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Health Law Faces Threat of Undercut From Courts

By KEVIN SACK and ROBERT PEAR

WASHINGTON — As the Obama administration presses ahead with the health care law, officials are bracing for the possibility that a federal judge in Virginia will soon reject its central provision as unconstitutional and, in the worst case for the White House, halt its enforcement until higher courts can rule.

The judge, Henry E. Hudson of Federal District Court in Richmond, has promised to rule by the end of the year on the constitutionality of the law's requirement that most Americans obtain insurance, which takes effect in 2014.

Although administration officials remain confident that it is constitutionally valid to compel people to obtain health insurance, they also acknowledge that Judge Hudson's preliminary opinions and comments could presage the first ruling against the law.

"He's asked a number of questions that express skepticism," said one administration official who is examining whether a ruling against part of the law would undermine other provisions. "We have been trying to think through that set of questions," said the official, who insisted on anonymity because he was not authorized to discuss the case freely.

While many newly empowered Republican lawmakers have vowed to repeal the health care law in Congress, a more immediate threat may rest in the federal courts in cases brought by Republican officials in dozens of states. Not only would an adverse ruling confuse Americans and attack the law's underpinnings, it could frustrate the steps hospitals, insurers and government agencies are taking to carry out the law.

"Any ruling against the act creates another P.R. problem for the Democrats, who need to resell the law to insured Americans," said Jonathan Oberlander, a University of North Carolina political scientist, who wrote in The New England Journal of Medicine last week that such a ruling "could add to health care reform's legitimacy problem."

So far, there has been only one ruling on the merits among nearly two dozen legal challenges to the health care act. Last month, a federal district judge in Michigan upheld the law. But another judge, Roger Vinson of Federal District Court in Pensacola, Fla., has joined Judge Hudson in writing preliminary opinions that seemingly accept key arguments made by state officials challenging the law.

Unlike the judge in Michigan, who was appointed by President Bill Clinton, both Judge Hudson and Judge Vinson were appointed by Republican presidents.

"We are not operating under the assumption that those two judges are inevitably going to rule against us," the administration official said. "But of course we're planning for the possibility that judges will reach different conclusions."

The novel question before the courts is whether the government can require citizens to buy a commercial product like health insurance.

Because the Supreme Court has said the commerce clause of the Constitution allows Congress to regulate "activities that substantially affect interstate commerce," the judges must decide whether the failure to obtain insurance can be defined as an "activity."

Lawyers on both sides expect the issue eventually to be decided by the Supreme Court. But the

appellate path to that decision could take two years. In the meantime, any district court judge who rules against the law would have to decide whether to block enforcement of one or more of its provisions, potentially creating bureaucratic chaos.

Such a decision would prompt a flurry of appeals, as the Justice Department almost certainly would ask the judge and then the appellate courts to stay, or delay, the injunction pending the outcome of higher court rulings.

Administration officials, as well as some lawyers for the plaintiffs, agree that Judge Hudson seems unlikely, based on his comments from the bench, to enjoin the entire law. The judge volunteered at a hearing last month that his courtroom was “just one brief stop on the way to the Supreme Court.”

If he does not enjoin the law, the immediate impact of a finding against the insurance mandate would be limited because that provision, and others that might fall with it, do not take effect for more than three years.

Virginia’s attorney general, Kenneth T. Cuccinelli II, a Republican who filed the Richmond lawsuit, argues that if Judge Hudson rejects the insurance requirement he should instantly invalidate the entire act on a nationwide basis.

Mr. Cuccinelli and the plaintiffs in the Florida case, who include attorneys general or governors from 20 states, have emphasized that Congressional bill writers did not include a “severability clause” that would explicitly protect other parts of the sprawling law if certain provisions were struck down.

An earlier version of the legislation, which passed the House last November, included severability language. But that clause did not make it into the Senate version, which ultimately became law. A Democratic aide who helped write the bill characterized the omission as an oversight.

Without such language, the Supreme Court, through its prior rulings, essentially requires judges to try to determine whether Congress would have enacted the rest of a law without the unconstitutional

provisions.

The Justice Department, which represents the Obama administration, acknowledges that several of the law's central provisions, like the requirement that insurers cover those with pre-existing conditions, cannot work unless both the healthy and the unhealthy are mandated to have insurance. Otherwise, consumers could simply buy coverage when they needed treatment, causing the insurance market to "implode," the federal government asserts.

The administration argues that other key provisions do not depend on the insurance mandate. Those provisions include establishing health insurance exchanges, subsidizing premiums through tax credits and expanding Medicaid eligibility, all scheduled for 2014.

Nor, administration officials said, would an adverse ruling necessarily undermine certain insurance regulations that recently took effect, like the requirement that insurers cover children younger than 26 on their parents' policies.

In a hearing last month, Judge Hudson remarked on the difficulty of determining Congress's intent regarding a law with hundreds of disparate provisions. "This bill has more moving parts than a Swiss watch," he said.

Lawyers for Virginia have sought to turn one of the federal government's arguments on its head. They note that the health law explicitly refers to the insurance requirement as "an essential part" of the act's regulatory scheme, and that Justice Department lawyers — in pressing their point that the law permissibly regulates commerce — have called it the "linchpin."

If it is so essential, Virginia's lawyers have asked, why should a judge believe that Congress intended for the rest of the act to stand without it?

Any illusion that the cases are not highly politicized was lost when Republican leaders raced this month to file friend-of-the-court briefs in Pensacola, and Democrats responded with briefs from state legislators and supportive economists. Among the Republicans intervening in the case are

Representative John A. Boehner of Ohio, the future speaker; 32 United States senators; and Gov. Tim Pawlenty of Minnesota, a possible presidential candidate.

A White House official said that in the meantime “the litigation is really not having an impact” on the pace of putting the law into effect: “I talk weekly to officials in states that have sued us, and in states that have not. I cannot tell the difference between them.”

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