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# Insurers' Demand For A 'Halbig' Contingency Plan Demonstrates Need For Immediate SCOTUS Review

By Michael F. Cannon
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This is significant. Ideological critics pooh-pooh Halbig v. Burwell and related cases as "nuisance lawsuits…frivolous." The health-insurance industry is not so sanguine. Amy Lotven of the trade publication *Inside Health Reform* reports [$] that before insurers agreed to sell coverage through the Patient Protection and Affordable Care Act's health-insurance Exchanges in 2015, they demanded that the federal Centers for Medicare and Medicaid Services explicitly agree to let them cancel policies if any of the Halbig cases succeed in blocking the subsidies that carriers had been receiving in the 36 states whose ObamaCare Exchanges were not, as the PPACA's requires before subsidies can flow, "established by the State." This is the first indication ObamaCare supporters are worried the *Halbig* cases could actually succeed, and further demonstrates why the Supreme Court should grant certiorari and expedited consideration to the related case *King v. Burwell*.

The Internal Revenue Services is currently subsidizing health insurance for about 5 million people in the 36 states that refused or otherwise failed to establish Exchanges themselves. That's a problem, because the PPACA explicitly, clearly, and repeatedly limits those subsidies to taxpayers who purchase coverage "through an Exchange established by the State." It's also a problem because those illegal subsidies end up subjecting some 57 million individuals and employers to illegal penalties under the law's individual and employer mandates.

The plaintiffs in *Halbig* and three other cases have challenged those illegal taxes and spending. Two of the three standing judicial opinions (in *Halbig* and *Pruitt v. Burwell*) have sided with the plaintiffs. Those courts ruled the Obama administration is breaking the law by taxing, borrowing, and spending billions of dollars contrary to the clear and unambiguous language of the PPACA. Even in the one standing opinion that sided with the government, the Fourth Circuit held in King v. Burwell, "There can be no question that there is a certain sense to the plaintiffs' position" because "a literal reading of the statute undoubtedly accords more closely with their position," and the government's argument was "only slightly" stronger.

As beneficiaries of those illegal subsidies, insurance carriers are spooked. Lotven explains they demanded that CMS change the agreements the agency signs with Exchange-participating carriers for 2015 to include what we might call a *Halbig* contingency plan:

The agreements to participate in the federally-facilitated marketplace (FFM) that CMS sent to issuers last week include a new clause assuring issuers that they may pull out of the contracts, subject to state laws, should federal subsidies cease to flow. CMS did not say if the clause is meant as a safeguard against the potential impact of various high-profile lawsuits — including *Halbig v. Burwell* – that could end up in the Supreme Court next year, but stakeholders assume that is the point.

The agency tells *Inside Health Policy* that the new clause was inserted at the request of issuers, and that both parties believe the clause is critical. Agreements must be signed and returned to CMS by Wednesday (Oct. 22).

Plaintiffs in the suits argue that the ACA subsidies are limited to people enrolled through state-based exchanges and that the IRS overstepped its authority in allowing people enrolled through the FFM access to subsidies. Because the courts have split in their decisions, plaintiffs in one of the cases – *King V. Burwell* – petitioned the Supreme Court to take up the issue. It is therefore possible that the court could agree to examine the case during the plan year.

The language in the clause says that CMS acknowledges that the issuer has developed its products for the FFM "based on the assumption that (advanced payment tax credits) and (cost-sharing reduction payments) will be available to qualifying (e)nrollees."

"In the event that this assumption ceases to be valid during the term of this Agreement, CMS acknowledges that Issuer could have cause to terminate this Agreement subject to applicable state and federal law," the contract says.

I have been watching the insurers pretty closely for any indication of what they might be thinking about these cases. To date, all they have done is file an amicus brief or two explaining that (big surprise) they would consider it a bad thing if they stopped receiving billions of dollars in federal subsidies. This is the first indication I have seen that ObamaCare supporters — a group that includes the insurance industry — are worried that these cases might succeed. I hope Lotven or another intrepid reporter can pry further comment out of them.

More importantly, the fact that insurers demanded a *Halbig* contingency plan demonstrates the need for immediate Supreme Court review of these cases. Insurers have revealed they rely heavily on the challenged subsidies and believe there's a reasonable chance the plaintiffs will prevail in court. Put another way, the health-insurance industry believes there is a reasonable chance that either *Halbig*, *King*, *Pruitt v. Burwell*, or *Indiana v. IRS* will eventually end up before the Supreme Court. As the *King* plaintiffs argued in their bid for Supreme Court review (in a brief praised in today's *Wall Street Journal*), "postponing review until after even *further* reliance would be the *worst* possible course." The Supreme Court should not wait for the next opportunity. It should grant cert and expedited review in *King*.

On October 30, the Cato Institute will host a half-day conference on the *Halbig* cases, featuring two of the plaintiffs: Oklahoma Attorney General Scott Pruitt and Indiana Attorney General Greg Zoeller. Full agenda here. Register to attend here.

*Michael F. Cannon is the Cato Institute's director of health policy studies.*