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Courts Disagree About Subsidies on ObamaCare's Federal Exchange

By Michael Tennant

July 23, 2014

Are Americans who buy health insurance on ObamaCare's federal exchange eligible for premium-assistance subsidies? Two federal courts offered opposing answers to that question Tuesday.

First, in the case of *Halbig v. Burwell*, a three-judge panel of the D.C. Circuit Court of Appeals ruled 2 to 1 that "the ACA [Affordable Care Act] unambiguously restricts the … subsidy to insurance purchased on Exchanges 'established by the State.'" Then, a few hours later, a Fourth Circuit Court of Appeals panel unanimously reached the opposite conclusion in the case of *King v. Burwell*, saying that the decision of the Internal Revenue Service (IRS) to offer subsidies to people in states that did not establish their own exchanges was "a permissible exercise of the agency's discretion."

Obviously both opinions cannot be correct. Either Congress intended subsidies to be made available solely to Americans in states that established their own exchanges or it did not. And if did restrict the subsidies in this way, noted *National Review's* Charles C. W. Cooke, "the Obama administration has been acting illegally since January" in granting subsidies to individuals buying insurance through Healthcare.gov.

A plain reading of the text of the ACA would indicate that this is the case. The Cato Institute's Jonathan Adler and Michael Cannon, whose research underlies the two lawsuits, wrote:

The statutory eligibility rules for the ACA's premium-assistance tax credits "clearly say" that eligibility "depends on the applicant being enrolled in a qualified health plan 'through an Exchange established by the State.'" The rules employ that restrictive phrase nine times, without deviation. [Quotations from Washington and Lee University law professor Timothy Jost.]

Moreover, they observed:

Before the House approved the ACA, a group of House Democrats actually complained about this feature. They likened the Senate-passed ACA's Exchange provisions to another program that conditions individual entitlements on state action (SCHIP). They warned that hostile states could block their residents from receiving "any benefit" by refusing to establish an Exchange,

just as some states denied their residents the benefits of the just-passed Children's Health Insurance Program Reauthorization Act of 2009 by refusing to participate.

In other words, there was no doubt whatsoever at the time of its passage that the healthcare law specifically restricted subsidies to residents of states that established their own exchanges — a provision viewed by many as a "carrot" to entice states into doing just that.

The D.C. court, seated in Washington, accepted these arguments, noting that the ACA "does not authorize the Internal Revenue Service to provide tax credits for insurance purchased on federal exchanges" but "plainly makes subsidies available only on exchanges established by states."

Sensitive to charges of judicial activism, the panel explained that it was, in fact, upholding the constitutional separation of powers:

We reach this conclusion, frankly, with reluctance. At least until states that wish to can set up Exchanges, our ruling will likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly. But, high as those stakes are, the principle of legislative supremacy that guides us is higher still. Within constitutional limits, Congress is supreme in matters of policy, and the consequence of that supremacy is that our duty when interpreting a statute is to ascertain the meaning of the words of the statute duly enacted through the formal legislative process. This limited role serves democratic interests by ensuring that policy is made by elected, politically accountable representatives, not by appointed, life-tenured judges.

"We are pleased with the Court's decision that validated the fundamental principle that the language of the statute controls and an executive agency, especially the IRS, cannot substitute its policy judgment to override a law's plain meaning," Pacific Research Institute (PRI) president and CEO Sally Pipes said in a statement. (PRI, along with the Cato Institute, filed an amicus brief in support of the plaintiffs.)

The Obama administration, of course, offered a much less favorable response.

"You don't need a fancy legal degree to understand that Congress intended for every eligible American to have access to tax credits that would lower their health care costs, regardless of whether it was state officials or federal officials who were running the marketplace," said White House Press Secretary Josh Earnest. "I think that is a pretty clear intent of the congressional law."

The text of the ACA presented a serious problem for the Obama administration when more than half the states chose not to set up exchanges, leaving that task up to Uncle Sam. That meant that millions of Americans would not be eligible for subsidies and would in many cases be unable to afford insurance. This, in turn, would exempt them from the individual mandate and their employers from the employer mandate, whose penalties are only triggered when employees get subsidies for exchange coverage. In short, ObamaCare would have unraveled if the administration had adhered to the letter of the law.

Thus, as it has done so many other times, the administration — filled to the brim with people possessing "fancy legal degree[s]" — chose to flout the ACA. It simply declared that people in states defaulting to the federal exchange were indeed eligible for subsidies, and that was that —

until the lawsuits started flying, at which point the administration claimed in its defense that the ACA's subsidy provisions are unclear.

The Fourth Circuit panel, seated in Richmond, Virginia, and the dissenting judge on the D.C. panel concurred with the White House.

"We find that the applicable statutory language is ambiguous and subject to multiple interpretations," the Fourth Circuit judges wrote, saying they would defer to the IRS' interpretation of the law.

Likewise, Judge Harry T. Edwards of the D.C. court, in his dissenting opinion, maintained that the Obama administration's reading of the law was "permissible and reasonable, and, therefore, entitled to deference."

The Fourth Circuit, however, was clearly at pains to find some way to evade the plain meaning of the ACA. As Hot Air observed, the court seemed "tormented" in trying to interpret the relevant provisions of the law and even agreed that the plaintiffs' argument had a "common-sense appeal."

Edwards, meanwhile, attacked both the plaintiffs' motives, calling the lawsuit an "attempt to gut" the ACA, and his panel's majority opinion, which he said "defies the will of Congress."

With conflicting decisions from federal courts, the issue is far from settled. The losers in both these cases are likely to appeal to either the respective full circuit courts or to the Supreme Court. (The Justice Department has already announced that it will "immediately seek further review of the" D.C. court's decision — and that the federal-exchange subsidies will continue.) Other, similar lawsuits are also wending their way through the courts. It seems likely, therefore, that the issue will end up before the Supreme Court sooner or later, and what will happen there is anybody's guess. The only thing certain is that if the Obama administration again finds the plain language of the ACA a hindrance, it won't hesitate to amend it by fiat.