

# Modern Healthcare

## House Republicans won their ACA lawsuit. Here's what happens next

Lisa Schencker

May 12, 2016

A federal judge's decision Thursday that the Obama administration unconstitutionally spent money to pay for part of the Affordable Care Act may not disrupt health plans or beneficiaries right away. But the fresh uncertainty immediately delivered a blow to the share prices of hospitals and health insurers.

House Republicans alleged in a lawsuit that the administration illegally spent money that Congress never appropriated for the ACA's cost-sharing provisions. Those provisions include reduced deductibles, copayments and coinsurance many Americans receive, depending on income, for plans purchased through the ACA's insurance exchanges.

About 56% of Americans who receive coverage through ACA's insurance exchanges – about 5.6 million people—got cost-sharing reductions as of June 2015, according to the CMS.

U.S. District Court Judge Rosemary Collyer agreed with House Republicans on Thursday, writing that appropriating the money without congressional approval violates the U.S. Constitution.

“None of [HHS] Secretaries' extra-textual arguments—whether based on economics, 'unintended' results, or legislative history—is persuasive,” wrote Collyer, who was appointed by President George W. Bush.

The White House and the Justice Department didn't comment Thursday on whether the administration would appeal the ruling, but an appeal is expected.

“It's unfortunate that Republicans have resorted to a taxpayer-funded lawsuit to re-fight a political fight that they keep losing,” White House Press Secretary Josh Earnest told reporters. “They've been losing this fight for six years. And they'll lose it again.”

House Speaker Paul Ryan (R-Wis.) called the decision an “historic win for the Constitution and the American people” in a statement. He said the ruling holds the executive branch accountable to American citizens.

Collyer stayed her decision pending an appeal, meaning it won't go into effect until after an appeals court decides on the matter, which won't likely happen for some time. Conservatively, it could take as long as two years for the case to reach the U.S. Supreme Court, assuming the court would take it up, said Josh Blackman, an associate professor of law at South Texas College of Law and adjunct scholar with the libertarian Cato Institute.

Blackman added that much could happen in healthcare over the next two years, noting the upcoming presidential election. "This case is far from over."

That means the decision Thursday won't likely affect insurance rate-setting or participation for 2017, said Tim Jost, a law professor at Washington and Lee University. The ruling does, however, inject some uncertainty into the healthcare environment.

Shares for four of the nation's major insurers, and a number of large hospital chains all dropped Thursday.

In the long run, it's not totally clear how much the ruling could damage the ACA if a federal appeals court and/or the U.S. Supreme Court were to uphold it.

"The cost-sharing credits are an important funding mechanism, so if those payments are not available, I think that would have a very serious impact on the exchanges," said Ankur Goel, former counsel to the U.S. Senate Judiciary Committee who is now a partner at McDermott Will & Emery.

Many experts, however, say the ruling would be unlikely to sink the law as a whole. For one, many are dubious that an appeals court would uphold Collyer's ruling.

Jost, who's been supportive of the ACA, believes the appeals court will reverse Collyer's decision on standing. Goel said the appeals court will likely focus heavily on the question of whether it's appropriate for courts to get involved in disputes between a legislative body and the executive branch. Goel co-authored an amicus brief siding with the government in a previous case challenging the ACA, *King v. Burwell*.

Collyer shocked many legal experts last year when she ruled the House had standing to sue in the first place. Many have said precedent should have barred lawmakers from proceeding with their lawsuits against the administration.

Blackman said the standing issue is the most difficult part of the case for House Republicans. "Once you get to the merits, the government's in trouble," he said.

If Collyer's decision is upheld by higher courts, one of a few outcomes is likely.

One possibility is insurers might raise their premiums if the government stops paying them for the cost-sharing reductions, which they still must offer under the law. That, in turn, would trigger an increase in the tax credits the government now pays Americans to help them afford their premiums. The Urban Institute has estimated that such a scenario would cost the government an

additional \$47 billion over 10 years.

Another possibility is that the government would still have to make the payments to insurers (who pass the savings on to beneficiaries) because that's what the law requires. In that case, Congress may have to start appropriating the money. If Congress refused, insurers could then seek relief in the U.S. Court of Federal Claims, where some experts say they could stand a decent chance of winning.

Yet a third possible result could be that Congress would have to start appropriating money to cover the cost-sharing payments each year. But that could create other problems for insurers, Jost said. Insurers set rates each year before the appropriations process concludes, meaning insurers would have to set rates each year without knowing whether to expect the cost-sharing payments, Jost said.

In her opinion, Collyer acknowledged all of those possibilities. But, she wrote, "These arguments all focus on the wrong consequences."

The consequence at issue, she concluded, is that if the government were to prevail, it would suggest that every permanently authorized benefit program must also include a permanent appropriation. Such an idea is at odds with the law, she wrote.

Consequences such as higher premiums, more federal debt and decreased enrollment in the exchanges would result from Congress' refusal to appropriate money for cost-sharing, she wrote. "That is Congress's prerogative; the court cannot override it by rewriting (the law)."