Obamacare's Next Near-Death Experience

A dueling pair of court cases show more trouble is in store for the health care law.

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And you thought Obamacare was in the clear. Sorry, but no.

On Tuesday, two separate federal courts handed down contradictory rulings that virtually guarantee the endlessly contested health care law will face yet another big test in the U.S. Supreme Court. And no matter how the judicial branch finally rules, the legislative branch will probably have to reopen the law anyway, thanks to a problem highlighted in the cases: the Affordable Care Act's little-known "territory problem." Happy times.

The stakes are high. Both suits challenge the legality of federal subsidies to people in Obamacare exchanges in the 36 states where the federal government has set up an exhange because the state government declined to do so. As the Cato Institute's Michael Cannon has explained, if these (basically identical) suits succeed, something like 7 million Americans in those 36 states will lose access to around $36 billion in federal premium subsidies in the next few years. On the other hand, thanks to the law's complex interlocking structure, 250,000 firms (and 57 million Americans) will also be liberated from the law's employer mandate, and 8.3 million Americans will be liberated from the individual mandate.

The two cases are: Halbig v. Burwell (heard in the Federal Circuit Court of Appeals) and King v. Burwell (in the Fourth Circuit). (Full disclosure: I played a small role in initiating King.)

The question before both courts was: Can the IRS legally provide Obamacare subsidies in an exchange not "established by a state" (i.e., established by the federal government)? In Halbig, two judges on a three-judge panel answered "no." In King, a three-judge panel unanimously answered "yes."

The Halbig panel reasoned that the IRS subsidies are statutorily authorized only in exchanges "established by a state," and since the federal government is not a state, Congress didn't authorize subsidies in any state that declines to to set up an exchange, even if the feds have set one up themselves. The King panel took precisely the opposite view. To read the law literally, it

said, would be "absurd." Congress must have intended for its reforms to apply in all states, regardless of who creates the exchange.

The Halbig panel found Congress's intent to be ambiguous, but the text clear. The King panel held the reverse: that the text is ambiguous, but the intent is clear.

I'll bet the family farm that this issue ends up in the Supreme Court. Both circuits are likely to hear the respective cases "en banc," that is, before all the judges, not just a select subset. If the two circuits come out on opposite sides, the high court will then be forced to sort matters out. If they rule the same way, the losing side will appeal to the Supreme Court, because of the high stakes. If four justices consent to take the case, it will be heard.

Currently, four of the nine Supreme Court Justices were appointed by Democratic presidents, the remaining five by Republicans. (In 2012, four of the more conservative justices voted to strike down Obamacare altogether.) Unless both circuits rule the same way and present an absolutely ironclad argument for their decisions, the odds of four justices voting to take the case are high.

And now to the "territorial problem." The administration's lawyers claim Congress could not possibly have intended to deny federal subsidies in exchange-declining states because its overall intention was to create a new, more affordable insurance system for all Americans by way of a package of interdependent policies that constitute a "three-legged stool": 1. Insurance mandates that requires insurers to take all applicants, and price their policies, regardless of an applicant's health status, known as "guaranteed issue" and "community rating." 2. An individual mandate that forces Americans to obtain Affordable Care Act-compliant health coverage. 3. Federal tax-credit subsidies to help lower-income Americans afford the mandatory coverage, provided they buy it through an exchange.

Naturally, a stool with fewer than three legs falls down. Most experts agree that without all three of the aforementioned legs, Obamacare's market reforms will almost certainly topple. But did Congress intend for all three legs to apply everywhere? Yes, claims the administration. Therefore, "established by a state" should be read to mean "established by or on behalf of a state."

But this argument runs into a problem when we come to U.S. territories, such as Guam or American Samoa. The Affordable Care Act specifically exempts them from the second leg of the stool (the individual mandate). Apparently a two-legged stool can stand in a U.S. territory.

It's a contradiction the law's defenders must address. And yet the judges who upheld Obamacare's subsidies in King silently passed over it. That's telling.

And by the way, a two-legged stool can't stand. In fact, territorial health insurance markets are currently collapsing, precisely because Congress exempted them from the stool's second leg (the individual mandate).

Fearing such a collapse, the territories have long been asking Congress to impose the individual mandate on them too. The administration reponse: "Sorry, our hands are tied by the statute."

Territorial reply: “Okay, then suspend the insurance mandates, so our insurance markets don’t implode.” Administration: “Sorry, our hands are tied by the statute.”

Then, last week, on the eve of the Halbig and King rulings, the administration reversed itself. It decided to cease enforcing the insurance mandates in the territories, despite a clear statutory requirement to do so. So now we have a one-legged stool in Guam, Puerto Rico, American Samoa and the Northern Mariana Islands. Happy times.

So here are some questions for the administration:

1) If congressional intent ought to govern in all cases, why are you flouting it in the territories?

2) If Congress intended that all three legs of the stool should apply everywhere, why did it specifically remove one of those legs (the individual mandate) in the territories?

3) If Congress expressly chose to exempt some Americans (in territories) from one leg of the stool (the individual mandate), why is it so hard to believe it also exempted other Americans (in certain states) from another leg of the stool (federal subsidies)?

No matter what happens, this much is clear: Obamacare is in for additional near-death experiences.

If the administration prevails in the subsidy cases, Congress will still have to reopen the law to deal with the lack of functioning insurance markets in the territories, which will naturally invite a debate over whether the “three-legged stool” ought to be amended or repealed everywhere.

If, however, the administration loses the subsidy cases, Obamacare’s controversial market reforms will be all but abolished in 36 states. That will force lawmakers and governors in those states to revisit whether to set up an exchange, and force Congress to reopen the law to provide subsidies in the hold-out states. Or conversely, to repeal the mandates in those states. Or maybe just repeal the whole darn law.

Happy times.