



Thinking The Unthinkable: What If The Whole Affordable Care Act Goes Down?

By Julie Rovner
Thu March 29, 2012

After this week's [oral arguments](#) at the Supreme Court, lawmakers and health policy experts are starting to ponder what had — until recently — been unthinkable to many: What if the court strikes down the *entire* Affordable Care Act?

Heading into the week, most supporters of the law had assumed that at worst, the court might find unconstitutional the requirement that most Americans either [have health insurance or pay a penalty](#). And it might also invalidate a few key insurance provisions that are immediately tied to that, such as requiring insurance companies to sell to people with pre-existing health conditions.

But listen to [the tenor of the arguments](#). (And here is the requisite warning that you can never tell what the court might or might not do from the questions justices ask.) There seemed to be enough skepticism from the conservative justices that people are now talking about a very real possibility that the court could throw out the entire law, all 2,700 pages, later this summer.

So what would that mean in practice? Obviously none of the things that haven't taken effect yet would happen. But what about the parts of the law that are already in operation?

Health lawyers mostly aren't sure, but their opinions generally range from "God only knows" to "bedlam" to "chaos."

Here are just a few of the questions a complete declaration of unconstitutionality might raise:

- Five million seniors have gotten rebates for their prescription drugs. More than 360,000 small businesses are getting tax credits for providing health insurance to their workers. Will all these people have to give that money back?
- Almost every state, including many that have sued to block the health law, has received millions of dollars to start planning to put the law into effect. Will they have to give that money back? And will people in those states being paid with those dollars lose their jobs?
- About 50,000 people are enrolled in temporary "Pre-Existing Condition Insurance Plans" for those who were previously uninsured for at least six months. If the law is declared invalid, that program would very likely have to shut down in fairly short order, leaving those people once again uninsured.
- There is also some reason to think the law's disruption could interfere with the operations of the Medicare program for the elderly. The health law made a lot of [changes](#) to the way Medicare works and pays doctors and hospitals and health plans. The regulations spelling out this year's payment rates were based on the health law being in place. So if the law is struck down, there's a possibility that Medicare couldn't pay any claims until officials go back through the entire rule-making process — which, by law, takes several months.
- In some cases the federal government would simply lose the ability to enforce rules. So things that are now required would simply become options. For example: The 2.5 million young people on their parents' health plans are covered by insurance contracts. They're probably OK, at least until the end of the plan year, although the federal law requiring that coverage would cease to be in effect. That would be the same for most of the insurance changes, such as restrictions on annual limits insurance companies can impose. But if the law is struck down, after the plan year ends, insurers would be free to reimpose the old rules.

Obviously, not everyone thinks it would be a bad thing to have the law go away.

One example, from Michael Cannon of the libertarian [Cato Institute](#): If insurers didn't have to cover pre-existing conditions for children, he says, "maybe some insurers would return to states" where they [stopped offering](#) coverage.

And there could be other benefits as well, he says. If the entire law were to go away, "we would have just dodged this whole [nasty debate](#) over religious freedom and abortion."

Copyright 2012 National Public Radio. To see more, visit <http://www.npr.org/>.

Transcript

MELISSA BLOCK, HOST:

Following this week's oral arguments at the Supreme Court, lawmakers and health policy experts are starting to ponder what until recently they considered unthinkable: What if the court strikes down the entire Affordable Care Act?

With us to examine what that might mean is NPR health policy correspondent Julie Rovner. And, Julie, we are now at a place where people are actually talking about that possibility, that the entire law won't be just tweaked or modified, it might be tossed out. How did we get there?

JULIE ROVNER, BYLINE: Well, going into this week, most supporters of the law had assumed at worst the court might find unconstitutional the requirement that most Americans either have health insurance or pay a penalty. And the court might also invalidate a few key insurance provisions that are immediately tied to that. Things like requiring insurance companies to sell to people with preexisting health conditions.

But given the tenor of the arguments - and here's where we have to put in the traditional warning that you can never tell what the Supreme Court might or might not do, based on the questions justices ask. But still, there seemed to be enough skepticism from the conservative justices that people are now talking about a very real possibility that the court could throw out the entire law, all 2,700 pages, when it rules later this summer.

BLOCK: Well, let's talk through what that might mean in practice. So, there are a number of parts of that law that haven't gone into effect. They would not go into effect. But what about the parts of the law that are already in operation?

ROVNER: Well, I've talked to several lawyers today, and their educated opinions range from God only knows to bedlam to chaos.

(SOUNDBITE OF LAUGHTER)

ROVNER: Let's start with some of the things that have already taken effect. You've got five million seniors who've gotten rebates for their prescription drugs. You've got 360,000 small businesses getting tax credits for providing health insurance to their workers. Will all these people have to give that money back?

BLOCK: That seems implausible, Julie. Is that a real possibility?

ROVNER: Well, it's not clear. You've also got states including, by the way, some of the same states that have brought this lawsuit against the health law, that have received millions of dollars to start planning to put the law into effect. Will they have to give that money back? And will the people in the states being paid with those dollars lose their jobs?

Now, one interesting possibility suggested by one lawyer is that people who lose benefits might be able to bring their own lawsuits. They, of course, weren't party to the lawsuits

brought by the states, now they're being deprived of benefits they were lawfully provided. They probably wouldn't win, but that doesn't mean they couldn't sue.

BLOCK: Julie, what about new programs that were created by the law, like the high-risk pools, the temporary insurance program for people with these preexisting conditions you mentioned?

ROVNER: From what I've been told, that operates completely with federal money authorized under the health law. So, that's something that would probably have to shut down almost immediately. That would leave about 50,000 people who are basically uninsurable - that's why they were in that program - once again uninsured.

BLOCK: And, Julie, also some reason to think this could interfere with how Medicare works. What's the question there?

ROVNER: That's right. A lot of people don't realize it. They think about this law and how it affects insurance, but the law also made a lot of changes to the way Medicare works and functions, and pays doctors and hospitals and health plans. The regulations spelling out this year's payment rates for all of those providers were premised on the health law being, well, legal.

So, if the health law is struck down, there's a possibility - nobody is quite sure yet - but a possibility that Medicare couldn't pay any claims until Medicare officials go back through their entire rulemaking process, which by law takes several months. So, that could cause chaos in and of itself.

BLOCK: Is there a scenario, do you think, under which the court could strike down the entire law, but still some or all of these things that you're discussing here would not happen?

ROVNER: Yes, some lawyers have said what the court might be able to do is kind of split the baby; say what's already happened would be deemed legal, but nothing going forward would be allowed. Now, that would still leave quite a mess. For example, two and a half million young people still on their parents' health plans are covered by insurance contracts, so they're probably OK until at least the end of the plan year.

That would be the same for most of the insurance changes, like restrictions on annual limits insurance companies can impose. But if the law is struck down, after the plan year ends, insurers would be free to re-impose the old rules.

BLOCK: And again, Julie, we won't know anything until the court rules. And that we may not even know answers to a lot of these questions then.

(SOUNDBITE OF LAUGHTER)

BLOCK: I'm getting the feeling that might be the case.

ROVNER: That's right. And we probably won't know anything from the court until late June.

BLOCK: OK. NPR health policy correspondent Julie Rovner. Julie, thanks.

ROVNER: You're welcome. Transcript provided by NPR, Copyright National Public Radio.