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Lawsuit over health care tax could kill 'Obamacare'

By: Valerie Richardson – March 31, 2013

"Obamacare" looks increasingly inevitable, but one lawsuit making its way through the court system could pull the plug on the sweeping federal health care law.

A challenge filed by the Pacific Legal Foundation contends that the Affordable Care Act is unconstitutional because the bill originated in the Senate, not the House. Under the Origination Clause of the Constitution, all bills raising revenue must begin in the House.

The Supreme Court upheld most provisions of the act in June, but Chief Justice John G. Roberts Jr. took pains in the majority opinion to define Obamacare as a federal tax, not a mandate. That was when the Sacramento, Calif.-based foundation's attorneys had their "aha" moment.

"The court there quite explicitly says, 'This is not a law passed under the Commerce Clause; this is just a tax,'" foundation attorney Timothy Sandefur said at a Cato Institute forum on legal challenges to the health care act. "Well, then the Origination Clause ought to apply. The courts should not be out there carving in new exceptions to the Origination Clause."

The Justice Department filed a motion to dismiss the challenge in November, arguing that the high court has considered only eight Origination Clause cases in its history and "has never invalidated an act of Congress on that basis."

The U.S. District Court for the District of Columbia is expected to rule on the Justice Department's motion "any day now," said Pacific Legal Foundation attorney Paul J. Beard.

The challenge citing the Origination Clause isn't the only lawsuit against Obamacare, but it is the only one that has the potential to wipe out the entire act in one fell swoop. Other claims, notably the freedom-of-religion cases dealing with the birth control requirement, nibble at the fringes but would leave the law largely intact.

In their brief, attorneys for the Justice Department argue that the bill originated as House Resolution 3590, which was then called the Service Members Home Ownership Act. After passing the House, the bill was stripped in a process known as "gut and amend" and replaced entirely with the contents of what became the Patient Protection and Affordable Care Act.

Using H.R. 3590 as a "shell bill" may be inelegant, but it's not unconstitutional, according to the government motion.

"This commonplace procedure satisfied the Origination Clause," said the brief. "It makes no difference that the Senate amendments to H.R. 3590 were expansive. The Senate may amend a House bill in any way it deems advisable, even by amending it with a total substitute, without running afoul of the Origination Clause."

The brief cites a number of cases in which courts upheld shell bills, but foundation attorneys counter that those rulings involved the Senate substitution of one revenue-raising bill for another.

"Here, by contrast, it is undisputed that H.R. 3590 was not originally a bill for raising revenue," said the Pacific Legal Foundation lawsuit. "Unlike in the prior cases, the Senate's gut-and-amend procedure made H.R. 3590 for the first time into a bill for raising revenue. The precedents the government cites are therefore inapplicable."

The Justice Department also points out that the court has allowed revenue bills to originate in the Senate if the money raised was incidental to the bill's mission.

The Affordable Care Act's central purpose is to "improve the nation's health care system," and it fulfills that goal "through a series of interrelated provisions, many, if not most, of which have nothing to do with raising revenue," said the government brief.

Mr. Sandefur disagrees. "What kinds of taxes are not for raising revenue?" he asked.

Legal opinion on the matter is split. Randy Barnett, a Georgetown University Law Center professor, said in an article for the Volokh Conspiracy that, "[I]f any act violates the Origination Clause, it would seem to be the Affordable Care Act."

But Yale Law School professor Jack M. Balkin said the Obama administration has legal precedent on its side, although the lawsuit "may nevertheless become plausible if enough prominent people get behind it and vouch for it."

"And then, perhaps, Chief Justice Roberts, given a second chance, will change his mind — again," Mr. Balkin said in an essay for The Atlantic.

Legal scholars agree on one point: The courts haven't seen the last of lawsuits against Obamacare.

"The Supreme Court's ruling last June was only the end of the beginning as far as Obamacare litigation is concerned," Cato Institute senior fellow Ilya Shapiro said at the February forum. "The more we read and the more regulations are promulgated, the more constitutional and other defects are found."