

Could Most of the Health Care Law Survive the Supreme Court?

By Jane Norman, CQ HealthBeat

Two legal experts who have opposing views on the challenges to the health care overhaul law agreed on one thing Thursday -- that the U.S. Supreme Court won't throw out the entire measure.

Instead they raised the possibility that the high court will decide only on the constitutionality of the law's requirement that Americans have health insurance -- as well as provisions that seem clearly related, such as the ban on denial of insurance to people with pre-existing conditions.

That would leave the rest of the massive law intact, including its Medicaid expansion, many other consumer protections and the creation of state-based exchanges to sell health insurance. Simon Lazarus, public policy counsel for the National Senior Citizens Law Center and a supporter of the law, said he views those exchanges as "tremendously important" for many Americans and likely to survive the court challenge because they have nothing to do with the mandate.

"The idea that Congress wouldn't have passed any of these things without the mandate is nuts," he said.

Lazarus and Ilya Shapiro, senior fellow in constitutional studies at the libertarian Cato Institute, spoke to the American Medical Association (AMA) advocacy conference.

Lazarus said he would be "absolutely shocked" if the Supreme Court follows on a ruling by a Florida district court judge and deems the whole law unconstitutional. Another federal district court judge in Virginia has ruled against the individual mandate and its directly dependent provisions. According to Lazarus, there are no dependent provisions.

Uncertainty about how courts might proceed is heightened because the law does not include a severability clause, which would specify that the entire law would stay in place even if one part is knocked out in the courts.

Both federal court rulings have given rise in recent days to discussions of what could replace the individual mandate and still provide for the enrollment of both healthy and sick people in health insurance, spreading out the risk.

Lazarus, a supporter of the law, said he believes the court will uphold it, but "there's absolutely no basis" for throwing out portions of the law that are not connected with the mandate.

Shapiro, who said he agrees with the rulings that the law is unconstitutional, predicted that the court will consider what is in the law that is related to the individual mandate, including the ban on denials of insurance coverage for people with pre-existing conditions. Shapiro said that once the individual mandate is tossed, "what can remain in place" then will likely be the issue for the court.

Meanwhile, politicians continue to vie to make themselves heard about the lawsuit. A group of Republican governors sent a letter to President Obama asking that he direct the Justice Department to support an "expedited appeals process" for the Florida and Virginia suits.

The administration already has declined to participate in a petition by Virginia Attorney General Kenneth Cuccinelli to the Supreme Court asking that the appeals courts be bypassed.

Justice Ruth Bader Ginsburg said in an appearance at George Washington University on Feb. 3 that Americans should not expect the case to be fast-tracked to the Supreme Court, according to the university newspaper. She said that challenges will have to work their way up through the "ordinary route."

Also, more than 70 House Democrats led by Anthony Weiner of New York sent a letter to Justice Clarence Thomas asking that he recuse himself from deliberations on the constitutionality of the law because of his wife's connections with a lobbying group with clients who want to overturn the law.