Weekly Checkup

Repeal the Individual Mandate Once and for All

CHRISTOPHER HOLT | FEBRUARY 15, 2019

Last week's Checkup delved into the current messaging war around pre-existing medical condition protections in light of the *Texas v. Azar lawsuit* challenging the Affordable Care Act (ACA). But lost in the politics of preexisting conditions is the fact that **there is a simple way to resolve the lawsuit and protect people with preexisting conditions: Congress could repeal the individual mandate**.

I won't revisit all the particulars, but the crux of the lawsuit is the constitutionality of the individual mandate. Previously, the Supreme Court held that the mandate was a tax and therefore constitutional. When Congress set the penalty to zero in 2017, a group of state attorneys general sued, arguing that the mandate couldn't be tax if it didn't raise revenue.

Law professors Nicholas Bagley and Richard Primus argued late last year that, rather than risk having the entire ACA overturned, Democrats should act to resolve the lawsuit. Bagley and Primus suggested three possible courses of action: 1) reinstate a nominal penalty for failure to buy health insurance, 2) pass legislation clarifying Congress' intent that the rest of the ACA be severable, or 3) repeal the individual mandate entirely.

Reinstating a nominal penalty might be the preferred political and policy course for Democrats, but Senate Republicans and the White House could hardly agree, having previously celebrated "repeal" of the penalty. Severability might be the cleanest option, but it would be politically difficult for Republicans to act so directly to preserve the ACA. **Fully repealing the mandate, however, could be framed as a victory for both sides**. And ultimately, both Republican and Democrat legislators should be nervous about allowing this lawsuit to continue.

If the law were to fall, the 116th Congress is simply not well positioned to respond in a timely, comprehensive, and politically satisfactorily manner to the crisis that would

unfold. The legal parameters of the health system might snap back to what they were a decade ago, but the system itself has changed in ways that cannot be easily or quickly rolled back. **There are immediate concerns as well.** Insurers will account for the uncertainty of the ongoing lawsuit when making decisions about premiums and offering coverage in the individual market. And members of Congress will be under increasing pressure to prepare for a ruling against the law, wasting valuable legislative resources planning for an eventuality that is far from certain.

Repealing the mandate now is the best solution for both parties' political and policy dilemmas. **Republicans can celebrate the full repeal of one of the more onerous federal overreaches in the ACA**, while also preventing a legislative and political nightmare that could impact both Senate control and President Trump's reelection prospects. Democrats have the tougher pill to swallow. Many are still committed to the idea of the mandate, and don't want to open the door to other changes to the law. But the politics make it unlikely that Democrats will ever reinstate the full mandate penalty, and the loss of the penalty has not had the negative effects some expected. **Repealing the mandate protects the ACA and prevents the same legislative and political nightmare scenario facing Republicans, which would be equally dangerous for Democrats and their House majority.**

Repealing the individual mandate is the right policy. It's also in the shared political interest of most of Congress and the administration.

HAPPY #HEALTHPOLICYVALENTINES DAY

AAF's Health Policy Team selects some favorite #healthpolicyvalentines from yesterday.

> *Our love is on #FHIR, and the way to my heart is through an open API, so let's be interoperable. #healthpolicyvalentines*
>
> *— Administrator Seema Verma (@SeemaCMS) February 13, 2019*

> *When the moon hits your eye like a big pizza pie, that's S05.91XA (unspecified injury of right eye and orbit, initial encounter) #healthpolicyvalentines*

> *— Megan Foster Friedman (@mfosterfriedman) February 12, 2019*

> *One taught me the Commerce Clause*
> *One taught me "unconstitutionally coercive"*
> *One taught me "exchange established by the state"*
> *And for that I say*
> *Thank u, next lawsuit#healthpolicyvalentines*
>
> *— Health Affairs (@Health_Affairs) February 13, 2019*

WORTH A LOOK

Axios: Hospitals are making a lot of money on outpatient drugs

Morning Consult: Voter Support for 'Medicare for All' Tumbles in New Year

Wall Street Journal: Johnson & Johnson to Buy Surgical Robotics Maker