Forbes

As Obamacare Draws Near, Lawsuits Against IRS May Exempt Millions

By: Mike Carvin & Sam Kazman – May 15, 2013

As we draw closer to January 1, 2014—the date on which many of ObamaCare's major reforms and regulations are scheduled to take effect—doubts are growing over the Administration's ability to successfully execute on its own signature health law. Insurers are blaming the statute for skyrocketing premiums. Businesses are citing uncertainty over ObamaCare as a basis for not hiring new employees. Officials at Health and Human Services have admitted that setting up the Act's new insurance "Exchanges" has proven an incredible logistical challenge. Even Senator Max Baucus (D-MT) last month predicted that implementation of the law he helped shepherd through the Senate was shaping up to be a "train wreck."

Actually, the problems run far deeper. In more than half the country, the implementation of ObamaCare has been premised on a patently illegal regulation—a lawless "quick fix" designed by the Administration to circumvent the fact that roughly two-thirds of the states have effectively chosen to "opt out" of the Affordable Care Act's intrusive mandates. A new lawsuit, recently filed by us in federal district court in D.C., will expose that flaw in ObamaCare's very foundation, vindicating the right of these "refusenik" states to shield their citizens from an overreaching federal government. Specifically, although the Act's plain language makes clear that a State's citizens may receive subsidies and a State's employers are required to offer health insurance *if*—but only if—the State decides to run the Act's insurance "Exchange," a new IRS rule completely rewrites this scheme and purports to make the subsidies and employer mandate applicable even where the State has *opted out* and the federal government runs the "Exchange."

A little background will help clarify what is at stake. One of the linchpins of the Act is the establishment of new, State-operated insurance "Exchanges"— a type of virtual marketplace where insurers could sell standardized health insurance products on the individual market, under the watchful eye of regulators. These Exchanges are the vehicle for distribution of the federal "premium assistance" subsidies that were intended to make comprehensive insurance affordable for millions of Americans. And those subsidies, in turn, are supposed to encourage businesses to sponsor affordable health coverage for their employees, because the Act penalizes employers if any of their employees receives a federal subsidy after buying an individual policy on an Exchange. Without these Exchanges and accompanying subsidies, millions of individuals would be effectively exempt from the law's "individual mandate," because insurance would be too expensive for them to buy; and businesses would not be subject to the "employer mandate" to sponsor employee coverage. Those are two of the Act's central pillars.

Congress knew that the federal government cannot *require* the states to establish or operate Exchanges, so it offered subsidized insurance premiums for residents of states with State-operated Exchanges to entice states to undertake this responsibility. Instead, fully 33 states—from Texas to Ohio to President Obama's and Vice President Biden's home states of Illinois and Delaware—have said "thanks, but no thanks." Instead, these refusenik states have chosen to shield their businesses and residents from the worst of the potential "train wreck."

Those lawful choices threatened to hobble ObamaCare across wide swaths of the country. Rather than try to address the underlying concerns that caused states to "disembark" from the ObamaCare train, however, the Administration devised a desperate quick-fix. The IRS wrote a regulation purporting to allow federal subsidies even for policies sold over *federally*-operated Exchanges, which the Act authorizes HHS to establish in states that have declined to create their own. That regulation would rewrite the terms of the offer that Congress extended and override the decision made by the 33 states that declined to create Exchanges, exposing businesses in those states to penalties that would otherwise not apply and vastly expanding in those states the scope of the individual mandate. It would also, of course, lawlessly spend money from the federal Treasury in circumstances where Congress—the guardian of the federal purse—has plainly not authorized such expenditures.

As health policy expert Michael Cannon of the Cato Institute and Professor Jonathan Adler of Case Western Reserve University have explained, the Affordable Care Act could not be clearer: Subsidies are authorized only for policies purchased "through an Exchange established *by the State* under *§ 1311*of the [Act]." Not even the IRS can get away with claiming that an Exchange established by the *federal government* under a *different* provision of the Act (§ 1321) satisfies that definition. The single paragraph that the IRS wrote to justify its counter-textual "interpretation" of the Act makes no effort to reconcile the regulation with the flatly contrary words enacted by Congress, instead claiming that the Act's legislative history does not show that Congress meant what it said. That is both untrue and irrelevant.

We are confident that the federal courts in D.C. will not allow the IRS to so brazenly authorize expenditures that Congress has prohibited, and will therefore preserve the terms of the actual bargain with states that Congress authorized. When the courts interpret the law as actually written and stop the IRS's power grab, the Exchanges at the heart of ObamaCare will only operate in the West Coast and the Northeast. Consequently, the Administration will either have to accept a dramatically circumscribed ObamaCare or return to Congress, which will provide the legislature a golden opportunity to craft a law that states may *want* to opt into—the way it's supposed to work under our Constitution.