

Could one word take down Obamacare?

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Section 1401 of the Affordable Care Act is, on the surface, just as exciting as it sounds. It outlines in excruciating detail the eligibility requirements for an American to receive a tax subsidy to assist in purchasing health insurance.

That's at first glance, at least. Two experts who recently scoured Section 1401 think they found something huge: a missing word that could undercut the Affordable Care Act's promise of affordable health insurance.

Case Western Reserve University's Jonathan Adler and Cato Institute's Michael Cannon argue in a new paper that any federally-established health insurance exchange does not have the authority to dole out health insurance subsidies. Those subsidies are important: They are the \$800 billion in tax credits meant to subsidize coverage for low- and middle-income Americans.

If that is true — and it's worth noting that the Obama administration, along with a number of legal scholars, argue that it is not — it would significantly curtail the Affordable Care Act's ability to do what it's supposed to do: make health care affordable. And that puts Section 1401 at the center of a burgeoning debate over what Congress meant when it wrote the Affordable Care Act, and how that affects its ultimate implementation.

"It could be an Achilles' heel," Cannon said.

Let's back up and look at Adler and Cannon's argument. It starts with the the Affordable Care Act's defining a health insurance exchange, in scintillating Section 1311, as a "governmental agency or nonprofit entity that is established by a state."

The last three words are the crucial ones, because they indicate that only states can establish exchanges under that Section 1311. There's a whole other part of the law, Section 1321, that allows the federal government to set up federal exchanges in states that do not take on the task themselves.

This all matters in the all-important Section 1401, where it lays out who can get a federal insurance subsidy. There, the law says that only those who are "enrolled ... through an Exchange established by the State under 1311."

If there's a smoking gun in this case, it's that sentence right there. It says that the only people who can qualify for subsidies are those who get coverage through a state-based exchange.

“The statute was very poorly drafted if the intent was to cover federal exchanges,” says Kevin Outterson, a Boston University professor who focuses on health policy and who previously worked as a tax attorney. “If I had a client who had recently lost some money on a provision like this, I’d say you have a pretty good chance to win that case.”

The debate now centers on whether Section 1401 has a drafting error. Did the federal government mean to count federally-established marketplaces there and miss a word? Or did they actually mean to send insurance subsidies only to states that did the heavy lifting?

Cannon and Adler argue its the latter: The tax subsidies were meant encourage states to build exchanges and not leave the task to the federal government. They point to an exchange in the Senate Finance Committee, where Sen. Max Baucus (D-Mont.) told Sen. John Ensign (R-Nev.) that using the tax credits were a “condition to participate in the Exchange.”

The Obama administration argues the opposite — that the law clearly intends for insurance subsidies to go to all 50 states. There’s another part of Section 1401 — Section 1401(f)(3), to be exact — that requires both federal and state exchanges to report information about any credits being administered. Why would federal exchanges need to report that information, the thinking goes, if they were not administering credits?

“This is a 2,000-page bill that was put together in extraordinarily messy circumstances,” says Yale University’s Abbe Gluck, who has studied the issue. “The provisions that establish the exchanges are separated, but critically in the reconciliation bill [cited above] and in Congress, they always talked about the two exchanges as interchangeable.”

A spokesman for Sen. Baucus agrees. “The clear intention of the health-care law is to provide consumers with tax credits to purchase quality, affordable health coverage through either a state or a federally-facilitated exchange,” says Sean Neary, Senate Finance Committee communications director.

We don’t know yet whether this idea has legal legs. No lawsuits have been filed, although Adler says he hears rumblings of that happening soon. Virginia Attorney General Ken Cuccinelli sent an e-mail to supporters Monday suggesting that he would push forward on the issue. There’s also a possibility that, should former Massachusetts governor Mitt Romney win the election, he could use Adler and Cannon’s argument to slow walk implementation.

Others, however, are skeptical that courts will buy it.

“Judges are pretty practical people,” says Boston University’s Abigail Moncrieff, whose work focuses on governmental law. “Even if Adler and Cannon have the right technical reading, it’s unlikely it would hold the IRS to that kind of technical mistake when there’s so much evidence that Congress did not mean for it.”

If our recent experience with lawsuits against Obamacare holds any lessons, it might be this: We’re horrible at predicting what challenges will stick. This argument may catch on. Or it may flop. Either way, as it works its way into the political discussion, its probably one to keep an eye on in the coming months and years.