



Obamacare in limbo: What happens next, and might Gov. Kasich start a state health-care exchange?

By Stephen Koff
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WASHINGTON, D.C. – Lots of questions remain from Tuesday's dueling court opinions on the Affordable Care Act.

The U.S. Court of Appeals for the District of Columbia said the federal government is not authorized to give taxpayer subsidies to people on the federal health care exchange – people in 36 states, including Ohio. Another federal appeals court said the government can, in fact, give out these subsidies. So, to help make sense of where things stand and what happens next:

Q: The D.C. Circuit did not throw out the Affordable Care Act, or ACA, also known as Obamacare. It only said that the statute written by Congress never authorized the federally run marketplace, or exchange, to provide taxpayer credits, better known as subsidies. Why is that a big deal?

A: Thirty-six states declined to run their own exchanges, deciding to use the federal government's marketplace instead. By the end of open enrollment, more than 5.4 million people signed up for health coverage through this federal exchange, according to figures from the U.S. Department of Health and Human Services.

Now consider: 87 percent of enrollees got taxpayer subsidies to help pay their premiums. Using a straight calculation (5.4 million X 0.87), that would mean that 4.7 million people – some experts say it is actually closer to 5 million – may not be eligible for their subsidies.

That's a majority of people now getting insurance and subsidies under the ACA.

The subsidies average about \$5,000 per family, according to the Congressional Budget Office.

If all those people lost the right to subsidies, they would have to come up with an average of \$5,000 per family to pay their annual premiums. That's unaffordable for most. Luckily for them, the ACA would allow them to file for exemptions – to drop out of health insurance without penalty – if the cost was unaffordable. Health economist

Jonathan Gruber of MIT has said that 99 percent of the subsidy recipients would find insurance just that -- unaffordable -- if they lost their subsidies.

Finally, consider that 8 million people nationwide signed up for individual coverage under the ACA, with more than half using the federal exchange. Here's why Tuesday's decision in the D.C. Circuit Court could matter: Well over half of the 8 million people nationwide who signed up for coverage could drop their coverage without penalty. The very premise of the ACA – affordable health coverage for all – could fall apart.

Q: If the D.C. Circuit Court decision were to prevail after more appeals, couldn't these 36 states just set up their own exchanges?

A: Technically, yes, with a lot of work. Realistically, though, a number of governors and state legislatures in places like Ohio and Missouri didn't want to do that in the first place. And in Ohio, voters in 2011 passed a ballot initiative, the Health Care Freedom Amendment (you might recall it as Issue 3), which said:

"In Ohio, no law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system." It also said the state could not establish a penalty or fine related to the purchase of health coverage.

This did not trump federal law, which does, in fact, compel coverage (unless one pays a penalty). But remember, the D.C. Circuit said that Congress left it up to states to set up exchanges -- and, according to ACA critics, exchanges provide the very mechanism for Ohioans to participate in the federally mandated health insurance system.

There are dots to connect and interpretations to be made here. But ACA critics say they all mean that the Ohio amendment would make it legally difficult for Ohio to establish its own exchange.

Jonathan Adler, a Case Western Reserve University law professor whose research helped pave the way to Tuesday's court cases, said the Ohio amendment "would likely preclude the state of Ohio from creating its own exchange unless the state constitution were to be amended." The same could happen in numerous other states where legislatures took a similar position.

Kathleen Gmeiner, of the Universal Health Care Action Network of Ohio, a group that supports the ACA and worked to promote coverage, sees it differently.

"When Issue 3 was passed in 2011, Ohio Republican legislators took the position that it does prevent Ohio from setting up its own exchange/marketplace," she said. "However, we disagree."

She noted past debate in which conservative groups such as the 1851 Constitutional Law Center said that by setting up an exchange, the state would put itself in the position of administering the ACA's requirements – including the requirement to participate in the health care system. But she said that such logic is flawed, noting that Ohio already

regulates insurance and that the IRS, not the state of Ohio, would remain in charge of policing the ACA's subsidy, individual responsibility and penalty provisions.

This is another issue that could go before courts. But it is premature, partly because of the next question and answer.

Q: Ohio Gov. John Kasich declined to set up an Ohio exchange, yet he chose to expand Medicaid, the public insurance program for low-income Americans, under a different ACA provision. If Ohioans were at risk of losing their federal ACA insurance subsidies, would the Kasich administration now be interested in setting up an Ohio-run exchange so Ohioans could keep buying subsidized private policies?

