

August 17, 2011 - Road to Reform

## Did the Democrats Miss Chance To Protect Reform Law?

by Dan Diamond, California Healthline Contributing Editor

Hindsight is 20/20. But what if the health law doesn't make it to 2015?

In the wake of the **11th Circuit Court of Appeals' decision** that the Affordable Care Act's individual mandate is unconstitutional, some are wondering if Democrats missed a chance to bulwark their health law against legal challenges.

Last week's ruling has accelerated fears that the Supreme Court will strike down the mandate -- and the White House has **consistently maintained** that without a mandate, its health reforms would fall apart.

### Why the Mandate Stuck

Democrats and many policy experts still argue that the mandate is the most effective way to achieve reform's twin goals of expanding coverage and lowering costs.

The provision retains support in the health care industry, too.

During contentious negotiations over health reform, the mandate led private payers to relax their opposition to the law, knowing ACA would bring them new customers even as it imposed new restrictions on insurance companies' behavior. Hospital and physician associations also took solace that cuts to Medicare and Medicaid spending would be balanced by curbing the number of uninsured patients.

At the same time, the mandate has been consistently unpopular -- just 22% of respondents to a **Harris Interactive/HealthDay March 2011 poll** supported it -- and the most prominent target for constitutional challenges to ACA.

The GOP zeroed in on the provision as a dangerous expansion of congressional power; within the Democratic Party, some grumbled that the mandate strengthened the power of private insurance companies.

Yet the White House did not immediately recognize the threat to its law's legality. Many scholars also dismissed the prospects of a constitutional challenge -- **defending the mandate** as a permissible tax -- until a district court judge in December 2010 declared that Congress had **unjustly extended the Constitution's Commerce Clause**.

### Missed Opportunities?

Given that ACA is President Obama's signature legislation, some observers say Democrats should have worked harder to protect the law or could have taken more care to construct it.

What else could the party have done? Here are the three most prevalent retrospective recriminations.

- *Stuck with the public option in 2009:* Former Clinton Labor Secretary Robert Reich, a prominent liberal critic of the current White House, argues that Democrats erred by **backing away from the public option** in the summer of 2009. Reich **contends that** a "Medicare for All" plan would have been constitutional, given the existing model of payroll taxes to fund entitlements. The public option also seemed broadly popular; the Kaiser Family Foundation's tracking polls in 2009 regularly found that the **majority of Americans favored a public plan** and **many physicians signaled their support**, too.
- *Struck a deal in 2010:* By last November, it was clear that the mandate was an emerging political liability. With the Democrats about to lose their supermajority in Congress, several analysts suggested that the party proactively attempt to compromise. Alec Vachon, president of Hamilton PPB, **told California**

**Healthline** last year that one option for lame-duck Democrats would be to pass a measure that would transfer the burden of enforcing the individual mandate from the federal government to states.

- **Find an alternative along the way:** The **Government Accountability Office in March** reviewed alternate approaches to the mandate, such as modifying enrollment periods or boosting public awareness of coverage options. While the GAO report made clear that the mandate was central to accomplishing ACA's goals, some **interpreted its findings** as a signal that ACA "could hold together even if the Supreme Court strikes down the individual mandate."

### What's Next: Path to the High Court

The ongoing **legal challenges** to ACA are now on the cusp of the Supreme Court, but split decisions at the lower levels have court watchers divided on the lawsuits' eventual outcome.

George Washington University law professor Orin Kerr, a former Supreme Court clerk, expects that the high court will **ultimately uphold the mandate**, possibly by a vote of 8-1. However, Cato Institute scholar Ilya Shapiro suggests that the court's ruling will be a split decision -- and Chief Justice Roberts **may be the swing vote** on severability.

If the mandate is ultimately struck down, but the rest of the law preserved, Congress would essentially have three options, the **Washington Post's Ezra Klein writes**. Legislators could "do nothing" and let ACA "limp along" with its promise unfulfilled; "repair" the law by using some of the tactics to expand coverage and access outlined by the GAO; or even repeal the law, should Republicans take the White House and possibly the Senate in 2012.

On the **Health Business Blog**, industry consultant David Williams lays out a scenario where, minus a mandate, a growing uninsured patient population overwhelms U.S. providers and forces some wealthier states into action, such as by creating uncompensated care pools. The rising cost pressures on working Americans and mounting health premium spending by corporations would then create momentum for more expansive reforms down the road. "Could it be that a Republican president ends up signing national health insurance into law around 2020? I wouldn't be shocked," Williams concludes.

Meanwhile, Reich has a throwback approach. If the mandate is struck down, Democrats should "immediately propose what they should have proposed right from the start -- universal healthcare based on Medicare for all, financed by payroll taxes," he writes. "The public will be behind them, as will the courts."

Of course, the nation's highest court will not hear the case for months, and the justices may wait until after the November 2012 elections **to render a verdict**. In the meantime, here's the president's own take on the legal challenge and a look at what else is making news across the nation.

