

# Courts May Not Get Last Word in Reform Fight

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WASHINGTON -- Opponents of President Barack Obama's health care overhaul law are cheering a federal court ruling that one of its core provisions is unconstitutional. They may not realize that Obama has a fallback option that also could do the job.

Even if the Supreme Court ultimately agrees that government cannot require individuals to carry health coverage, the Obama administration could borrow a strategy that Medicare has used for decades to compel consumers to join new insurance groups.

Medicare's coverage for doctor visits is voluntary and carries a separate premium, yet more than nine in 10 older people sign up. The reason is simple: Those who opt out when they first become eligible face a lifelong penalty that escalates the longer they wait.

The same kind of penalty could be incorporated into the health care overhaul to replace its current mandate that all those who can afford a policy must get one. It would be a stiff nudge to enroll healthy people who are potentially reluctant. That's needed to help keep premiums affordable because the law takes away the ability of insurers to turn away sick people.

Even if the approach doesn't work as well as for Medicare, it could provide a strong incentive.

"It wouldn't be a nirvana solution," said health policy consultant Chris Jennings, but "it's better than nothing." A Democrat, Jennings served as a senior health care adviser to President Bill Clinton and Hillary Rodham Clinton in the 1990s when they unsuccessfully pushed for coverage for all.

Jennings believes the law as written would cover more people for a lower cost, but says "it would be irresponsible not to try an alternative" if the courts reject it.

Other prominent experts say Medicare's way could be more effective.

That's because the fines that back up the health care law are relatively low. When the individual coverage requirement takes effect in 2014 many people might still come out ahead by ignoring it. The fines they'd face could be lower than the premiums they would have to pay.

It's a "mandate lite," said economist Gail Wilensky, who ran Medicare for President George H.W. Bush. "A modification of what is done with seniors on Medicare would be a much more powerful tool. You don't have to buy insurance. But if you don't, the first time you come in, we're going to add a penalty that you'll have to pay for the next four or five years."

The White House says the law will be vindicated and there's no need for a fallback plan.

Nonetheless, the decision by U.S. District Judge Henry E. Hudson, a Republican appointee in Richmond, Va., was the first successful challenge to the new law. Hudson ruled that Congress exceeded its constitutional authority to regulate interstate commerce by requiring individuals to obtain health insurance, whether through an employer, a government program or by purchasing their own policy.

Hudson denied the Virginia attorney general's request to strike down the law in its entirety or block it from going into place while the administration appeals. It could take a couple of years for the case to reach the Supreme Court.

Democrats were late to accept the idea of an individual health insurance requirement — one of the law's least popular provisions. Most liberals still favor a government-run plan modeled on Medicare.

Requiring individual responsibility was the GOP alternative during the 1990s health care debate. Most Republicans have now abandoned it as big government intrusion, but Wilensky says she has no problems with the concept.

"As a society, we have made a commitment not to let people die in the street because of lack of medical care," she said, noting that hospital emergency rooms have to accept the uninsured. "It's not unreasonable to say that people be required to carry some sort of coverage."

The individual requirement got a boost when Massachusetts enacted it in 2006, after a compromise between then-Republican Gov. Mitt Romney and Democratic state legislators. The idea rests on basic economics: Insurance works best when everybody contributes to the pool. You can't get fire insurance after your house has burned down.

As a presidential candidate, Obama opposed the individual requirement as too costly for the average household. He embraced it after it became the only approach that could pass both the House and Senate. The legislation also provides tax credits to make premiums more affordable.

If Obama has to switch to Medicare's approach, there's one caveat: It may not work as well with younger people.

"Sixty-five-year-olds are more risk averse than younger people," said Jennings. "If you are 65, you are not going to take the risk of being uninsured for a year. Someone who is 24, 28, or 32, would be more likely to take that risk."

Without any coverage mandate — or penalties such as the ones Medicare imposes — the new law would cover only about half the more than 30 million who'd otherwise get insurance. According to congressional budget experts, premiums would be as much as 20 percent higher because healthier people would tend to stay away.