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Two New Legal Challenges Seek to Scuttle Obamacare

As small businesses sort out health care options under the Affordable Care Act, two court cases try to move the ground under their feet.

BY Jeremy Quittner 9 September 2013

If you thought the Supreme Court ruling in 2012 on the Affordable Care Act was the last word on implementing the new U.S. health care law, think again.

Two recent court cases are aimed at scuttling the law, and their impact on business owners could be profound. Both cases are working their way through the district courts, and at least one is poised to reach the appellate level soon. Conservatives hope the cases will reach the Supreme Court as a second challenge to the ACA, possibly before the end of the year.

The cases are *Pruitt v. Sebelius* and *Halbig v. Sebelius*. Both were brought by conservative Republican heavy-hitters: respectively, Oklahoma Attorney General, Scott Pruitt, and Michael Carvin, of the law firm Jones Day, who argued unsuccessfully against the ACA at the Supreme Court level on behalf of the National Federation of Independent Business, and successfully for George Bush in *Bush v. Gore* during the 2000 election.

Both suits argue that the implementation of the ACA, as currently worded, will have the effect of excluding and penalizing many individuals and businesses seeking coverage under the law.

The key argument in each was crafted by Michael Cannon, an economist at the Cato Institute, and Jonathan Adler, a law professor at Case Western Reserve University. Based on the way the law is worded, they argue, only states that set up and operate insurance exchanges will be eligible for federal subsidies designed to help low-income people purchase insurance. The law makes no mention of subsidies for states that let the federal government operate their exchanges instead.

The suits also argue that the final rules on the ACA issued by the Internal Revenue Service in August-- which stipulate that both federal- and state-operated exchanges are entitled to subsidies--represents an unconstitutional overreach. Only Congress, conservatives say, has the responsibility to make such decisions.

The suits, along with the refusal by many leaders in conservative states to prepare their residents for the ACA, are creating even more confusion for small business owners seeking to craft an Obamacare strategy, critics say.

Thirty-four states have refused to set up exchanges. Backers of the two legal challenges say that individuals and businesses in those states will be deprived of subsidies and exemptions under the law, and will be subject to financial penalties not faced by those in states that operate their own exchanges.

Ronald White, the judge for U.S. eastern district of Oklahoma, where *Pruitt v. Sebelius* is being argued, believes the case has grounds to proceed, despite a Department of Justice motion for dismissal. In August, White dismissed two counts of the complaint, but let three others stand.

The second case, *Halbig v. Sebelius*, which was filed in May, uses a similar legal argument, but was brought by a group of conservative Washington, D.C.-area business owners who fear they will face financial penalties if they do not provide health care coverage. The judge on the case, which is being argued in U.S. District Court for the District of Columbia, has not yet ruled on the government's request for a dismissal from July.

"We will be asking the judge to rule quickly, and I am sure that the Oklahoma plaintiffs will do the same, as it will be much better to have this resolved sooner, before people make decisions and start buying [health insurance] on a potentially false premise," says Yaakov Roth, the lead associate working on *Halbig* for Jones Day.

Critics of the legal challenges say the cases are based on a deliberate misreading of the ACA. "[The cases] take two phrases in different provisions of the ACA and read them in isolation, without looking at the act as a whole," says Simon Lazarus, senior counsel for the Constitutional Accountability Center, a public interest legal group.

Lazarus also said that the cases are unlikely to get to the Supreme Court soon, which could render them moot. "In order to be successful," he says, "they have to get to the Supreme Court before the tax credits and subsidies flow to people and people begin to buy insurance."