



TO: Wisconsin Lawmakers
FROM: Cathy Mahaffey, CEO, Common Ground Healthcare Cooperative (CGHC)
Melissa Duffy, Government Relations
RE: Understanding the Texas v. U.S. Lawsuit on the Affordable Care Act
DATE: October 17, 2018

There is a case currently pending in a Texas court that could have serious implications for the affordability and availability of insurance coverage for tens of thousands of Wisconsin citizens.

The case we refer to is *Texas v. United States*, which argues that the Affordable Care Act (ACA) will no longer be constitutional once the individual mandate penalty is zeroed out on January 1, 2019. The plaintiffs have asked for a preliminary injunction that could strike down the entire ACA if the judge agrees with them. The US Department of Justice, which has decided not to defend the case, has instead asked for a declaratory judgement that invalidates only the following provisions of ACA: the individual mandate and the ACA provisions on guaranteed issue, community rating and pre-existing conditions.

The purpose of this memo is not to argue the merits of the lawsuit which may be ruled on at any time. But as a non-profit health insurance co-op that is governed by over 55,000 individual members, we feel the need to help lawmakers understand the implications of the case and implore them to protect Wisconsin citizens with pre-existing health conditions from unaffordable health insurance rate increases.

What If Protections for Pre-Existing Conditions, Community Rating and Guaranteed Issue Went Away?

While it's true that these protections have had an impact on premiums in the individual market, they also are the safety net that keeps people with pre-existing conditions covered for their health needs. Without these, we will eventually return to a time when individuals applying for coverage can be flat out denied, and when insurers can place riders on medical conditions, increase prices for sicker people, and place limits or waiting periods on coverage. Because the balance of risk is so critical in the individual market, all insurers would have to participate in these practices if only one insurer did, otherwise only certain carriers would unfairly carry the bad risk in the market and quickly go out of business. People who need care would find themselves unable to afford it, and healthcare providers would find themselves with a lot of unpaid bills.

We hope that the Wisconsin legislature will act quickly to ensure that doesn't happen.

Earlier in the session the Wisconsin legislature considered legislation that would continue pre-existing condition protections for insured individuals in Wisconsin. As an insurance company focused on the needs of consumers, we strongly support this effort. But extending pre-existing condition protections alone won't protect consumers because insurance companies could still deny coverage to consumers that have medical conditions. The legislation also needs to address guaranteed issue (anyone that applies for coverage cannot be denied), basic medical and prescription protections, and rating mechanisms that keep insurers from simply raising their prices for sick people to unaffordable levels instead of denying them.

If all insurers are required to meet these basic protections, the risk would be spread among insurers evenly and it would help to promote competition. But it can't be only unhealthy people in the market. We also need to work together on ideas to ensure that people don't wait until they are sick to purchase insurance, and that insurers can keep coverage affordable. Wisconsin reinsurance program is one example of a great idea that can help promote a healthier market.

What If the Affordable Care Act in its Entirety is Found Unconstitutional?

If the entire ACA is invalidated, Wisconsin consumers will need the Wisconsin legislature to create a bridge to the next functional market. You may have heard insurers complain about the ineffectiveness of the individual mandate penalty to attract healthy individuals to the market, which has also contributed to rising health insurance premiums. That has been true in our experience. But what is also true is that some people who are healthy have continued to buy health insurance because the tax credits they receive under the ACA are keeping their monthly share of costs affordable. If those tax credits are jeopardized, you will see many people who want health insurance but can live without it choosing to do so. Not only would this create pain and financial hardship for thousands of Wisconsinites, it would also potentially damage the individual market to a point beyond repair.

One thing we have learned: People really do want to be covered by comprehensive health insurance that will be there for them if they get sick. If we keep the costs affordable, people will choose to remain insured.

What If We Bring HIRSP Back?

It is not as simple as returning to the regulatory structure that was in place prior to the Affordable Care Act. Back then the Health Insurance Risk Sharing Plan (HIRSP) was touted as one of the more successful high-risk pools in the country because it did not experience funding issues and there weren't consumer waiting lists, but it did not make health coverage affordable for everyone. The rates were 1.5 times the rates charged to those that were not denied coverage, and that only covered 60 percent of the costs of the program. The other 40 percent of costs were shared equally by insurers and health care providers (via discounts).

Prior to the ACA, it was the healthy who could obtain individual coverage if they wanted it. Individuals who did not have access to employer sponsored coverage (including early retirees and lower income workers) could be denied coverage for any number of reasons not always linked to disease: being a certain age, having elevated blood pressure or being moderately overweight. Even though HIRSP offered subsidies to lower income individuals, many people opted not to spend the money, and HIRSP only covered 24,000 people at its height compared to the nearly 200,000 Wisconsinites covered by the ACA today.

We are certainly not saying that Wisconsin shouldn't do something to help mitigate the costs of the high-risk population in the individual market. We definitely need to address incredible costs associated with caring for those with pre-existing conditions whether or not the lawsuit prevails. We are only making the point that recreating HIRSP will likely not work given today's environment where most individuals with ongoing medical conditions are receiving a subsidy to help them afford their monthly premium.

Common Ground Healthcare Cooperative's Role

As a non-profit insurer that is, in essence, owned and governed by its members, CGHC has a unique perspective on the individual market. We never intended at our start to only serve the individual market, but circumstances created by the Affordable Care Act (which we feel is broken and needs fixing) have resulted in the individual market being 90% of our business. The majority of that business is the subsidized population that purchases insurance through Healthcare.gov.

And because we are non-profit, we have been able to stay in the individual market and continue to serve our members while other insurers have pulled out of the market. All we ask for is a level playing field and a healthy regulatory environment where we and other insurers can attract their share of good risk and bad.

It is in this spirit we share this memo with the legislature and offer to be a resource to you in the event *Texas v. United States* or another event disrupts the market. We also stand ready to help the legislature understand implications of decisions or considerations to change the market. We promise that in doing so, we will focus on the needs of consumers and their long-term medical and financial health. If we can be of assistance to you or your staff, or if you want to discuss this matter further, please do not hesitate to reach out to Melissa Duffy at (608) 334-0624.