
GOVERNMENT HEALTH IT

A new wrench in the ACA

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In the latest battle of the health reform wars, four words could bring down the Affordable Care Act's main insurance expansion policy, depending on which court interpretations gain traction.

Just as more states are lining up to default to the federally-facilitated health insurance exchange, HealthCare.gov, two judges on the D.C. Circuit Court of Appeals have sided with libertarian activists and concluded that the text of the ACA authorizes insurance tax-credits subsidies to be administered only through exchanges “established by the State.” But hours later, the Court of Appeals for the Fourth Circuit, in Richmond, Virginia, upheld the tax credits in a unanimous ruling on a nearly-identical case — potentially setting up the issue for Supreme Court review while sowing uncertainty meantime.

If the D.C. Circuit ruling stands, more than half of all the consumers who have received tax credits in the 36 states with a federal exchange could lose access to the subsidies — or even have to pay them back — along with their insurance, and health plans could see a huge loss of business along with dozens of individual markets lacking the individual mandate meant to curb adverse selection.

Under the guidance of Cato Institute health policy analyst Michael Cannon and Case Western Reserve law professor Jonathan Adler, three employers and four individuals sued the federal government, arguing that the subsidies should only be available in state-based exchanges and that the Department of Health and Human Services and Internal Revenue Services ignored the phrase “established by the state” when they crafted regulations making the subsidies available everywhere.

Ludacris is how some ACA supporters described the lawsuit — as if Congress didn't intend for every American to have access to insurance tax credits if their income is below 400 percent of the federal poverty level.

In court, the Obama administration argued that the ACA's instruction that the federal government "shall establish and operate such exchange" in the absence of a state effectively means that federal and state exchanges are the same for the purposes of the tax credits.

But the law says what it says, concluded judges Thomas Griffith and Raymond Randolph, Republican appointees who made up the two-member majority on the D.C. Circuit.

An exchange “established by the federal government cannot possibly be ‘an Exchange established by the State,’” wrote Randolph. “To hold otherwise would be to engage in distortion, not interpretation. Only further legislation could accomplish the expansion the government seeks.”

The third judge on the panel, Democratic appointee Harry Edwards, dissented from the other two and sided with the federal government, hinting at the economic implications of overturning the government’s subsidy authority for the majority of exchange enrollees.

“This case is about Appellants’ not-so-veiled attempt to gut the Patient Protection and Affordable Care Act,” Edwards wrote, referring to Cannon and his cadre who lost their case on the first try. “It is inconceivable that Congress intended to give States the power to cause the ACA to ‘crumble.’”

The argument put forth in the lawsuit, Edwards concluded, “cannot be squared with the clear legislative scheme established by the statute as a whole.”

In nearly-identical case that made its way to the Court of Appeals for the Fourth Circuit in Virginia, the three judges decided unanimously that, while open to some initial questioning, the “established by the State” language in the ACA does not rule out tax credits being administered through federal exchanges. The court admitted that “we can not discern whether Congress intended one way or another to make the tax credits available on HHS-facilitated exchanges,” but, per the precedent of deferring to federal agencies in interpreting the law and considering the law as a whole, they decided to uphold the tax credit system.

Back at the D.C. Circuit, where two judges voted to overturn the rules, another review is likely.

Given the significance of the case’s outcome — it could limit the enforcement of the individual and employer mandates and leave millions uninsured — the Obama Administration is poised to ask the entire D.C. Circuit Court of Appeals to review the decision, or the whole circuit of judges may vote to do so. The decision could also ultimately go to the Supreme Court.

Meanwhile, current subsidies issued through the first open enrollment period aren’t being immediately invalidated.

As for remedies, Congress could always go back and fix what some ACA supporters have said is really just a drafting error, though that may be unlikely given the partisan climate. But even if the D.C. Circuit’s ruling goes forward and the law of the land is that subsidies can only be offered through state exchanges, there could be a workaround that absolves states of the need to invest millions in operating marketplace technologies.

The federal government “could try to make it easy for states to set up state exchanges with a HealthCare.gov back-end,” suggested Larry Levitt, senior vice president of the Kaiser Family Foundation. But perhaps the biggest challenge, he wrote on Twitter, is “that a governor would have to want to do it.”