its appeal options. Even so, implementation of the law will "continue uninterrupted."

Authors of the Civil Rights Act, incidentally, justified its provisions under the constitution's Commerce clause, which authorizes Congress to regulate interstate commerce. In the various federal lawsuits challenging the ACA, the Obama administration has contended that the Commerce clause gives Congress the right to require individuals to obtain health insurance coverage and penalize them if they do not. It was this argument that US District Judge Henry Hudson rejected when he declared the individual mandate unconstitutional.

A legal expert at the Cato Institute, a conservative think tank, said in a blog posting yesterday that Hudson is right on the money.

"By striking down the individual mandate, Judge Hudson vindicated the idea that ours is a government of delegated and enumerated — and thus limited — powers," wrote Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute in Washington, DC. "This is just one district court — whose opinion is not binding on the judges who will now consider the government's appeal — but we can now see the day where this unprecedented assertion of federal power is definitively rejected as fundamentally contrary to our constitutional order."

In contrast, Robert Schapiro, a law professor at Emory University in Atlanta Georgia, described Hudson's ruling as "not well grounded in existing law."

A specialist in constitutional law, federal courts, and civil procedure, Schapiro told *Medscape Medical News* that previous Commerce clause cases in the federal courts have focused not on whether a particular activity — or in regard to the ACA, individual inactivity — is commercial in itself but on whether the activity affects commerce. Hudson should have given more consideration to the economic consequences of individuals foregoing insurance in his ruling, said Schapiro.

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