### Challenges to Reform

- On Monday, **President Obama** said he expects the U.S. Supreme Court to uphold the individual mandate in the federal health reform law "without a problem." His comment came days after federal judges at an appeals court in Atlanta ruled that the insurance requirement is unconstitutional, marking the first time that an appellate court ruled against any part of the law. Although he expressed confidence in a potential high court ruling, Obama added that the White House will "have to manage" the situation if the justices do not "follow existing law and precedent" (Vicini, **Reuters**, 8/15).

### Reform Effects

- Three-quarters of U.S. health care employers expect costs to rise under the federal health reform law, including 43% who believe the cost increases will be significant, **according to a recent Buck Consultants survey**. The survey found that nine out of 10 respondents plan to pass on additional costs to workers through higher employee contributions or reduced benefits, 57% do not plan to drop health plan coverage for employees and 48% plan to increase wellness initiatives to improve employee health (Bouchard, **Healthcare Finance News**, 8/11).
- Between January and July, about 17 million beneficiaries of Medicare fee-for-service plans received one or more preventive services because of the federal health reform law, according to CMS Administrator Donald Berwick. The overhaul stipulates that Medicare waive patient fees for certain preventive care

beginning this year. As a result, more beneficiaries are seeking out preventive care, he said. The services included more than three million mammograms, a 6% increase from the first half of 2010, and 1.2 million colorectal cancer screenings, a 3.6% increase over the same period last year. According to CMS, beneficiaries also underwent about one million annual wellness visits, a new service under the reform law with no out-of-pocket costs for beneficiaries (Fiegl, *American Medical News*, 8/11).

### Eye on the Exchanges

- Last week, **HHS** awarded \$185 million to 13 states and the District of Columbia to help them build the insurance exchanges. According to HHS, more than half of states already have started implementing exchange programs (Baker, "**Healthwatch**," *The Hill*, 8/12). Forty-nine states have received planning grants and seven states received "early innovator grants" to develop an information technology infrastructure for the exchanges. States can apply for establishment grants until June 2012 (Norman, *CQ HealthBeat*, 8/12). **HHS Secretary Kathleen Sebelius** on Friday also **sent a letter to governors** describing resources and options available to help states set up the program (**HHS release**, 8/12).
- **Kansas Gov. Sam Brownback (R)** announced last week that his state will return a \$31 million "Early Innovator" grant from **HHS** that was intended to help the state develop an information technology infrastructure for its health insurance exchange. Brownback explained that there is "much uncertainty" with the federal budget, making it necessary to "fre[e] Kansas from the strings attached to the Early Innovator Grant" (Millman/Nocera, *Politico*, 8/9). HHS officials expressed disappointed with the state's decision (Zigmond, *Modern Healthcare*, 8/9). In April, Oklahoma became the first to return its Early Innovator grant. Five other states have received such grants (*Politico*, 8/9).

### In the States

- The **Ohio Supreme Court** has ruled that **a proposed amendment to the state constitution** to block implementation of the federal health reform law can appear on the ballot in November. The amendment -- known as Issue 3, or the Health Care Freedom Amendment -- would establish that in Ohio, "no law or rule shall compel, directly or indirectly, any person, employer or health care provider to participate in the health care system" (Norman, *CQ HealthBeat*, 8/12). Supporters of the measure needed about 385,000 signatures to add it to the ballot, and a group that supports the federal health reform law had challenged the validity of some of the signatures (Carr Smyth, *AP/Miami Herald*, 8/12).
- Missouri officials announced that the state is lowering premiums for its Pre-Existing Condition Insurance Plan by 23% for new and existing enrollees. The PCIP program was created under the federal health reform law to provide guaranteed coverage to people who have medical conditions that make it more difficult for them to obtain insurance on the individual market. Under the new rates, Missouri residents who qualify for the state's PCIP will pay monthly premiums between \$137 and \$601, depending on age and deductible. **Missouri Department of Insurance Director John Huff** said that participation in the program has been lower than expected, with just 550 residents currently enrolled (*Kansas City Business Journal*, 8/9).
- A primary care physician shortage in Colorado likely will cause overcrowding in emergency departments by the time the federal health reform law is fully implemented in 2014, **a recent Archives of Internal Medicine study** suggests. More than 500,000 additional state residents are expected to become insured over the next three years. For the study, researchers at the **University of Colorado School of Medicine** analyzed data from the National Health Interview Survey and found that as barriers to primary care access increased in the previous 12 years, more people turned to EDs for care. A study author said hospitals should increase their staff strength to prepare for the increase in patient volume and recommended that incentives be created for medical school students to choose primary care (Sealover, *Denver Business Journal*, 8/8).

### Rolling Out Reform

- Last week, **HHS Secretary Kathleen Sebelius** announced \$28.8 million in grants that will support 67 new community health centers in the U.S. and in Puerto Rico (Adams, *CQ HealthBeat*, 8/9). The funding is part of \$11 billion allocated for new and existing health care centers over the next five years (*Reuters*, 8/9). Some of the total funding for fiscal year 2011 came from the federal health reform law, while the rest was provided through the regular appropriations process (*CQ HealthBeat*, 8/9).

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