

Forbes

Congressional Research Service: Courts Could Force HHS to Implement CLASS Act, Despite Its Insolvency

By Avik Roy

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Today, the U.S. House of Representatives will vote on H.R. 1173, the Fiscal Responsibility and Retirement Security Act of 2011, sponsored by Rep. Charles Boustany (R., La.). This two-page bill would repeal the fiscal disaster known as the CLASS Act, Obamacare's new long-term care entitlement, which was "suspended" by the Obama Administration because Health and Human Services Secretary Kathleen Sebelius could not certify that the entitlement was fiscally sustainable. Why, you might ask, should Congress bother to repeal CLASS, given that Sebelius has suspended its implementation? Because, according to the Congressional Research Service, courts could force her to implement the new entitlement, despite the fact that it will blow up the deficit.

According to the text of the Affordable Care Act, Secretary Sebelius is required to "designate a benefit plan as the CLASS Independence Benefit Plan" by October 1, 2012. Back in November, the House Energy and Commerce Committee asked CRS to evaluate the question: based on this language, could advocacy groups file suit against HHS for failing to implement the program? Would a court be likely to side with these plaintiffs? According to CRS, it's a real possibility.

"If the Secretary does not designate a plan by October 1, 2012," write the CRS staffers, "this failure to act would appear to be the type of agency action that could be challenged under the judicial review provision for agency action unlawfully withheld." A court could grant deference to Sebelius' finding that the program was unsustainable, but it could also force implementation of CLASS by "declaring the Secretary in violation of 5 U.S.C. § 706(1) or issuing a writ of mandamus to compel agency action, thus requiring the Secretary to renew her efforts to create a plan that is consistent with the statutory requirements."

CLASS is a partially loaded gun

This is why Congress needs to repeal CLASS now, rather than letting the sleeping dog lie. As Tom Miller has put it, "One should never leave a gun on the table, even if most of the chambers are empty or just house blanks." Some conservative activists have been reluctant to support repealing CLASS separately from Obamacare, on the grounds that one shouldn't make a bad law better, thereby diminishing the case for full repeal. But CLASS is too dangerous for that.

Yesterday, I spoke with Rep. Boustany, a cardiac surgeon, about his repeal bill. Boustany is quite concerned about the possibility, raised by CRS, that a court could force the implementation of CLASS. "The court could compel [HHS] action. So we would then see the agency going forward with something that's deeply flawed," he said. "The requirement [to implement CLASS] is still active even though [Sebelius] hasn't certified its solvency. She could be found in contempt."

Can a repeal bill pass?

Because Republicans control the House, Boustany is confident that his bill can pass the lower chamber. It may even gain some support from centrist Democrats. The key question is whether it can get through the Senate. “The Chairman of the Senate Budget Committee, Kent Conrad, called this a Ponzi scheme. Alice Rivlin [President Clinton’s budget chief] has called for repeal.” On the other hand, pro-CLASS activists will attempt to wage war on any Democrat who joins Republicans on this bill.

If Boustany and his compatriots are successful in repealing CLASS, it’s important that they continue to focus on reforming our broken long-term care system. As I’ve written before, 30 percent of all Medicaid spending—\$122 billion in 2009—is for long-term care. “From the standpoint of doing something substantive to improve the lot of families who need long-term care, repealing CLASS gives us the impetus to reform long-term care,” says Boustany. “We need to enhance an individual family’s ability to use pretax savings to purchase these plans” in the private sector, before people fall ill and try to rely on Medicaid.

He’s got a point. Until CLASS is repealed, there can’t and won’t be any momentum behind real long-term care reform. **John Goodman** has come up with some interesting ideas for encouraging private-sector long-term care insurance, and for limiting the ability of wealthy people to take advantage of Medicaid’s program. “As a physician, I treated hundreds of patients who needed long-term care, including ones with Alzheimer’s,” Boustany wrote in an op-ed for *Politico*. “More than 13.5 million seniors could have this disease by 2040. Middle-class families remain dangerously unprepared for these costs. Some people will likely spend more than \$100,000 on care. The fictional CLASS daily benefit of \$50 per day won’t cover this.”

Sen. Harkin: “The problem with CLASS is that it’s voluntary”

Even liberal Democrats like Sen. Tom Harkin (D., Iowa) agree that CLASS can’t work. “It’s not going to be implemented,” he told *National Journal*. “But we need something like it...the problem with CLASS is that it’s voluntary.” That is to say, unless there is a federal individual mandate forcing all Americans to buy long-term care insurance, a government system is unworkable.

An advantage to repealing CLASS now is that the Congressional Budget Office will score CLASS repeal as having zero impact on the deficit. On the other hand, if Sebelius is forced to implement the program, the CBO will have to score it as “reducing” the deficit in the near-term, because the plan takes in premiums initially in order to pay out its generous benefits in the long term. Hence, repealing CLASS will make it easier, from the CBO-scoring standpoint, to repeal Obamacare.

The question for today is: how many Democrats believe in arithmetic, and will thereby vote to repeal CLASS? Any Democrat who keeps the program alive, and lives in a competitive district, should be called to account for it.