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D.C. appeals panel deals big blow to Obamacare subsidies

But second court backs administration on key part of law

By Tom Howell Jr.
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Millions of Americans are not entitled to government health insurance subsidies under Obamacare because of the way the law is written, a divided three-judge panel of the D.C. Circuit Court of Appeals ruled Tuesday.

But the force of the legal victory was undercut just hours later when another appeals court in Richmond sided with the Obama administration on the subsidy question, setting up an almost certain extended legal battle that could soon reach the Supreme Court.

In a decision that could blow a massive hole in President Obama's signature domestic achievement, the court held that people living in states that relied on the federal government to set up their insurance market exchanges cannot offer the subsidies considered critical to making coverage affordable.

The D.C. Circuit Court of Appeals ruled the administration used an IRS rule to stretch the meaning of the Affordable Care Act, which said financial aid to low- and middle-income people should only flow to exchanges "established by the State." If that means only state-run exchanges, it would cut off subsidies to two-thirds of the nation.

The 2-1 decision from a three-judge panel effectively invalidated the IRS rule that ensured subsidies flowed to every state, and the deciding judges seemed to realize the potential impact of the ruling.

"We reach this conclusion, frankly, with reluctance," Judge Thomas B. Griffith said in his opinion for the court. "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."

Hours later, the U.S. Court of Appeals for the Fourth Circuit upheld the administration's interpretation of where subsidies may flow, creating a split in the circuits. The judges in

Richmond reasoned that Obamacare's language was ambiguous and that the IRS rule was "a permissible exercise of the agency's discretion."

Yet the D.C. Circuit is widely viewed as the second-most powerful court in the land, and their edict will likely overshadow the Fourth Circuit for now.

The Obama administration is sure to appeal the D.C. circuit's decision because the subsidies are a huge draw for Obamacare customers. Without that selling point, the reforms would effectively collapse under the weight of premiums that are no longer affordable.

White House press secretary Josh Earnest said the ruling will have no immediate impact on consumers' ability to receive tax credits right now, and the administration is "confident" about the appeal that the Justice Department will be making.

"While this ruling is interesting to legal theorists, it has no practical impact," Mr. Earnest said.

But Republicans wasted no time in cheering the blow to the White House, which comes on top of a Supreme Court victory in the Hobby Lobby case that allowed closely held corporations to ignore Obamacare's contraception mandate.

"For the second time in a month, the courts have ruled against the president's unilateral actions regarding Obamacare," Speaker John A. Boehner, Ohio Republican, said. "The president has demonstrated he believes he has the power to make his own laws. That's not the way our system of government was designed to work."

Under the court's ruling, only the 14 states and the District that have taken on the responsibility for their exchanges would be able to dole out premium tax credits to their residents.

Other states, most with Republican governors or state legislatures, refused to set up the exchanges, forcing the federal government to step in for them.

To redress the potentially fatal blow to its signature law, the administration will likely seek an "en banc" hearing on the case by all the judges in the D.C. Circuit. That may be more likely to go their way, as Republicans have accused Democrats of packing the court.

Court rules allow any active member of the appeals court to vote for an en banc hearing, according to I. Glenn Cohen, a professor at Harvard Law School.

"There is nothing in the rules that say that people who were confirmed after the decision was taken up but before it was issued do not get to sit, so I imagine it means the now-Democrat stacked group will vote for en banc rehearing," he said.

If Tuesday's decision is upheld in the long run, about 5 million Americans who used the federal exchange will see their health costs soar because they no longer have subsidies to bring down their premiums, according to Avalere Health, a Washington-based consultancy.

"The responsibility for that lies squarely on the shoulders of the president," Michael Cannon, director of health policy at the libertarian Cato Institute, told The Washington Times in a recent interview.

Mr. Cannon, a chief architect of the legal theory behind the Halbig case and an opponent of Obamacare, said he told "everyone who would listen" not to set up a state-run exchange because the subsidies could not legally flow to those states.

The complaining individuals and entities in Monday's case were from states that opted not to set up their own health exchanges. To buttress their argument, they said the subsidies produced a ripple effect in which they were no longer insulated from the law's twice-delayed employer mandate, a rule that requires companies with 50 or more full-time employees to offer health coverage or pay fines.

The rule is triggered once an employee takes advantage of government subsidies on an Obamacare health exchange. Without any subsidies, the plaintiffs reasoned, they would not have to worry about the employer mandate.

The Obama administration argued that Congress always intended the Health and Human Services Department to "stand in the shoes" of states that decided not to run their own marketplaces. That's what it did during the law's first enrollment period, setting up HealthCare.gov to serve the three dozen states that deferred to the federal government.

Mr. Earnest said there are four Obamacare legal challenges working their way through federal courts, and two district courts have ruled in favor of the administration.

"There is decidedly mixed legal opinion about this," Mr. Earnest said. "For those keeping score, we're still ahead, two-to-one."