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Another serious blow for Obamacare

By Joel W. Hay

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The recent conflicting decisions by the Richmond, Va., and Washington, D.C., federal appeals court panels throw the legality of the Affordable Care Act again into question at a critical time in its implementation.

If the D.C. judges are upheld on further appeal, it could easily strike a death blow to Obamacare. The core issue decided in both cases was whether the Internal Revenue Service has the authority to provide tax subsidies and penalties to individuals and employers in the 36 states that opted out of creating state-run health insurance exchanges.

The D.C. panel of judges found that there was no language in the law to allow penalties or subsidies except through state-run health insurance exchanges. The Richmond judicial panel found the language in the ACA statute ambiguous and therefore deferred to the IRS's interpretation.

The stakes are huge. According to Michael Cannon, a Cato Institute health policy expert leading this legal charge against the ACA, if the IRS's subsidies and penalties are illegal, then 8 million individuals potentially signing up for the federally-run health insurance exchange will lose health insurance subsidies averaging \$4,400 each.

In fact, 4.5 million individuals who have already signed up for health insurance in these states may have to pay back the health insurance subsidies that they've already received. A family earning as little as \$33,000 could be asked to pay back nearly \$20,000 in federal health insurance subsidies for 2014.

But that is only one problem for the ACA.

To avoid even greater unpopularity right before the mid-term elections, Obama has postponed the full implementation of the employer penalties for firms not offering health insurance until 2016.

This also allegedly violates the language of the ACA statute and has already triggered a lawsuit by House Speaker John Boehner.

If the courts decide that the IRS is not allowed to assess health insurance mandate penalties, 250,000 employers in the 36 states that don't have state-run exchanges will face no obligation to provide health insurance coverage for 57 million people.

At that point, given that health insurance companies are no longer allowed to experience-rate their premiums, health insurance plans in the 36 states without state-run exchanges will go into a death spiral as premiums are raised and healthy people drop insurance coverage that they are no longer mandated to obtain.

Given that they failed to set up state-run exchanges initially, the state legislatures in these 36 states opting out of federally-run Obamacare will face little political pressure to enact new state-run exchanges at this point.

While never popular with a majority of those polled, the unfavorable poll numbers on Obamacare have widened since the health insurance exchanges were launched last fall. These state politicians will be unlikely to take on their small businesses, large employers or their workers losing jobs over 30 hours per week now if they weren't willing to do so before the Obamacare roll-out.

If anything, some of the 24 states (plus D.C.) that set up state-run exchanges may opt out of Obamacare to avoid the hit that it is taking on their economies and employment.

Even if the ACA is gutted by a court decision, I suspect that California and some of the states that have successfully enacted state-run exchanges would find a way to keep them going just as Massachusetts did with Romneycare prior to Obamacare.

The arcane reason that the Affordable Care Act contains no federal subsidy or penalty rules is that language of the law came out of the Senate bill that beat a filibuster by only one vote and was to be modified in conference with the House.

However, just then, Sen. Edward Kennedy, D-Mass., died and was replaced by Sen. Scott Brown. At that point, the House had to pass the Senate bill without any changes, or face further Senate filibustering of the law.

So just like two years ago, we're one Supreme Court ruling away from overturning Obamacare. And that's assuming that the Republicans never again win the White House or gain enough control of the House and Senate to make good on their pledges to shut it down.

I still wouldn't give Obamacare great odds for long and healthy survival, but the sudden dives, jolts, twists and turns it's already experienced in its political and legal history make Magic Mountain's biggest roller coaster look like a gentle kiddie ride. Continue to hold on to your hats!

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