



Challenges give health care law four possible outcomes

By Richard Wolf, USA TODAY

WASHINGTON – The Supreme Court's decision this month on [President Obama's](#) health care law is likely to take one of four basic forms. No matter what the court rules, however, it won't be the last word.

The court can uphold the entire law, strike down the "individual mandate" requiring most Americans to buy insurance, strike down the mandate and related health insurance changes, or kill the entire law.

Still to come: State actions. More lawsuits. The verdict from voters on Nov. 6. And more battles in Congress next year.

"The bottom line here is the [Affordable Care Act](#) is moving through a gantlet," says Robert Laszewski, a private health policy consultant. "The first stop in the gantlet was the Supreme Court. The second stop in the gantlet is the election."

The court has some additional issues to decide, including whether the law's Medicaid expansion is unduly "coercive" and whether the law can't be challenged at all until

someone pays a penalty to the [Internal Revenue Service](#) for not buying insurance.

The major battle, however, is over the constitutionality of the mandate and its relationship to the rest of the law.

Here are four scenarios:

Option 1: Law upheld

A decision upholding the law would unleash a series of political, legislative and legal forces.

As states decide whether to implement the law, such as setting up health care exchanges for millions of Americans to pick insurance plans, "there's going to be political action, there's going to be legislative action, there's going to be lawsuits," says Michael Cannon, health policy director at the [Cato Institute](#), a libertarian think tank. "Opponents ... will not go away."

- Republicans in Congress plan to resume legislative attacks. The [House of Representatives](#) has voted to weaken or wipe out the law more than a dozen times, including this month's vote to repeal a tax on medical devices.

- Opponents would be galvanized for the fall elections. For Obama, that could mean a more difficult path to re-election, despite his victory in court.

- Lawsuits pending at lower courts will move forward, and new ones could be filed to test other aspects of the law, ranging from its Independent Payment Advisory Board — charged with finding savings in Medicare — to its requirement that most insurance plans pay for contraception coverage.

The pace of litigation could increase as more regulations are issued, because "there's going to be winners and losers all over the place," says Bradley Joondeph, a law professor at [Santa Clara University](#) who tracks health care litigation.

Given that upheaval, state governments would face a choice: How fast should they move to implement the law?

"I think most of us are going to wait," Wisconsin Gov. [Scott Walker](#), a Republican, said Thursday.

[Bill McCollum](#), the former Florida attorney general who filed the first lawsuit against the Affordable Care Act on March 23, 2010, agrees. "I don't think it would be an immediate rush to enact the exchanges or conform to the law," he says.

Nevertheless, the [Department of Health](#) and Human Services says 34 states have accepted grants to pay for exchanges. They have until November to meet deadlines for exchanges to go into effect in January 2014.

[Ezekiel Emanuel](#), a former [White House](#) health policy adviser now at the [University of Pennsylvania](#), says the health exchanges should be up and running roughly a year from now. "We certainly can't do that at the last minute," he says.

Option 2: No mandate

The verdict that would present the biggest complications is also one of the most likely, if the justices' questions in March prove prophetic: striking down the individual mandate requiring most Americans to buy health insurance.

That's because the law's expansive provisions would remain, including requirements that insurance companies guarantee coverage for people with pre-existing conditions and limit premiums for those with expensive ailments.

The mandate is intended to bring young, healthy people into the market, providing premiums for insurers and patients for health care providers. Without it, the [Congressional Budget Office](#) estimates, about half of the law's projected 32 million newly insured people would remain uninsured, and premiums in the individual health insurance market would rise by an additional 15% to 20%.

"It becomes an impossible thing for the insurance companies. It becomes unworkable," McCollum says. "I think both sides would realize that there has to be some change."

Insurers wouldn't be the only ones seeking a change. Doctors, hospitals, drugmakers and medical device manufacturers accepted new taxes and cuts in Medicare reimbursements under the law because they expected more patients.

Proponents of the law say not much would be lost. They say the mandate was a small portion of the law, dwarfed by the promise of covering 32 million Americans and improving coverage for millions of others.

"The notion that the mandate is the heart of the statute is way off base," says Ron Pollack, executive director of [Families USA](#), a leading health care consumers group. He says Congress could replace it with incentives designed to get young adults to buy insurance, such as late enrollment penalties or automatic enrollment provisions.

