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The Little Court Case That Could Destroy ObamaCare

By: John Merline
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A legal challenge that critics once laughed off as a hopeless cause now threatens to deliver a crippling blow to ObamaCare, after one U.S. appeals court ruled 2-1 that most of the health law's tax subsidies are illegal.

The case — Halbig v. Burwell — centers on whether, as written, ObamaCare allows subsidies for those who sign up for a health plan via the federally run Healthcare.gov exchange. The law says subsidies are allowed for plans sold through exchanges that are "established by the state."

Since only 14 states set up their own exchanges, the stakes are huge. Of 8 million whom the administration claims signed up for ObamaCare plans, 5.4 million did so via the federal exchange, and 87% of those are getting premium subsidies.

In May 2012, despite the concerns about what the law actually allows, the IRS issued regulations sanctioning ObamaCare subsidies for policies sold in the federal exchange.

The agency justified its decision by saying that "we interpreted the statutory language in context and consistent with the purpose and structure of the statute as a whole."

ObamaCare backers say the IRS was right, and that, despite sloppy legislative language, Congress clearly wanted everyone enrolled in an ObamaCare plan to have access to tax subsidies.

But Michael Cannon of the libertarian Cato Institute and Case Western Reserve University law professor Jonathan Adler, who uncovered the issue in 2011, argue that "the language restricting tax credits to states that establish an exchange is clear and unambiguous" and that ObamaCare's "lead author affirmed that the law conditions tax credits on states establishing exchanges."

The reason for the restriction, backers of the lawsuit argue, was to provide states a strong incentive to set up their own exchanges, rather than rely on the federal government to do the work.

In its 2-1 ruling, the U.S. Court of Appeals for the District of Columbia Circuit basically agreed with Cannon and Adler, saying "the Constitution assigns the legislative power to Congress, and Congress alone." The court admits the ruling would have "significant consequences" but says "high as those stakes are, the principle of legislative supremacy that guides us is higher still."

But an appeals court in Virginia reached the opposite conclusion on Tuesday, saying that "the applicable statutory language is ambiguous and subject to multiple interpretations," and so it deferred to the IRS' view.

If the D.C. court's ruling prevailed, 4.7 million enrollees in the federal exchange now getting subsidies could see monthly premiums jump an average $264.

In addition, because of how the law's provisions interact, businesses in those 36 states would be freed of the employer mandate.

The result would devastate ObamaCare. Those most likely to drop unsubsidized coverage would be the young and healthy, leaving the resulting insurance pool sicker and more expensive.

That's just what happened in the five U.S. territories, which had to follow ObamaCare's market regulations, but couldn't offer any insurance subsidies.

Confronted with the rapid meltdown in the insurance markets in those territories, the administration decided to exempt them from ObamaCare.

The chance of success of the current legal challenge is highly uncertain. The administration plans to ask the full District court — where Democrats appointed a majority of the judges — to render its opinion. And the Supreme Court will likely have to weigh in at some point.

The political fallout is also unclear. While the District court ruling seems to provide a clear boost to Republicans who have sought ObamaCare's repeal, industry analyst Robert Laszewski argues that "the political consequences for all of these people losing their subsidies and their coverage would immediately shift to the Republicans who control these state governments."

Democrats already are trying to do that. Michigan attorney general candidate Mark Totten said the ruling will cause "nearly a half million Michigan families (to) lose an annual $4,700 tax credit," casting blame at state Republican AG Bill Schuette.