Los Angeles Times

A U.S. court quashes the dopiest Obamacare lawsuit of all

Michael Hiltzik

April 15, 2015

It is widely held that the dopiest anti-Obamacare lawsuit is King vs. Burwell, a conservative contrivance that tortures four words in the Affordable Care Act to assert that consumer healthcare subsidies in three dozen states should be invalidated.

But the Supreme Court has taken up King for a ruling, which implies that at least four justices think the assertion is worthy of consideration. (A decision is due early this summer.)

That leaves a lawsuit entitled Johnson vs. U.S. Office of Payroll Management holding the crown. On Tuesday, however, the Chicago-based U.S. Court of Appeals for the 7th Circuit tossed the case with a horselaugh, so its reign may be ending.

The lead plaintiff in the case is Sen. Ron Johnson (R-Wis.), a fierce opponent of the ACA. His novel argument is that the law denies him his constitutional right to equal protection because it offers him a benefit -- to wit, the same insurance subsidy enjoyed by most other Americans who get health coverage from their employer -- that would cause him "reputational and electoral injury" if he accepts it.

Judge Joel M. Flaum, writing for a unanimous three-judge panel of the court, rightly considered the argument, which is that Johnson is injured by this benefit, bizarre. If he's so concerned about taking a benefit that he attacked while running for office, Flaum wrote, why doesn't he just turn it down? "We do not see how Sen. Johnson's reputation could be sullied ... by being offered, against his will, a benefit that he then decided to refuse."

The court consequently found that Johnson has no standing to sue, affirming a lower court ruling, and Johnson hasn't said whether he'll appeal to the Supreme Court. Some legal experts say the chances are slim that the court would accept the case, though stranger things have happened in ACA jurisprudence.

Thanks to the ruling, Johnson said, "another executive action by the administration will go unchallenged, all based on the legal technicality of standing." It's worth observing, for the record, that "standing" isn't a mere "technicality": It's embedded in the Constitution as a limitation on judicial jurisdiction.

To understand how frivolous Johnson's lawsuit was from the start, one needs to recap how members of Congress and their staffs came to be subject to the individual coverage provisions of the ACA. It's important, too, because the ACA's attackers often assert that members of Congress are either exempt from the ACA or given a special privilege. Neither is true.

The ACA's rules governing the state and federal individual health plan exchanges always were aimed at people without employer-sponsored coverage. That's because individuals and small businesses faced higher costs and rampant discrimination from insurance companies; employer-sponsored plans are both cheaper and immune from exclusions for pre-existing conditions and other complicating features.

Federal lawmakers and their staffs were in the employer-sponsored category. Their employer is the federal government, which offers standardized coverage and pays part of the expense, as most big employers do.

During congressional dickering over the law in 2009, Sen. Charles Grassley (R-Iowa), mischievously inserted an amendment requiring members of Congress and their staffs to get their insurance through the Obamacare exchanges. His argument was that the lawmakers should taste the same medicine as their constituents.

The problem was that there was no mechanism for employers to pay their share of exchange-provided coverage. Why? Because the exchanges are for people who *don't* get their coverage from their employers. Forcing congressional employees to go through the exchanges but denying them the same contribution of about 75% of the cost of healthcare that all other federal employees receive would be tantamount to a pay cut of up to $10,000 a year.

Most lawmakers understood that this wouldn't be a good or fair outcome, though it was hailed by the salt-of-the-earth types at the Cato Institute and the Wall Street Journal's editorial page, who safely get their coverage at work, including (at least at the Journal) employer contributions.

In time, the Office of Personnel Management ruled that the standard employer contribution would apply to Congress and its staff, even though they had to buy coverage on the exchanges. Everyone breathed a sigh of relief except for people like Sen. Johnson, for whom "the story that a lawless president might try to rescue an undeserving Congress from a poorly drafted statute was irresistible," in the words of Nicholas Bagley of the University of Michigan.

Bagley, however, raised the salient question of whether Johnson had standing to sue, which normally requires a plaintiff to show injury from the government action at issue. "After all," he wrote, "his core objection is that the government is giving him and his staffers *more* money than it should. Getting a windfall from Uncle Sam isn’t exactly an injury."

That's the issue the appeals court confronted. Implicitly recognizing Bagley's point, Johnson tried a few other tacks. He claimed he was denied "equal treatment" because he was offered a benefit that not all exchange buyers can get (the employer contribution).

The court's reply: equal to whom? Johnson's employer contributions actually make him equal to those of his constituents who also receive employer contributions.

Johnson's other big argument was that he was being forced to go against his principles by the OPM rule, and that voters might punish him for it. The court found this thin, very thin. Not only could Johnson reject the employer contribution, but he couldn't show how electoral harm might apply to his co-plaintiff, Brooke Ericson, a member of his staff.