



The Daily Dish

More Uncertainty for the ACA

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Eakinomics: More Uncertainty for the ACA

The Affordable Care Act's (ACA's) individual market was built upon three interlocking insurance regulations: (1) guaranteed issue, (2) community rating, and (3) the individual mandate. Guaranteed issue means that insurers cannot deny coverage to anyone, particularly those with expensive, pre-existing conditions. Guaranteed issue automatically means that the insurance pool will contain the expensive risks.

Community rating means that everyone in the pool pays the same premium. The ACA is not pure community rating, but premiums can differ only because of age, tobacco use, family size, and geography. Community rating automatically means that the expensive risks are not paying for themselves.

The individual mandate meant that everyone had to buy insurance. The mandate was the conceptual linchpin, because it was a way to force the young and inexpensive risks into the insurance pool, charge them more than their expected health services cost, and cover the insurers' losses on the expensive risks.

Recall that the Supreme Court upheld the constitutionality of the ACA in 2012, ruling that while the government did not have the power to compel people to buy health insurance, it did have the power to tax people who did not buy health insurance. Thus, the tax-based penalty for being uninsured passed constitutional muster. In its ruling, the court noted that an essential feature of a tax was the revenue it generated for the federal coffers.

Things got interesting when the Tax Cuts and Jobs Act (TCJA), passed in 2017, repealed the tax-based penalty for being uninsured. A group of 20 Republican state attorneys general, led by Texas, filed suit arguing that because the tax revenue was gone, the tax was gone and the constitutionality of the entire ACA was gone as well. Things got *really* interesting this past Thursday when the Justice Department [informed](#) the leaders of both parties: "After careful consideration, and with the approval of the President of the United States, I have determined that, in *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex.), the Department will not defend the constitutionality of 26 U.S.C. 5000A(a), and will argue that certain provisions of the Affordable Care Act (ACA) are inseverable from that provision."

Put simply, the Justice Department [will not defend](#) the ACA in court. (A group of 17 Democrat attorneys general has been granted standing to defend it.) But the Justice Department stopped short of agreeing that the entire ACA should be tossed. Instead, it argued that while the three interlocking insurance regulations had to stand or fall as a group, the remainder of the ACA is "severable" from these provisions and could survive the legal challenge.

The court challenge will continue. But its presence means that in developing rates during 2018 for insurance that would take effect in January of 2019, insurers cannot be certain what regulatory regime will be in place. Will they be able to medically underwrite (charge more for those with expensive conditions) or even deny coverage? Will this permit cheap policies for the young invincibles? Or, will they continue to operate under the current rules? Expect this development to be a political football in 2018, and another headache for all

stakeholders in the individual markets.