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ACA Supporters Predict Ruling Against Subsidies Won't Go Into Effect

By Sara Hansard

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July 22 --Affordable Care Act supporters said a July 22 ruling by an appeals court overturning an Internal Revenue Service rule allowing subsidies for health insurance plans bought in ACA marketplaces run by the federal government won't have an impact on exchanges or the subsidies, if the court grants an en banc rehearing that the Obama administration said it will request.

“We will be seeking an en banc review from the D.C. Circuit Court,” Justice Department spokeswoman Emily Pierce told Bloomberg BNA in an e-mail July 22. “As that court's order says, it will not take effect until after the rehearing process concludes. The Department will be filing a petition for rehearing en banc so there is no need for the Department to seek a stay.”

The U.S. Court of Appeals for the D.C. Circuit's decision in *Halbig v. Burwell* “will never go into effect,” Ron Pollack, executive director of Families USA, said, predicting that the full appeals court of 11 judges will likely reverse the 2-1 panel decision.

Pollack, an ACA supporter, said in a telephone press briefing that a unanimous ruling July 22 by the U.S. Court of Appeals for the Fourth Circuit that upheld the same IRS rule suggests the U.S. Supreme Court would be unlikely to take the case. That case is *King v. Burwell*(*see related article*).

ACA opponents applauded the D.C. Circuit's ruling, saying it upheld the language of the ACA. The law states that subsidies would be available for people buying plans in marketplaces created by states.

If the D.C. Circuit's decision is affirmed, it will prohibit distributing federal subsidies to make health plans affordable for an estimated 5 million enrollees in health plans purchased through the federally run marketplaces operating in 36 states.

“*Halbig* did not cause those effects. These are the effects of the Patient Protection and Affordable Care Act, the statute that Congress enacted,” Michael Cannon, director of health policy studies at the Cato Institute, said in a press briefing. Cannon co-authored an amicus brief supporting the plaintiffs in *Halbig*. “If those effects are undesirable,

Congress needs to fix them,” he said. The cost of the subsidies is estimated to be \$36 billion in 2016, he said.

Subsidies 'Make a Critical Difference.'

“Our expectation is that when enrollment begins again Nov. 15 through Feb. 15, people who have not yet enrolled in coverage but are eligible for subsidies will be able to apply for them and will be able to receive them,” Pollack said.

“These subsidies make a critical difference in terms of whether the premiums are affordable,” Pollack said. Under the ACA, premium tax credits are available to people with incomes between 100 percent and 400 percent of the federal poverty level, and about 85 percent of approximately 8 million people who purchased ACA marketplace plans for 2014 did so with the help of the subsidies.

Opposite Predictions on Possible Effects.

If the D.C. Circuit ruling stands, Pollack and Jonathan Adler, a professor of law at Case Western Reserve University who co-authored the amicus brief with Cannon, predicted opposite effects in states that haven't created ACA marketplaces. Pollack said that states with Republican governors that opposed the ACA would move to establish marketplaces so state residents could receive subsidies.

Adler said in the Cato Institute press briefing that it would be “difficult for states to establish exchanges if this ruling is upheld. You'd be asking every state to impose an employer mandate.”

Under the ACA, large “shared responsibility” payments are imposed on employers when employees qualify for subsidies in the marketplaces. Cannon also said that a prohibition on subsidies in federally operated marketplaces would result in exempting residents in those states from the law's individual mandate, which requires that most people have health insurance coverage and has been a major source of controversy.

White House: No Impact Right Now.

“It's important for people all across the country to understand that this ruling does not have any practical impact on their ability to continue to receive tax credits right now,” White House Press Secretary Josh Earnest said about the D.C. Circuit's *Halbig* decision at the daily briefing July 22.

“There's a lot of high-minded case law that's applied here. There's also an element of common sense that should be applied as well, which is that you don't need a fancy legal degree to understand that Congress intended for every eligible American to have access to tax credits that would lower their health care costs, regardless of whether it was state officials or federal officials who were running the marketplace.”

There are four different cases on the same issue making their way through the federal court system, Earnest said. “There is decidedly mixed legal opinion about this,” with a majority of decisions favoring the government, he said.

Final Resolution Far Away.

Caroline Pearson, a vice president at health-care consulting firm Avalere Health LLP, told Bloomberg BNA in an e-mail July 22 that “it could be more than a year before we have final resolution on the legal issue.” If the D.C. Circuit's decision is upheld, Congress could amend the law to allow the subsidies in the federally operated marketplaces, or states without state-based marketplaces could establish them. However, “the politics make this difficult,” she said.

“If all of this fails, the federal government is likely to pursue an administrative fix that would circumvent the court decision,” Pearson said. The Department of Health and Human Services would “effectively deem all of the exchanges to be state-based, but continue operating them through HealthCare.gov,” the federal marketplace website.

That would be similar to the approach taken for 2014 for Idaho and New Mexico, she said. Those two states had been approved to set up their own state-based marketplaces in 2014 but were unable to do so because they didn't have adequate technology.

Avalere released an analysis July 17 finding that the nearly 5 million Americans who receive subsidies for federal marketplace plans would receive an average premium increase of 76 percent if the courts ultimately rule that consumers in the federal exchange can't receive premium subsidies.

Congressional Reaction.

House Speaker John Boehner (R-Ohio) issued a release saying that the D.C. Circuit's ruling showed that “the president has demonstrated he believes he has the power to make his own laws.” The decision justifies action by the House next week on a lawsuit challenging the Obama administration's implementation of the ACA, he said. The pending House action is based on the administration's delay of the employer mandate, which Republicans say is illegal .

“This is yet more evidence that Obamacare is not working--and cannot work--for the American people,” Senate Health, Education, Labor and Pensions Committee ranking member Lamar Alexander (R-Tenn.) said in a statement about the D.C. Circuit decision. “It is time for Democrats and the president to realize this and work with Republicans to start over as rapidly and responsibly as possible with step-by-step reforms that reduce the cost of health insurance and expand freedom and choice.”

Sen. Tom Harkin (D-Iowa), chairman of the Senate HELP Committee, applauded the Fourth Circuit's decision in a statement, saying its decision “reaffirmed that the law was

written to ensure that financial help would be available on the federal and state marketplaces.”