

# Bloomberg

## Obamacare Battle Now Before a Baltimore Judge Picked by Obama

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Five days after a Texas judge declared the Affordable Care Act unconstitutional, Obamacare supporters are back in court in a bid to save it.

A lawsuit filed in September as a hedge against just the sort of ruling U.S. District Judge Reed O'Connor in Fort Worth issued Dec. 14 is the new front in the nearly nine-year war over President Barack Obama's signature achievement and could force the issue back before the U.S. Supreme Court.

Maryland Attorney General Brian Frosh is seeking a judge's declaration that Obamacare remains legally viable even without a tax penalty the Supreme Court called key to its legitimacy in 2012, to create a split between competing courts.

"It's pretty obvious what Maryland is trying to do, get another court to disagree with Judge O'Connor, which should not be hard to do," said Timothy Jost, a professor emeritus at the Washington and Lee University law school in Lexington, Virginia, who's been tracking ACA litigation since 2010.

O'Connor, a Republican appointee, ruled on Dec. 14 that without the tax penalty, the ACA provision compelling people to buy insurance was unconstitutional and the whole thing had to go because the individual mandate couldn't be separated from the rest of the law. His decision came in a 20-state assault on the measure, which the federal government declined to defend, leaving the task to Democratic officials from California and 14 other states. Maryland didn't participate in that defense.

The federal government allowed Obamacare to stay in place, pending appeals. The judge's ruling will need to survive review by higher courts to have any effect on the program that's credited with expanding health insurance to about 19 million people in the U.S.

### **Maryland Lawsuit**

On Wednesday, Justice Department lawyers will ask U.S. District Judge Ellen Hollander in Baltimore to throw out Frosh's Maryland case, attacking not its merits, but its procedural underpinnings, arguing the state isn't being harmed as long as the ACA is being enforced.

Hollander was nominated to the federal bench by Obama in April 2010, less than a month after the ACA was signed into law and the first suits were filed to dislodge it. She may issue a ruling

as soon as arguments are completed, but more likely will compose a written ruling in coming days or weeks.

Ilya Shapiro, a senior fellow at the libertarian Cato Institute in Washington, was an early opponent of Obamacare. In a phone interview on Tuesday, he said that while O'Connor was right on the merits of the case before him, the judge's conclusion that the entire act had to go would likely be reversed on appeal.

### **People Overreacting**

"Those who are celebrating and those who are angry are overreacting," he said. In that light, Shapiro added, the Maryland case is something less than a last-line of defense for the Affordable Care Act. He also noted that should both or either case reach the Supreme Court, the same five justices who upheld the law in 2012 are still there.

Still, the cases cast a cloud over Obamacare's future at time when threats to its most popular provisions -- guaranteed coverage for people with preexisting conditions and allowing young adults to the age of 26 to remain on their parents' plans -- fueled last month's Democratic takeover of the House of Representatives and blunted Republicans' long campaign to undo the ACA.

Exit polls for House races showed that health care was the No. 1 issue for 2018 voters, and those who cited it preferred Democrats by a jarring 52-point margin.

President Donald Trump, a steadfast critic of Obamacare, hailed the Texas federal court ruling as "great news for America" in one tweet, while urging in-coming House Speaker Nancy Pelosi and Senate Majority Leader Mitch McConnell to craft new legislation in another.

Frosh decried the Texas decision in a statement Saturday, warning its impact on Maryland families would be devastating. "Hundreds of thousands will lose health insurance coverage altogether, and millions more who have preexisting conditions will be endangered as well," he said.

While any bid to overturn the Texas decision would be heard by a U.S. appeals court in New Orleans, the ultimate ruling in Maryland's case would go to a comparable panel in Richmond, Virginia, creating at least the possibility of differing outcomes, setting the stage for U.S. Supreme Court review.

Jost also predicted O'Connor's decision would be reversed on appeal. If not, he said, Congress could reimpose a nominal tax, as little as \$1, for failure to procure qualifying coverage, removing the Texas judge's rationale for striking down the law.

"The Maryland case is premature at the moment," said University of Michigan law professor Nicholas Bagley, explaining it may indeed be vulnerable to the Justice Department argument the state hasn't yet sustained the kind of harm that would give it legal standing to sue.

In recognition of that possibility, the state has already asked Hollander for permission to file an amended complaint, should she agree with the federal government. Tangentially, it's also raised a challenge to acting U.S. Attorney General Matthew Whitaker's ability to lead the Justice Department, contending his appointment was improper and the temporary post should have gone to Deputy Attorney General Rod Rosenstein.

Should the U.S. succeed in knocking out the Maryland case, Hollander may not rule on that issue. Speedy Senate confirmation of William Barr, Trump's pick for that cabinet post, could also render the question moot.

The Frosh-filed case is important "only if things go off the rails in Texas," and the ACA is no longer being enforced, Bagley said. "I think of the Maryland litigation as an insurance policy."

The newer case is *State of Maryland v. U.S.*, 18-cv-2849, U.S. District Court, District of Maryland (Baltimore). The older case is *Texas v. U.S.*, 18-cv-167, U.S. District Court, Northern District of Texas (Fort Worth).