

# Los Angeles Times

## More legal trouble for Affordable Care Act

Critics of Obama's healthcare plan are suing over a part of the law that offers tax credits through state exchanges. If they win, the program falls apart in 36 states

David G. Savage October 25, 2013

If computer glitches are not enough of a problem, President Obama's healthcare law also has a legal glitch that critics say could cause it to unravel in more than half the nation.

The Affordable Care Act proposes to make health insurance affordable to millions of low-income Americans by offering them tax credits to help cover the cost. To receive the credit, the law twice says they must buy insurance "through an exchange established by the state."

But 36 states have decided against opening exchanges for now. Although the law permits the federal government to open exchanges instead, it does not say tax credits may be given to those who buy insurance through a federally run exchange.

Apparently no one noticed this when the long and complicated bill worked its way through the House and Senate. Last year, however, the Internal Revenue Service tried to remedy it by putting out a regulation that redefined "exchange" to include a "federally facilitated exchange." This is "consistent with the language, purpose and structure ... of the act as a whole," the Treasury Department said.

But critics of the law have seized on the glitch. They have filed four lawsuits that urge judges to rule the Obama administration must abide by the strict wording of the law, even if doing so dismantles it in nearly two-thirds of the states. And the Obama administration has no hope of repairing the glitch by legislation as long as the Republicans control the House.

This week, U.S. District Judge Paul Friedman in Washington, a President Clinton appointee, refused the administration's request to dismiss the suit. Instead, he said the challengers had put forward a substantial claim, and he promised to issue a written ruling.

"This is a problem," said Timothy Jost, a law professor at Washington and Lee University. "This case could have legs," although "it was never the intent of Congress to establish federal exchanges that can't do anything. They were supposed to have exactly the same powers."

Michael Carvin, the Washington lawyer leading the challenge, says the wording of the law is what counts. "This is a question of whether you believe in the rule of law. And the language here is as clear as it could possibly be," he said.

Last year, Carvin went before the Supreme Court to argue that the law's mandate to buy insurance was unconstitutional. The high court handed down a split decision. By a 5-4 vote, the justices ruled the government may impose a tax penalty on those who can afford to buy insurance but decline to do so. But in a 7-2 decision, they said states had the option to expand their Medicaid coverage under the law, or to turn down extra federal money.

The states have now split evenly, as 25 of them have opted to take the extra money from Washington and expand their Medicaid coverage, and 25 have refused. As a result, the law's aim to provide free healthcare for those who are poor will go forward in only half of the nation.

The new suits take aim at the parts of the law that offer subsidies to those who are above the poverty level but still may struggle to pay for insurance. A single person with an income up to \$45,960 can qualify for subsidies now, as can a family of four with an income up to \$94,200. If the federal government cannot offer these subsidies in the 36 states without exchanges, it cannot enforce the mandate to have insurance, lawyers say.

"My jaw dropped when I first saw this," said Michael F. Cannon, a health policy expert at the Cato Institute and a fierce critic of the law. He and others credit Jonathan Adler, a Case Western Reserve University law professor, with first highlighting the glitch.

"This has the potential to sink Obamacare. It could make the current website problems seem minor by comparison," Cannon said.

Defenders of the law say the courts are being used as part of the political campaign against the law.

"This is definitely heating up. It is now the major focus of the Republican strategy for undoing the Affordable Care Act," said Simon Lazarus, a lawyer for the Constitutional Accountability Center. "The lawsuits should be seen as preposterous," he said, because they ask judges to give the law a "nonsensical" interpretation.

No judge has ruled directly on the claim that the IRS rule put forth by the administration is illegal and contradicted by the words of the law. Indiana Atty. Gen. Greg Zoeller filed one of four lawsuits this month. A federal judge in Oklahoma is considering a similar suit filed by that state's attorney general. A fourth suit is scheduled to be heard by a judge in Richmond, Va.

If any of the four judges agree with the challengers, they are likely to be asked to put the law on hold until the legal dispute is resolved. And that in turn could quickly send the issue to a U.S. appeals court and then to the Supreme Court.

"They are betting on getting five votes at the Supreme Court," Lazarus said. "I don't think it will happen."