



Could a wording 'glitch' doom Obama's healthcare law?

By David G. Savage
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When a federal appeals court ruled last month that a seemingly arcane wording flaw in the Affordable Care Act should invalidate a central part of the law, many of those who drafted the statute five years ago reacted with shock and anger.

In 2009, they had spent months piecing together a compromise that sought to create a national system of subsidized insurance — but one run by the states. Now, they fear their work could be undone by what some call a "drafting error" and others portray as a political miscalculation.

The judges from the U.S. Court of Appeals for the District of Columbia Circuit based their ruling on language saying that subsidies would be offered for health policies bought through an "exchange established by the state."

That wording meant only marketplaces established by 14 states, including California, would qualify, the three-judge panel ruled; 5 million people in 36 states where consumers used the federal government's exchange should not get subsidies.

(Another federal appeals court panel, in Virginia, took the opposite view in a ruling issued the same day. Until the litigation is over, subsidies are continuing in all states.)

The ruling seems likely to propel Obamacare once more before the Supreme Court, where opponents came within a single vote of overturning the law in 2012.

That prospect has sparked an intense debate over how the disputed language ended up in the law.

The story begins in 2009, when Democrats held a solid majority in both houses of Congress. In the House, most Democrats favored having one nationwide federal insurance exchange. They predicted — correctly, as it turned out — that many Republican-controlled states would balk at extending insurance to low- and middle-income residents.

But in the Senate, some Democrats worried over the specter of a "federal takeover." They insisted that states have a prime role.

To complicate matters further, two Senate committees adopted health bills. The more conservative Finance Committee relied entirely on states to set up exchanges; its bill said low-income buyers would receive a federal subsidy for insurance obtained "through an exchange established by the state."

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The more liberal Health Committee included a "federal fallback" in case some states refused to cooperate. Its bill said the federal government "shall establish and operate a Gateway" for insurance in any uncooperative states, and their low-income residents "shall be eligible" for subsidies.

When the two bills were merged at the end of 2009, the "shall be eligible" promise for all low-income residents was dropped. Left intact was the Finance Committee provision that said subsidies would be provided for insurance purchased through an "exchange established by the state." The Senate approved the bill on Dec. 24, 2009.

Two surprises followed. In January 2010, Republican Scott Brown won the Massachusetts Senate seat long held by the late Sen. Edward M. Kennedy, depriving Democrats of the 60 votes needed to end filibusters. Because the Senate faced a stalemate, House Democrats agreed to adopt the Senate's bill as written, without further tinkering.

Then, once the bill became law, more than half the states signaled they would not operate insurance exchanges, leaving the task for Washington.

Conservative opponents of the law soon spotted a potential weakness. In September 2011, the Cato Institute's Michael Cannon said the "Obamacare glitch" could block insurance subsidies in all the states that relied on a federal exchange.

Lawsuits soon followed.

Congressional staff members who worked on the law insist that everyone intended to provide subsidies nationwide. They didn't focus on the now-crucial phrase, they said. And they admit they did not foresee a rebellion among conservative states.

"This was an issue no one thought of. We were focused on hundreds of other issues — abortion, illegal immigrants, the size of the subsidies. Yes, you can look back now and say, 'That was stupid. Why didn't we catch it?'" said Harvard University health policy professor John McDonough. "That's why every major law has a technical corrections bill afterward."

Many former Senate aides say other parts of the law make clear the federal exchange is the stand-in for a state exchange and that, as a result, subsidies should be allowed.

That's the position taken by the Obama administration and upheld by the U.S. 4th Circuit Court of Appeals, based in Virginia.

One provision that administration lawyers point to says if a state refuses to create an exchange, the health secretary shall "operate such exchange within the state" and "take such actions as are necessary to implement" the law.

Still others point out that no one advised states that failing to establish an exchange could deprive their citizens of subsidies.

"I would hope the courts take a look at the intent and the overall structure of the law, because the intent was very clear," said David Bowen, former health policy advisor for Kennedy.

Some are troubled that a legal claim, once seen as a long shot, has gained such traction. Topher Spiro, a former Senate health policy staffer now at the Center for American Progress, said he viewed the lawsuits as "silly, not to be taken seriously."

"Other than a few right-wing activists, no one thought this was a legitimate challenge," he said.

All the backward looks at the law's intent may not determine the outcome, however. The Supreme Court is likely to have the final word, and its conservatives, led by Justice Antonin Scalia, frequently say they decide cases based on what a law says, not what Congress may have intended.