



Lingering Obamacare court cases are troubling insurers

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March 28, 2017

The defeat of the Republican health-care bill removes some uncertainty for insurers as they prepare to determine rates for 2018, but there are still unresolved legal issues, which could pose big hurdles ahead.

Insurers are particularly concerned about what House Republicans and the Trump administration will do about cost-sharing reduction subsidies for low-income people on Obamacare exchange plans.

"We're helping them understand that the subsidies are very important," said Michael Neidorff, chairman and CEO of [Centene](#), an insurance company that specializes in Medicaid and Obamacare plan health coverage.

"It really impacts low-income individuals who really would not have the means to covering all the deductibles, or the insurance premiums themselves," he said.

People who earn up to \$29,000 not only get subsidies to pay for their Obamacare premiums, but also receive "cost-sharing reduction," or CSR, funds, to make out-of-pocket costs more affordable.

The subsidies are a big deal for insurers because they pay the CSR costs upfront, and during the Obama administration they were reimbursed for those costs. But Republicans in the House sued to stop those payments, arguing that the Affordable Care Act did not authorize the administration to make the payments and that the funding for those subsidies had not been approved by Congress.

Last year, a federal judge agreed, ruling in favor of the House. When President Donald Trump won, GOP congressional leaders put their lawsuit on hold until this spring.

The big question is what happens now?

"Now we are in the Trump administration and as best as I can tell, these payments are still being made," said Joshua Blackman, associate professor of constitutional law at South Texas College of Law in Houston, and author of "Unraveled: Obamacare, Religious Liberty, and Executive Power."

"This puts the Republicans in a very strange spot, as they are making the same illegal payments that they were saying the Obama administration was making," said Blackman, who also serves as an adjunct scholar with the conservative Cato Institute.

If the payments are stopped, insurers say it will destabilize the individual Obamacare market by making plans unaffordable for low-income enrollees.

"If Congress decides to keep going with that lawsuit, the insurers will sue or leave the markets and the markets will implode," said Abbe Gluck, a professor and director of the Solomon Center for Health Law and Policy at Yale Law School. Gluck served as co-counsel on a Supreme Court brief defending the legality of Obamacare in the 2012 challenge of the ACA.

"Is it in their interest to destabilize the insurance markets now? Probably not," Gluck said.

Anthem CEO Joe Swedish told Trump in a private meeting at the White House that maintaining the CSR payments — which amount to \$9 billion to insurers for 2017 — is critical. Other CEOs have also pressed for a settlement of the case.

"We've said all along that one of the things that was important was to settle the issue of the cost-sharing reductions," said Dr. Mario Molina, CEO of Molina Healthcare. "Congress has the ability right now to appropriate the money. If they want to put this behind us, they can do it."

"I think they recognize it and individuals are talking... Come (this) May they need to deal with that," said Centene's Neidorff.

In addition to the CSR litigation, more than a dozen insurers have sued the government over payments they were originally promised to make up for big losses on high-cost enrollees during the first two years of Obamacare.

Congress fought funding for that program too, so the Obama administration only paid out a fraction of the claims, which helped contribute to some insurers leaving the exchanges due to losses.

"Now the Trump administration has inherited those lawsuits and they have to decide what they are going to do with them," said Gluck.

A federal claims court judge ruled in favor of insurers in one of the lawsuits last month. The court award would now be paid out of the federal judgment fund for legal claims.

"But there is already movement afoot amongst Republicans to amend the judgment fund, saying 'we don't want companies getting this money that was never appropriated,'" explained Blackman.

"That is to say, if Congress never agreed to fund something and the government then defaults on that debt, you can't get it through this judgment fund."

Still, one insurer said if the Trump administration could settle those cases now, it would buy a lot of goodwill from the industry.