States — most likely those controlled by Democrats — also could create their own mandates. That's what then-governor [Mitt Romney](#) signed in Massachusetts in 2006, without legal challenge.

In Congress, Democrats could seek alternatives to the mandate, but such efforts might prove unpopular before the November elections. Republicans, prodded by the insurance industry, could try to scuttle the insurance changes for people with preexisting conditions, but those are among the law's most popular provisions.

"Whether Congress can agree on any of those alternatives is a very different story," says Larry Levitt, vice president of special projects at the non-partisan [Kaiser Family Foundation](#). "It's entirely possible that stalemate is the result."

Option 3: More provisions invalidated

Lawmakers would be under far less pressure to fix what the court hands them if insurance protections for people with pre-existing conditions and related changes are eliminated along with the mandate.

The insurance market would be similar to today's, with the same advantages and drawbacks. Premiums could go down, particularly for young and healthy people.

But so would the quality of coverage, particularly for the old and sick.

Even a high-risk insurance pool created under the law to help people with pre-existing conditions who were without insurance at least six months will expire in January 2014, when the broader changes were to take effect. About 60,000 people have joined that plan, the Health and Human Services Department says.

Under this scenario, states could seek to fill the gap with their own mandates and insurance market changes. That's most likely in states with Democratic governors and legislatures.

Democrats in Congress also could try to replace the mandate and insurance market overhaul with lesser changes.

Among opponents, however, "there's going to be blood in the water," Cannon says. Opponents "are going to be energized to get rid of the rest of it."

House Republicans say they will try to repeal the rest of the law — its insurance expansions, taxes, Medicare savings and more — and then vote on lesser fixes as part of their "repeal and replace" strategy.

"Our goal would be to have the end result be all of it gone," says Brendan Buck, a spokesman for House Speaker John Boehner. "Clear out whatever is left from what they strike, and then move step by step on our replacement provisions."

Option 4: Law killed

The justices may decide to strike down all the taxes, subsidies, mandates, coverage expansions, insurance market changes and other provisions in the law. But some may find their way back.

Several insurance companies plan to keep some changes already enacted.

"Consumers and employers will continue to have the option of purchasing coverage that includes many of the benefits they have today, such as allowing dependent children to stay on their parents' policies until age 26," says [Karen Ignagni](#), president of [America's Health Insurance Plans](#).

Some 6.6 million young adults joined their parents' plans in the first year of eligibility, according to the [Commonwealth Fund](#), a liberal health research group.

One program at risk would be discounts from drug companies for more than 5 million seniors and people with disabilities. The Medicare discounts have saved consumers \$3.5 billion since the law was passed.

The bigger question: Would the effect of the court's ruling be prospective or retroactive? It would be difficult to retract benefits already on the books.

"You would have a mess on your hands," says Levitt, of the Kaiser Family Foundation. "The general sense is anything that's already happened kind of is water under the bridge."

The politics could be a wash, as in the case of the law being upheld. While Obama and Democrats would lose their most prized achievement from his term in office, their liberal base would be energized. A recent United Technologies/*National Journal* poll found striking down the law would have little impact on the president's re-election

The Supreme Court, favored by just 44% of Americans in a recent *New York Times*/CBS Poll, could become more unpopular after such a perceived power grab. "You could well imagine an argument being made around the politicization of the court," says Sheila Burke, a health policy lecturer at [Harvard University](#) who served as the top aide to former Senate Republican leader [Bob Dole](#).

What would happen next?

Democrats might seek to replace at least portions of the law, such as smaller federal subsidies for the uninsured. But they would face the "Obamacare" moniker that has made the law relatively unpopular, Cannon says.

Republicans likely would follow through on their "repeal and replace" agenda by proposing lesser changes. Romney, for instance, wants to give states more flexibility, let consumers buy insurance across state lines, and limit awards in medical malpractice lawsuits.

"It puts the ball back in the political arena," says [Randy Barnett](#), a [Georgetown University](#) law professor who represents the business groups challenging the law.

"We'll have a national debate about health care reform, and then we'll have an election, and whoever wins the election will have a mandate."