

Health Care Policy

Obamacare Executive Order Has Little Effect On Litigation Testing Health-Reform Law

A first-day-in-office executive order signed by President Donald Trump added some uncertainty to the path litigation surrounding Obamacare will take, but didn't mandate the agencies do anything with respect to current cases.

The order commands federal agencies to try to waive or delay requirements of the health-reform law that impose economic or regulatory burdens on states, families, the health-care industry and others.

It will "no doubt cause the Department of Justice to review its litigation stance in a number" of Affordable Care Act-related cases, health-policy scholar Timothy S. Jost told Bloomberg BNA. Jost is professor emeritus at Washington & Lee University Law School in Lexington, Va.

But the order "doesn't signal what will happen" with ACA litigation, like that concerning the law's insurer cost-sharing requirements, Josh Blackman told Bloomberg BNA. Blackman is an associate professor at South Texas College of Law in Houston and an adjunct scholar at the libertarian Cato Institute in Washington.

It has "nothing" to do with the cases concerning various ACA issues, or the DOJ's decision to continue or drop a case, Tom Bulleit, who heads the health-care practice in Ropes & Gray LLP's Washington office, told Bloomberg BNA.

The order simply asks the agencies to use their discretion to minimize burdens caused by Obamacare. It doesn't give the DOJ any power it didn't already have when it comes to deciding its litigation strategy, he said.

Cost-Sharing Suit in Limbo. Blackman has written extensively about *U.S. House of Representatives v. Burwell*, a lawsuit filed by House Republicans to stop the Health and Human Services administration from reimbursing insurers for reducing costs normally paid by members, like copays and deductibles. The ACA required the reductions.

A federal district court said the payments were unlawful because Congress never appropriated the money for them. It stayed its order preventing the HHS from giving insurers the money pending a potential appeal.

The DOJ, representing the HHS, quickly made the appeal a reality, but the U.S. Court of Appeals for the D.C. Circuit Dec. 5, 2016, granted the House's motion to pause the case until February. The House had argued proceeding with the case could be a waste of resources because the Trump administration might decide not to

continue the appeal or to change tactics (25 HLR 1734, 12/8/16).

The court most recently denied two Obamacare customers the right to step into the litigation to protect their interests, which they argued may not be protected by the Trump DOJ (26 HLR 119, 1/19/17).

Dismissing Appeals. "If the Trump administration wanted to destroy the individual market as quickly as possible," dismissing the appeal in *U.S. House of Representatives v. Burwell* could accomplish it, Jost said, adding he couldn't "imagine this would be wise," as it likely would immediately end insurance coverage for 18 million to 20 million people.

Dismissing the appeal before there is an ACA replacement would leave those insured individuals with no safety net, Bulleit said. The DOJ could use the executive order as "cover" should it decide to dismiss the case, but it doesn't need to do so, Bulleit said.

Lawsuits challenging requirements under the ACA's individual and employer mandates might be more likely to be dropped by the DOJ, but again the executive order shouldn't have any bearing on the decision.

At-Risk Mandate? The Supreme Court has looked at the contraceptive mandate, for example, twice. In 2014, the court said in *Burwell v. Hobby Lobby Stores Inc.* that for-profit, closely held corporations whose owners objected to providing employee health plans that covered contraceptives and related services had to be given the opportunity to opt out.

The opt-out's scope was tested by religious nonprofit organizations in oral arguments presented to the court in seven cases consolidated under the heading *Zubik v. Burwell*. The groups objected to the manner in which the HHS administered the opt-out.

Earlier in some of those seven cases, the high court blocked the HHS from requiring the organizations to file a form to claim the opt-out. The HHS then said the organizations didn't have to use the form so long as they made the request in writing.

That wasn't sufficient for the groups, which argued this process still required their participation in providing insurance for products and services they considered to be "sinful." The court granted review in *Zubik* to test whether the HHS requirement, known as the accommodation, infringed the groups' religious rights.

'Biggest Punt.' The result was the "biggest punt in Supreme Court history," according to some court watchers. Instead of deciding the issue, the court released a short unsigned opinion tossing the clash back to the appeals courts.

The court directed the parties to try to forge compromises. But the HHS in Jan. 10 status reports filed in the various appeals courts said it decided not to modify the existing regulation after reviewing comments from various stakeholders. Trump's HHS, especially if Rep. Tom Price (R-Ga.) is confirmed as secretary, may rethink that stance.

But that would be an agency decision, and wouldn't have anything to do with the litigation, which is under the DOJ's direction, Gretchen Borchelt, of the National Women's Law Center in Washington, told Bloomberg BNA.

The executive order was "unclear" and introduced "confusion" and "uncertainty." It didn't, however, require the DOJ to change its position on the birth control benefit cases, she said. Borchelt is vice president for reproductive rights and health at the NWLC.

The birth control coverage benefit is one of the ACA's most popular measures, Borchelt added. Thus, even if the law is repealed—something she believes isn't yet a "done deal"—the provision could survive. Trump has promised to keep other popular provisions.

On the other hand, Borchelt said, the administration signaled, and Price said during confirmation hearings, that protecting religious beliefs will be a priority. Borchelt said her organization will be watching the HHS's FAQs and guidance to make certain the birth control benefit implementation measures don't simply disappear.

The Becket Fund for Religious Liberty, which represented many of the religious nonprofit organizations in the contraceptive mandate cases, didn't respond to Bloomberg BNA's request for comment.

A DOJ spokeswoman declined to comment on pending litigation.

BY MARY ANNE PAZANOWSKI

To contact the reporter on this story: Mary Anne Pazanowski in Washington at mpazanowski@bna.com

To contact the editor responsible for this story: Peyton M. Sturges at PSturges@bna.com

The executive order is at <http://src.bna.com/lBt>.

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).