

# Modern Healthcare

## Obamacare legal battle threatens subsidies for millions

By: Joe Carlson  
June 14, 2014

If [Obamacare](#) opponents succeed in their legal battle to block federal premium subsidies offered through the [federal insurance exchange](#), millions of Americans would lose their insurance, thousands of companies no longer would face a penalty for not providing coverage to their workers and premiums in the individual insurance market would soar.

These scenarios are possible because of what is widely seen as a drafting error in the Senate bill that became the Patient Protection and Affordable Care Act. Now, opponents of the law are trying to drive an explosives-filled truck through that statutory hole in four separate but similar federal lawsuits that are working their way to the [U.S. Supreme Court](#).

If the cases reach the high court, legal observers believe it is possible the conservative majority led by Chief Justice John Roberts would find the premium subsidies illegal, crippling the law's insurance expansion. That might pacify conservatives still fuming at Roberts for voting to uphold the constitutionality of the law's individual mandate in 2012. At stake are the premium subsidies received by about 6.8 million Americans this year in the 36 states using the federal exchange.

### Seeking a victory

Indeed, a legal victory for those challenging the subsidies would achieve a large part of what congressional Republicans have sought but have been unable to achieve legislatively—rolling back and unraveling Obamacare. That's because most of the 8 million people who signed up for coverage through the exchanges for 2014 qualified for premium tax credits. Taking those subsidies away almost certainly would prompt many of those people to drop coverage, according to healthcare reform experts interviewed for this article.

An appeals court victory for the plaintiffs would set off a high-stakes legal battle over staying the ruling to prevent many people from immediately losing their subsidies.

“This is dangerous litigation,” said Washington and Lee University law professor Tim Jost, an

ACA expert who supports the law. “They want to drive a stake through the heart of Obamacare.”

The legal question in the four cases centers on the wording that describes who is eligible for the subsidies. Section 1401 of the law says premium tax credits to buy insurance will be provided to individuals and families who get insurance “through an exchange established by the state.” At the time the law passed, nearly everyone including actuaries at the [Congressional Budget Office](#) assumed it would offer sliding-scale premium subsidies for any U.S. citizen or legal resident in any state with a household income of between 100% and 400% of the federal poverty level who did not qualify for Medicaid, did not have affordable coverage through an employer and who purchased coverage on the insurance exchange in their state.

There is no evidence in the legislative history that the law's drafters intended for the subsidies to be available only through state-run exchanges. But the law's challengers argue that the drafters wrote Section 1401 the way they did to pressure states to set up their own exchanges, under the threat that otherwise their residents would not be able to receive subsidies.

The Internal Revenue Service issued a rule in May 2012 interpreting Section 1401 to allow subsidies for qualifying residents of all states, not only those with state-run exchanges, which so far only 14 states and the District of Columbia have established. “Typos aside, there is no indication that those subsidies would not be provided in every state,” said Linda Blumberg, a senior fellow with the Urban Institute who has written articles in support of the law.

But the plaintiffs argue that the IRS rule is contrary to the law, and that subsidies for people who have signed up for coverage in the 36 states with federally facilitated exchanges are therefore illegal. The plaintiffs include individuals, businesses and state officials supported by anti-Obamacare attorneys and conservative activists at the Cato Institute, Competitive Enterprise Institute and the Constitutional Accountability Center.

## **'Viewed in isolation'**

The cases being coordinated by the Competitive Enterprise Institute, *Halbig v. Sebelius* and *King v. Sebelius* are awaiting decisions from federal appeals courts in Washington and Richmond, Va. Two federal suits filed by state officials, *Pruitt v. Sebelius* in Oklahoma and *Indiana v. IRS*, are pending in U.S. District Courts in Oklahoma City and Indianapolis.

So far, district judges in Washington and Virginia have rejected the plaintiffs' challenges to the subsidies. Judge Paul Friedman in Washington, in his January ruling in *Halbig*, wrote that while the plain language of the law “viewed in isolation” appears to support the plaintiffs' interpretation, “the plain text of the statute, the statutory structure and the statutory purpose make clear that Congress intended to make premium tax credits available on both state-run and federally facilitated exchanges.”

## **May head to Supreme Court**

But last March, two Republican-appointed judges on a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit hinted during arguments in *Halbig* that they agree with the plaintiffs. “What we've got here is language that doesn't seem to be malleable in any way, shape or form,” Judge Raymond Randolph said during oral arguments. “If the legislation is just stupid, it's not up to the court to save it.”

