

US health reform heads for legal showdown with states

Published at www.cmaj.ca on Mar. 26

Opponents of United States President Barack Obama's newly minted health reform law are not about to raise the white flag after their legislative defeat. In a broad offensive, Republican officials in 14 states swiftly launched lawsuits in an effort to stop mandated health insurance from taking effect.

States are historically sensitive to federal actions that they see as trampling on their constitutional rights. It took court fights and troops to enforce racial desegregation in the South half a century ago in the bloodiest defiance of federal authority by states since the Civil War.

But the health reform lawsuits, one of which was filed seven minutes after Obama signed the legislation, face tough odds. Some independent scholars say the action is merely posturing in advance of November congressional elections, a way to keep the issue on the boil until voters have their say. Others believe the cases have merit.

In Washington, DC, where the reforms require passage of a companion bill to be made complete, Republican legislators are introducing mischievous amendments in what their aides privately acknowledge is an attempt to delay the process and embarrass Democrats rather than to fix anything in the legislation.

One Republican amendment stipulates sex offenders be barred from getting erectile dysfunction prescriptions under federal health programs. Democrats call that a "gotcha" because no one favours subsidized erection drugs for deviants. But if Democrats agreed to

any changes, even ones sanctifying motherhood and apple pie, their streamlined method for passing the companion bill would be imperiled.

The state challenge was filed in

people to purchase insurance or pay a penalty.

"This is the first time in American history where American citizens will be forced to buy a particular good or service," said Attorney General Jon Bruning of Nebraska.

In Washington state, Democratic Governor Christine Gregoire said she learned from a local newspaper that her Republican attorney general had joined the lawsuit, even though she is his chief client. Gregoire said a ludicrous situation is developing that could see her state arguing against itself in court.

Obama's law requires citizens and legal residents to carry health insurance starting in four years, with narrow exemptions. A US\$95 penalty will be imposed on individuals who don't have insurance commencing in 2014. By 2016, the penalty for being uninsured rises to US\$695, while a penalty of as much as US\$2250 will be imposed on families who don't have coverage. Penalties will rise by inflation thereafter.

Jonathan Turley, a leading constitutional authority who teaches law at George Washington University in Washington, DC, says the suits raise important questions about federal power.

"Congress has the clear upper hand," Turley says. "But I'm a little surprised to see how many people are dismissing these lawsuits as meritless. Once you strip away the rhetoric or hyperbole, there is a legitimate constitutional issue. People of good faith have to acknowledge that this assertion of federal authority goes farther than anytime in history."



Reuters/Jim Young

Congressional Republicans hold up their party's version of a health care reform bill during a joint session of the US Congress on Capitol Hill in Washington, DC. Angered by President Barack Obama's health legislation, the Republicans are vowing to campaign during next November's congressional elections using the slogan "Repeal and Replace."

Florida on behalf of 13 states with another, Virginia, suing separately. More may join. The suits are brought mainly by Republican attorneys general, elected officials who in some cases serve under Democratic governors but have authority to act on their own in court.

Their principle argument: The federal government has no right to force

The US Constitution gives powers to the states if they are not reserved for the federal government. But the US Supreme Court has held federal law to be supreme far beyond the powers of taxation, military conscription, monetary policy and the like. Federal law granted equality to blacks and guaranteed abortion rights in landmark cases. And it was a Republican president, George W. Bush, who toughened national standards for education, traditionally a state responsibility.

Yet states do assert themselves: More than a dozen defy a federal prohibition on using marijuana for medical purposes, for example.

“Many academics view states’ rights as already eviscerated,” Turley says.

“This case could be the greatest moment or the last hurrah for states’ rights. States’ rights advocates can rightfully view this as their Alamo.”

Republican legislators have proposed steps of their own that would have overridden state powers. They fought unsuccessfully over the past decade to curb what they consider frivolous medical malpractice lawsuits to spare doctors the costs of excessive litigation and ease pressure to practise defensive medicine.

“Just yesterday, they wanted to enact sweeping federal tort reform and trump the wisdom of judges and juries in states or local communities,” Anthony Tarricone, president of the American Association for Justice, which repre-

sents trial lawyers, wrote in the liberal Huffington Post. “Don’t fall for their old credo: ‘Do as I say, not as I sue’.”

For their part, Republicans are reminding people that Obama once opposed a health insurance mandate for adults, saying it would be unfair to punish Americans who don’t get coverage.

Despite the dust-up, Republican leaders seem to recognize their best shot against the reforms might be in the court of public opinion, namely, the fall elections. Said Mitch McConnell of Kentucky, leader of Senate Republicans: “The slogan will be ‘Repeal and Replace’.” — Cal Woodward, Washington, DC

DOI:10.1503/cmaj.109-3223