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Could 'Missing Number 1321′ on Subsidies Derail Affordable Care Act?

By: Andrew Zajac
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If President Barack Obama's signature health-care law unravels, it could be for want of a single number in crucial passages of the 2,409-page statute.

The missing number, 1321, refers to a section of the Patient Protection and Affordable Care Act that directs the federal government to establish an insurance marketplace in states that decline to create the exchanges, where low- and moderate-income people can buy health insurance and get subsidies for it. Key passages of the law, including who's eligible for a subsidy, are missing that reference.

That's provided an opening for Obamacare opponents to argue today to the U.S. Court of Appeals in Washington that millions of otherwise qualified people in the 36 states that haven't set up marketplaces are ineligible to receive the subsidies.

"It's the last legal challenge that could derail this law," said Christopher Condeluci, a Washington attorney who was on the Republican staff of the Senate Finance Committee when it crafted portions of the health-care overhaul.

The tax subsidy dispute strikes at the financial heart of the statute, posing a broader threat than a U.S. Supreme Court challenge to a requirement that employers' insurance cover birth control, also slated for arguments today.

Central Goals

Many of the 17 million people eligible for subsidies couldn't afford insurance without the tax credit, which would undercut the law's central goal of extending coverage, according to Ron Pollack, executive director of the advocacy group Families USA.

"It would mean that the effort to expand insurance coverage in the vast majority of the states would pretty much be halted," Pollack said in a phone interview.

The omission of references to section 1321 was "a drafting error," said Condeluci, now with Venable LLP.

"The four digits aren't there, so should the court try to read into congressional intent that 1321 was supposed to be there?" Condeluci said. "Yes. That was the intent."

Michael Cannon, director of health policy studies at the libertarian Cato Institute, tracked court papers in arguing that the statute should be read literally.

The Democratic-controlled Congress restricted the eligibility for subsidies to state-run exchanges because it wanted to force states to set up the marketplaces, Cannon said in a phone interview.

'They Miscalculated'

"They miscalculated," said Cannon, co-author of a 2012 paper calling attention to the problematic wording of the eligibility standards. "Everyone assumed that all states would establish exchanges."

"This was a 'drafting error' that was made nine times" in the law, Cannon said. "That tells you, no, this wasn't an error. It was done deliberately."

The law directs that subsidies should go to income- qualified people enrolled in exchanges "established by the state." It can't be stretched to mean 'established by the state or by the federal government on behalf of a state,''' Cannon said.

The plaintiffs are business owners from six states with federally-established marketplaces. Represented by Michael Carvin of Jones Day, they contend that the Internal Revenue Service's decision to extend credits to people buying health plans on a federal exchange triggers mandates and penalties they shouldn't be subject to.

Lawsuit Tossed

Their argument hasn't found traction in courts.

In Richmond, Virginia, U.S. District Judge James Spencer, an appointee of Republican President Ronald Reagan, found no support in the legislative history of the Obamacare law for the idea Congress intended to condition federal funds on state participation. His Feb. 18 dismissal of the case is on appeal.

Two other cases are pending in federal court in Indiana and Oklahoma.

In Washington, U.S. District Judge Paul Friedman, an appointee of Democratic President Bill Clinton, said there's more than one reasonable way to interpret the challenged phrase "exchange established by the state" when it's read in isolation. Taking a broader view, it's clear Congress intended to make the subsidies available on both state and federal exchanges, he ruled on Jan. 15.

Friedman's decision set up today's arguments before a three-judge appeals court panel.

The case is *Halbig v. Sebelius, 14-5018, U.S. Court of Appeals, District of Columbia (Washington).* The Virginia case is *King v. Sebelius, 13-cv-630, U.S. District Court, Eastern District of Virginia, (Richmond).*