



Can Obamacare Succeed Without Subsidies? Split court decisions raise questions about health insurance subsidies for millions of Americans.

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President Barack Obama's signature health care reform law, the Affordable Care Act, faces new scrutiny in the courts, raising additional questions about the future of Obamacare. In late July, two federal appeals court panels issued contradictory rulings within hours of each other on the legality of one of the law's key components: subsidies to help people pay for health insurance.

At issue in both lawsuits was whether the wording of the law authorizes the government to make tax credits available to subsidize the cost of health insurance premiums for millions of qualifying middle- and low-income Americans who purchase insurance using healthcare.gov, the federal exchange, or only for those who use state-run marketplaces. The reasoning behind the opposing rulings boiled down to whether the judges strictly interpreted the letter of the health care law or its spirit.

Halbig v. Burwell was brought by a group of individuals and employers from states that did not establish their own exchanges and objected to the subsidies and the law's mandate that they buy insurance. A West Virginia man who joined the lawsuit, for example, admits to being at least partly motivated by opposition to "government handouts," and would rather avoid the choice of purchasing health insurance – even at a subsidized cost of less than \$21 per year – or facing a tax penalty, according to court documents.

In a major blow to Obamacare, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled 2 to 1 that the health care law, as written, restricts tax credit subsidies to people who purchase health insurance through marketplaces that are "established by the State." In his decision, Judge Thomas Griffith, appointed to the court by President George W. Bush, noted that the ruling "will likely have significant consequences" for millions of Americans and health insurance markets. "We reach this conclusion, frankly, with reluctance," he wrote.

The ruling does not immediately block subsidies to people who use healthcare.gov, pending the Obama administration's appeal. But if the ruling is upheld, it would mean the Internal Revenue Service lacked the authority to subsidize health insurance premiums through tax credits to nearly 5 million Americans in as many as 36 states – many with Republican governors or legislatures –

where only the federal exchange operates. That could drastically alter or ultimately cripple Obamacare.

Some 7.3 million people – or about 62 percent of the 11.8 million people expected to enroll in federally facilitated marketplaces by 2016 – could lose out on \$36.1 billion in subsidies, according to a report by the Urban Institute and the Robert Wood Johnson Foundation.

There would be a “domino effect,” says Linda Blumberg, a senior fellow and an economist at the Urban Institute’s Health Policy Center. Without the subsidies, fewer people would have affordable insurance available, and so they would be exempted from the health care law’s requirement to have coverage, she explains. In turn, healthy people might leave the insurance pool, while those with costly medical needs come in. As a result, “the average price of insurance goes up, up and up,” she says. Moreover, insurers are likely to push for the repeal of patient protections, including those prohibiting discriminating against people with pre-existing conditions.

In his dissenting opinion, Senior Judge Harry Edwards, the lone Democrat-appointed judge on the panel, described the lawsuit as a “not-so-veiled attempt to gut” the health care law. The majority opinion “defies the will of Congress,” he wrote.

Just two hours later, a three-judge panel of the 4th U.S. Circuit Court of Appeals in Richmond, Virginia, reached the opposite conclusion in *King v. Burwell*, a similar lawsuit brought by Virginia residents. It upheld the health care law, ruling 3 to 0 that subsidies provided in both state- and federally run exchanges are permissible and clearly intended by the Affordable Care Act.

In his published opinion, Judge Roger Gregory, originally nominated to the court by President Bill Clinton, wrote that the “statutory language is ambiguous” but it is “clear that widely available tax credits are essential to fulfilling the Act’s primary goals” and Congress was aware of their importance when drafting the bill. “The economic framework supporting the act would crumble if the credits were unavailable on federal exchanges,” Gregory wrote. His ruling – joined by two Obama appointees – upheld the health care law, reasoning that the IRS’ payment of premium subsidies as tax credits is “a permissible exercise of the agency’s discretion.”

What’s Next?

