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How a small flaw may unravel health law; Past Senate aides say intent should override blunder

By David Savage

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Former Senate staffers who were proud to have worked on what they saw as a historic bill to bring health insurance to millions of Americans have been stunned and even angered this summer to see that a wording flaw might unravel much of their effort.

Foes of the Affordable Care Act first tried to have it struck down as unconstitutional but fell one vote short in the Supreme Court. Then they sued to challenge the workings of the law. In July, they won a significant victory when a three-judge U.S. appeals court panel in Washington said the law, as written, does not authorize insurance subsidies in about two-thirds of the states.

Former congressional aides found the ruling infuriating. In 2009, they spent months piecing together a compromise that sought to create a national system of subsidized insurance -- but one run by the states. Now their work could be undone by what some call a "drafting error" and others a political miscalculation.

A central element of the health care law was the creation of "exchanges" -- online marketplaces on which consumers could buy insurance. Those with incomes up to $94,200 for a family of four could obtain subsidies, often shaving hundreds of dollars off the monthly bill.

But the appeals court decision would eliminate those subsidies for residents of most states. People living in the 14 states that operate their own exchanges can receive subsidies, the court said, but not the more than 5 million people who bought insurance using the federal exchange. (Another federal appeals court panel, in Virginia, ruled the same day, taking the opposite view.)

The judges based their decision on language in the law that said subsidies would be offered for health policies bought through an "exchange established by the state."

Obama administration lawyers have urged the full appeals court in Washington to reconsider

the ruling of the panel. Meanwhile, conservative opponents of the law asked the Supreme Court to hear an appeal of the Virginia case.

The story of how the disputed words came to be begins in 2009, when Democrats held both houses of Congress. In the House, most Democrats favored having one federal insurance exchange. They predicted -- correctly, as it turned out -- that many Republican-controlled states would balk at extending insurance to low- and middle-income residents.

But in the Senate, some Democrats worried over the specter of a "federal takeover." They insisted on a prime role for states.

To complicate matters further, two Senate committees adopted health bills. The more conservative Finance Committee relied entirely on states to set up exchanges. Its bill said low-income buyers would receive a federal subsidy for insurance obtained "through an exchange established by the state."

The more liberal health committee included a "federal fallback" in case some states refused to cooperate. Its bill said the federal government "shall establish and operate a Gateway" for insurance in any uncooperative states, and their low-income residents "shall be eligible" for subsidies.

When the two bills were merged at the end of 2009, the "shall be eligible" promise for all low-income residents was dropped. Left intact was the provision that said subsidies would be provided for insurance bought through an "exchange established by the state." The Senate approved the bill Dec. 24, 2009.

Two surprises followed. In January 2010, Republican Scott Brown won the Massachusetts Senate seat long held by Sen. Edward Kennedy, depriving Democrats of the needed 60 votes to end filibusters. Because the Senate faced a stalemate, House Democrats agreed to adopt the Senate's bill without further tinkering.

Then, once the bill passed into law, more than half the states signaled they would not operate insurance exchanges, leaving the task for Washington.

Opponents of the law soon spotted a potential weakness. In September 2011, the Cato Institute's Michael Cannon said the "Obamacare glitch" could block insurance subsidies in all the states that relied on a federal exchange.

Lawsuits soon followed.

Congressional staff members who worked on the law insist everyone intended to provide subsidies nationwide.

They didn't focus on the now-crucial phrase, they said. "We were focused on hundreds of other issues -- abortion, illegal immigrants, the size of the subsidies. Yes, you can look back now and

say, 'That was stupid. Why didn't we catch it?' " said Harvard health policy professor John McDonough. "That's why every major law has a technical corrections bill afterward."

Many former Senate aides say other parts of the law make clear the federal exchange is the stand-in for a state exchange and that, as a result, subsidies should be allowed.

That's the position taken by the Obama administration and upheld by the federal 4th U.S. Circuit Court of Appeals, based in Virginia.

One provision administration lawyers point to says that if a state refuses to create an exchange, the health secretary shall "operate such exchange within the state" and "take such actions as are necessary to implement" the law.

"I would hope the courts take a look at the intent and the overall structure of the law, because the intent was very clear," said David Bowen, former Kennedy adviser.

That portrait of unanimity was tarnished recently when a video surfaced showing Jonathan Gruber, an MIT economist and adviser to Democrats, telling a group in 2012 that "if you are a state, and you don't set up an exchange, that means your citizens don't get their tax credits."

Gruber subsequently said his comment was "just a mistake" and came at a time when federal authorities were not ready to operate exchanges.

All the backward looks at the law's intent may not determine the outcome, however. The Supreme Court is likely to have the final word, and its conservatives frequently say they decide cases based on what a law says, not what Congress may have intended.