Experts say the issue is probably headed to the Supreme Court, which is likely to rule no sooner than the spring of 2015.

“The first-order effect (of courts striking down the subsidies) is the world learns that President Obama was violating the law in a major way,” said Michael Cannon, director of health policy studies at the Cato Institute who is considered the intellectual father of the litigation.

It's widely agreed that most people who signed up for exchange plans would have difficulty affording the coverage without a subsidy. Nationally in 2013, the total premium cost for 83% of people who signed up for exchange plans exceeded 8% of their household income, not counting the subsidy. That 8% threshold is the definition of “unaffordable” in the law.

For many exchange plan enrollees, the subsidy covers much or most of their premium. The average premium subsidy nationally in 2014 was \$2,890, according to the Kaiser Family Foundation.

Forty-nine economists who signed a friend-of-the-court brief in the *Halbig* and *King* cases supporting the Obama administration's position wrote that based on the best available projections, 6.5 million Americans would not or could not pay the full cost of their insurance and therefore would lose their coverage.

On top of that, the elimination of the subsidies would wipe out the law's requirement to obtain insurance for millions of people in the 36 states. That's because the premium would exceed the allowed percentage of household income, and the law waives the individual mandate for people in that situation. If the mandate were effectively eliminated in 36 states, political pressure likely would mount to repeal the individual mandate entirely. The insurance industry and many experts argue that would significantly reduce the number of insured Americans.

The end of subsidies in those 36 states also would have other major effects on coverage and rates. For one, it would effectively eliminate the requirement that employers in those states with 50 or more full-time workers offer their workers affordable coverage or pay a penalty. Employers are penalized for not offering coverage if even one of their workers obtains subsidized insurance through an exchange. But if the subsidies are eliminated in the 36 states, that would remove the penalty trigger.

Wiping out those subsidies also would create grave problems with the law's insurance market reforms. Insurers still would be required to take all comers regardless of age or health status and still could vary premiums only within a limited range based on age and smoking status.

But older and sicker enrollees in exchange plans would be the likeliest to find a way to keep their

coverage. That would raise medical costs in the plans and drive up premiums, potentially sending the plans into an actuarial death spiral.

The impact would continue to widen. The individual-market risk pool under Obamacare includes plans both inside and outside the exchanges. In their amicus brief, the 49 economists wrote that “as premiums inside the exchanges rise, premiums outside the exchanges will rise as well, making insurance less affordable not just for low- and middle-income individuals who might have qualified for subsidies, but also for the sizable population ... (of) self-employed, early retirees, individuals in employment transitions and individuals employed by small businesses that do not offer insurance coverage.”

Thus, the viability of the entire individual insurance market across the country would be threatened. Hospitals and physicians could face millions of newly uninsured patients, triggering chaos in the healthcare industry. That would put intense pressure on the Obama administration and Congress to repeal the law's popular insurance market reforms.

## **MH Takeaways**

A legal victory for those challenging premium subsidies offered through the federal exchange serving 36 states would achieve a large part of what congressional Republicans have sought but have been unable to achieve legislatively—rolling back Obamacare.

## **Leaving the market**

Insurers, hospitals and other groups that support the healthcare reform law could try to convince elected officials in the mostly Republican-led states that use the federal exchange to establish their own state-run exchanges so their residents could qualify for premium subsidies.

Cannon of the Cato Institute said insurers conceivably could threaten to pull out of the individual market in states that don't go along.

Insurers and their trade group, America's Health Insurance Plans, declined to speculate on how they would react in such scenarios. But some observers said insurers would be reluctant to threaten a pullout because it would anger state officials whose goodwill they need.

Alternatively, insurance lobbyists could press congressional Republicans to accept a technical corrections bill to fix the language on the ACA subsidies. Or they could try to convince Obama and congressional Democrats to repeal the law.

What are the chances of success on either option?

“Zero,” said Chris Condeluci, former tax counsel to Republicans on the Senate Finance Committee who now works as counsel with Washington law firm Venable.

It seems like something that could only happen in a darkly satiric novel about Washington politics: A single mistake in drafting one sentence in a long and complicated law sinks the most important healthcare legislation in half a century. But it's a very real possibility.