

HEALTH REFORM WEEK

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State Challenges to Law Grow in Wake of Ruling; One Insurer Vows to Keep Complying

Several states have joined their federal counterparts in ramping up the fight against the health reform law following a Florida judge's "unconstitutional" ruling Jan. 31, but there may be limitations to what opponents can do at this point, health insurance and legal observers tell *HRW*.

The governors or legislators issuing such challenges to the law should be prepared to get some pushback from their own constituents, Jon Kingsdale, Ph.D., managing director of Wakely Consulting Group and the former head of Massachusetts' pioneer Connector insurance exchange, tells *HRW*.

"As I understand it, federal market insurance rules apply [under the law] if states don't enact their own," in such cases as the development of the insurance exchanges, Kingsdale says. Whether they support the reform law or not, most health plans and employers "will want their exchanges to be managed locally rather than from Washington," he says. Even in Florida, where state legislators are aggressively resisting implementation, the reality on the ground is that the local insurance market may already be seeing the benefits of these reforms, Kingsdale adds.

Twenty-one Republican governors nevertheless contend that the law in its current form will destroy their budgets and should be amended. "In addition to its constitutional infringements, we believe the system proposed by the [reform law] is seriously flawed, favors dependency over personal responsibility, and will ultimately destroy the private insurance market. Because of this, we do not wish to be the federal government's agents in this policy in its present form," the governors wrote in a Feb. 7 letter to HHS Sec. Kathleen Sebelius. The letter indicated that the governors would halt implementation of their health insurance exchanges in the event HHS failed to make certain changes to the law.

The Jan. 31 ruling by Florida-based U.S. District Court Judge Roger Vinson (appointed by President Ronald Reagan) was the catalyst for all of this activity. Vinson sided with 26 states in declaring the reform law unconstitutional under the commerce clause of the Constitution, while dismissing a

separate claim by the plaintiffs challenging the law's Medicaid expansion (*HRW* 2/7/11, p. 1). The ruling joined three other decisions on the reform law: a Virginia federal court's ruling to strike down the individual mandate as unconstitutional and two other U.S. district court decisions that upheld the statute's requirement that most individuals buy health insurance starting in 2014.

Vinson's decision set off a fresh ripple of challenges from federal and state opponents of the law. On Feb. 4, Sen. Kay Bailey Hutchison (R-Texas) introduced legislation that would delay any of the law's provisions not in effect on the date of its enactment until final resolution was reached on the pending lawsuits. "This common-sense legislation creates a 'timeout' while the question is settled" in the courts, said Sen. Ron Johnson (R-Wis.), one of the bill's 16 co-sponsors, in a prepared statement Feb. 4. In the latest attempt to block funding for the law, it appears the House GOP leadership plans to use a stopgap spending bill as a possible means to prevent HHS from hiring more personnel to oversee the law's new benefits, according to news reports Feb. 9.

Florida Takes Most Aggressive Stance

Florida, one of the 25 state plaintiffs in the suit Vinson ruled on, to date appears to have taken the most aggressive stance at the state level, refusing federal grants to implement the law. As Jack McDermott, spokesperson from the Florida Office of Insurance Regulation, explains to *HRW*, state Attorney General Pam Bondi (R), the lead attorney general in the lawsuit, has interpreted Vinson's opinion to be tantamount to an injunction (or functionally equivalent to an injunction) against implementing the law.

The ruling raises questions "as to whether our state can pass enabling legislation to enforce a law the federal court has declared to be unconstitutional," McDermott says. For now, it does not appear as if Florida Gov. Rick Scott (R) or state legislative leaders have any interest in passing a bill to give the Office of Insurance Regulation authority to implement the federal law's functions, he adds.

Florida Insurance Commissioner Kevin McCarty has not officially issued a written statement on this issue, McDermott continues. During a Feb. 1 meeting of the Florida Health Insurance Advisory Board, McCarty implied that his office would adopt a "wait and see approach," based on actions by the governor, the legislature and the court system, McDermott says.

On the flip side, the ruling also calls into question whether states could be held in contempt for *not* abiding by the law. Mark Hedberg, a partner in the health care practice group of law firm Hunton & Williams, LLP, says Vinson's decision would provide no basis for holding the victorious state plaintiffs in contempt. "A contempt order from the court would be to punish violation of the court's order. The court has declared the act unconstitutional in its entirety, so acting in accordance with that order wouldn't expose them to a contempt citation," he tells *HRW*.

If anything, those states who were party to the lawsuit would "have the ability to claim the benefit of that judgment" unless Vinson's order is stayed, Hedberg says. Simply put, "currently there is no health reform act in those states. That order is in effect and, best that I know, the federal government has not moved for a stay of Judge Vinson's order." The Department of Justice said it would appeal the case, but "an appeal by itself doesn't stay the order that the district court entered," Hedberg says.

That said, states may want to err on the side of caution in making a decision to not comply until all of these lawsuits are resolved, he says. This is because "you don't know what's going to happen in the next court on appeal," Hedberg says, adding that the ruling "has exposed everybody involved in implementation to an awful lot of uncertainty."

From one Florida insurer's standpoint, the law still stands and must be complied with.

It's important to make the distinction that those 26 states (Florida included), not the insurers, were party to the lawsuit, Randy Kammer, vice president, regulatory affairs and public policy with Blue Cross and Blue Shield of Florida, tells *HRW*. "So, if [those states] make a decision that the Vinson decision voids the law as it relates to them, that's one thing. However, the insurance companies are still under the law because there are federal requirements with which we must comply.

So until the Supreme Court rules otherwise, we believe it's important to continue on with the implementation," she says.

This is what states that support the law say they intend to do. In a Feb. 4 prepared statement, eight attorneys general said they were confident that its constitutionality would be upheld on appeal. Vinson's ruling "is incorrect and we applaud the decision by the U.S. Department of Justice to appeal it.... In the meantime, the numerous health care reforms provided in the federal health reform law will continue to be implemented to the benefit of all Americans," their statement said.

The attorneys general, who all filed an *amicus* brief in the U.S. Court of Appeals for the Sixth Circuit on Jan. 21 regarding the law's constitutionality, represent California, Connecticut, Delaware, Hawaii, Iowa, Maryland, New York and Vermont.

Some other states that sided with Vinson's decision are still trying to work within the law's parameters. In Oklahoma, Insurance Commissioner John Doak's (R) concern is "the federal law requires states to do certain things and if we do not do those things, the federal government can design and implement those things on us," Shawn Ashley, spokesperson for the Oklahoma Insurance Department, tells *HRW*. The commissioner "wants to make sure the state can control those things we have an opportunity to control, rather than allowing the federal government to control them," Ashley says.

The case will find its way to the Supreme Court, Doak said in a Jan. 31 statement following Vinson's decision.

In the interim, "state lawmakers and insurance providers should begin taking the steps to identify and implement health insurance solutions that will benefit Oklahomans. I will do my part in helping to find and put in place market driven solutions," he said.

In their letter to Sebelius, the 21 GOP governors wrote that they could accept some "improvements" to the law, despite their concerns about its impact to their budgets and to the health care system in general.

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