A: We asked Chris Brock, spokesman for Lt. Gov. Mary Taylor, because Taylor, besides serving as lieutenant governor, also runs the Ohio Department of Insurance. Fallout in Ohio from a final court decision would land on her desk. This is what Brock said:

"With these two decisions appearing to provide contradictory direction, states are still trying to determine how they're impacted. No changes are anticipated to the current programs in the near term and speculating about the future hypotheticals simply isn't what we choose to do. What's clear is that Obamacare remains deeply flawed, has been implemented poorly and virtually no one can predict what's going to happen next. Not only are its higher costs bad for employers and health care consumers, but its growing instability is a potential economic drag as well. It's just a mess, and Washington needs to straighten it out quickly and decisively so people, businesses, health care providers, states and everyone else involved can have some certainty, let alone avoid the ongoing financial burden of it."

Q: What was the political makeup of the panels that ruled on Tuesday?

A: The D.C. Circuit Court ruled 2-1 against the Obama administration. The judge writing the opinion, appellate Judge Thomas Griffith, was appointed to his seat by President George W. Bush. Concurring Judge A. Raymond Randolph was appointed by President George H. W. Bush.

The dissenting judge, Senior Circuit Judge Harry Edwards, was appointed by President Jimmy Carter.

Strains of what some commentators saw as partisanship were on display throughout the case. Griffith has a reputation as a moderate. But during oral arguments in March, Randolph criticized the ACA as "an unmitigated disaster."

On the other side, and in the minority Tuesday, Edwards remarked in his dissent, "This case is about Appellants' not-so-veiled attempt to gut the Patient Protection and Affordable Care Act ('ACA')."

The 4th Circuit Court, sitting in Richmond, Virginia, ruled 3-0 in the Obama administration's favor. Judge Roger Gregory, who wrote the opinion, was appointed by

President Bill Clinton. Clinton installed Gregory on the bench with a recess appointment after Senate Republicans would not take up his confirmation. But President George W. Bush subsequently re-nominated Gregory and the Senate this time approved.

The other two judges in the 4th Circuit decision, Andre Davis and Stephanie Thacker, were Obama appointees. Davis said in a strongly worded concurring opinion that citizens have the right to decline health coverage, although they then must pay "a tiny tax penalty."

"What they may not do," he added, "is rely on our help to deny to millions of Americans desperately-needed health insurance through a tortured, nonsensical construction of a federal statute whose manifest purpose, as revealed by the wholeness and coherence of its text and structure, could not be more clear."

Q: The Justice Department said it will ask the full D.C. Circuit Court, with 11 active members as well as senior judges who may join in, for its opinion. Is a different outcome on that court possible when all 11 members consider the case?

A: Yes. The full court is seen as more friendly to the Obama White House. Seven of the 11 active judges were appointed by Democrats.

But the full D.C. Circuit could decline to take it up, too.

As for how the full court would rule, Case's Adler, on a conference call Tuesday along with Michael Cannon of the Cato Institute, said: "Michael and I have both said in various forums that when you challenge the federal government under a complex statutory scheme, it's like betting against the house at Keno, so one should always be somewhat pessimistic." Cannon and Adler have been at the forefront of the legal analysis that holds that Congress never authorized the ACA's federal exchange to offer taxpayer subsidies.

However, Adler said he thought two-judge majority in Tuesday's ruling examined the ACA's wording and Congress's intent just as it was supposed to under the law. There was "nothing remarkable about what the court did" in the way it reviewed the ACA, Adler said. "And I would certainly hope that any other court that looks at this approaches it the same way."

Q: If the full D.C. Circuit leaves Tuesday's ruling intact, then the ruling will remain in conflict with the one by the 4th Circuit, which said the government may provide tax subsidies on the federal exchange as well as on state exchanges. Will the U.S. Supreme Court settle the matter?

A: If the conflict remains, that is likely, lawyers say. There are still other challenges to the ACA, based on similar grounds, in other lower courts, so other potential conflicts could arise to the appellate level, too. A split between the circuits – one saying that people on the federal exchange may not get subsidies, the other saying they may –

would present the most likely reason for the Supreme Court to resolve the issue once and for all, legal experts say.

Even if there is no such split, one of the losing parties could appeal to the Supreme Court. And considering those unresolved cases pending in lower courts, "there is value in resolving this question sooner rather than later," Adler said. So "it's not clear to me that the elimination of a circuit split would necessarily eliminate the possibility of a Supreme Court review."