The Obama administration will appeal the Halbig ruling by the three-judge panel of the D.C. Circuit, which was the first to find that premium subsidies available through the federal exchange are invalid, a Justice Department official said on Aug. 1. Since seven of those judges were appointed by Democratic presidents – including four recently appointed by Obama – chances are better that if the full court decides to rehear the case, it will overturn the panel’s decision. Of course, the outcome is uncertain, since court rulings don’t necessarily follow party lines.

“I have learned not to predict legal outcomes but I sure hope they do,” says Jonathan Gruber, an MIT economist who was consulted on the Affordable Care Act.

Those who lost the King lawsuit in the 4th Circuit decision also could request that the full court rehear their case. But since most of those judges were nominated by Democrats, asking them to rehear the case “would probably be a waste of time,” says Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute. “If I were counsel for King, I would go straight to the Supreme Court,” he said. The high court might agree to hear the case because of the split circuit court decisions, although it’s hard to predict what the justices would decide.

The Supreme Court has saved Obamacare before, however. In 2012, the justices, in a 5 to 4 majority opinion, upheld the health care law’s individual mandate, or the ability of the federal government to tax individuals who refuse to purchase insurance – a key portion of the legislation. But the court also allowed states to opt out of a provision that expanded Medicaid insurance to all low-income Americans. And just last month, in the Hobby Lobby case, it found that Obamacare could not force “closely-held” private companies to provide birth control coverage to their employees if doing so violates their religious beliefs. In response, the Obama administration is expected to issue new regulations next month that include a compromise arrangement.

Two other cases that challenge subsidies available under the health care law are making their way through the federal court system, one in Indiana and one in Oklahoma. Both lawsuits, brought forth by each state’s own attorney general, challenge the health care law’s employer mandate, a requirement that all businesses with more than 50 full-time equivalent employees provide them with health insurance, explains Timothy S. Jost, professor of law at Washington and Lee University School of Law in Lexington, Virginia. The underlying theory, he says, has been “developed by libertarians who are opposed in principle to the government providing an entitlement to health care.”

The next steps seem likely to occur in courtrooms, but there are other solutions. Some of the states that now partner with the federal exchange could still choose to run their own marketplaces. However, it’s an expensive proposition, and the deadline for obtaining federal grants to support the health insurance exchanges expires at the end of this year. The Urban Institute’s Blumberg says that Illinois, New Hampshire, West Virginia, Arkansas and Delaware are best positioned for starting state-run exchanges.

Another long shot: Congress could consider a legislative fix to clear up the ambiguity in the Affordable Care Act’s language. But that seems unlikely, since Republicans have voted more than 50 times to repeal the entire law. Moreover, the rhetoric heard on Capitol Hill in response to the July rulings suggests slim prospects for a legislative solution.

"There’s a lot of high-minded case law that’s applied here," White House press secretary Josh Earnest told reporters recently. "There’s also an element of common sense that should be applied as well, which is that you don’t need a fancy legal degree to understand that Congress intended for every eligible American to have access to tax credits that would lower their health care costs regardless of whether it was state officials or federal officials who are running the marketplace."

What’s the Upshot?

If you're among the nearly 5 million Americans receiving tax credit subsidies for insurance purchased through the federal exchange, you likely won't feel an immediate impact. That's because appeals of one or both of the rival court rulings could take a year or longer to wind through the courts.

Tax credit subsidies for insurance purchased through the federal exchange this year amount to an average of \$4,410 per enrollee, according to Congressional Budget Office estimates. But if – and it's a big if – the Halbig ruling is eventually upheld and those subsidies disappear, individuals in many states who remain in their current plans could see an average premium increase of more than 70 percent, according to an analysis by Avalere Health, a health care consultant firm based in Washington, District of Columbia. In addition to losing their financial assistance, they'd also still be paying the taxes that help pay for Obamacare without sharing in the benefits.

"What we know about consumer shopping on exchanges is that they are highly price sensitive and many of the folks that are subsidized are likely on the low end of the subsidy scale," says Elizabeth Carpenter, director at Avalere Health. "So certainly, if these subsidies were to go away they would likely find insurance both unaffordable practically and unaffordable technically under the law."