



The Daily Dish

It Was Only a Matter of Time

DOUGLAS HOLTZ-EAKIN | JUNE 7, 2023

Merck has filed [suit](#) against the federal government seeking to block the implementation of the Inflation Reduction Act (IRA) Medicare price negotiation provisions. At the core of the complaint are two claims. First, the negotiation provisions amount to a government taking:

To start, the Fifth Amendment requires the Government to pay “just compensation” if it takes “property” for public use. Yet the singular purpose of this scheme is for Medicare to obtain prescription drugs without paying fair market value. The IRA wields the threat of crippling penalties to force manufacturers to transfer their patented pharmaceutical products to Medicare beneficiaries, for public use. And the Act costumes these seizures as “sales” by forcing manufacturers to accept Government-dictated payments that represent a fraction of the drugs’ fair value. By definition—and by design—that is not “just compensation.” Requisitioning manufacturers’ medicines in this manner is instead a classic per se taking.

Second, it violates Merck’s First Amendment rights:

Further, the IRA’s mechanism for effecting this taking makes a mockery of the First Amendment. Congress could have accomplished its economic goals much more simply and honestly: by empowering HHS to set prices for covered drugs. The IRA instead operates through a façade of “negotiations” and “agreements” that require manufacturers to convey that they “agree” to HHS’s “fair” prices. The only conceivable purpose of this circuitous regime is political deception—to allow the Government to pretend, as it already has done, that HHS’s prices are not top-down mandates but the product of voluntary “agreements” with companies who concede they are “fair.” Conscripting companies to legitimize government extortion is the sort of parroted orthodoxy that the First Amendment’s compelled-speech doctrine forbids.

What does Merck want the courts to do? “To vindicate fundamental constitutional values, this Court should declare that the Program effects compensable takings under the Fifth Amendment, and enjoin its compelled “agreements” under the First Amendment.” Pretty straightforward.

The language of the complaint is a bonus. Eakinomics readers are well aware that it has left no disdainful adjective untouched in its efforts to accurately characterize this abomination of a law. Merck, however, has set a new standard. It has gems such as referring to the “IRA’s dystopian parody of ‘negotiation,’” “In reality, however, this ‘Drug Price Negotiation Program’ is a sham,” and “This is not ‘negotiation.’ It is tantamount to extortion.”