Pessimist's persistence could pay off against Obamacare

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December 8, 2014

WASHINGTON — A Supreme Court challenge that poses a grave threat to President Obama's health care law had its genesis precisely four years ago as a power-point presentation by a self-proclaimed pessimist from South Carolina.

The idea was picked up by an Ohio law professor, given a policy and public relations push by a Washington health economist and turned into a lawsuit by an Oklahoma attorney general. Three more lawsuits followed.

Nearly five years after the law was passed, their effort has reached the Supreme Court, which saved the president's signature domestic policy achievement in 2012 but now could deal Obama a significant setback.

The challenge hinges on four words repeated several times in the statute: "established by the State." It posits that only state-operated health insurance exchanges can offer the federal subsidies that make premiums affordable for millions of participants. In 36 states where the federal government runs the exchanges, the lawsuit claims, such assistance shouldn't be allowed.

If the challengers succeed — a prospect that once seemed far-fetched but now looks like a 50-50 proposition — it would threaten federal tax credits averaging $4,700 a year for more than 7 million people. Without that help, most of them would not be required to get health insurance, because it would not be affordable. If they drop out, insurers would be forced to raise rates on everyone else, and the entire economic model behind Obamacare could collapse.

That potential chain reaction — representing the greatest threat to Obamacare since its last near-death experience at the Supreme Court — looms because of the grunt work put in by people such as Tom Christina.

"I'm a pessimist," the employee benefits lawyer told his audience at the American Enterprise Institute four years ago, explaining why he feared the original challenge to the law's individual

health insurance mandate would fail — a prediction that proved prophetic. So he devised another line of attack.

In his power-point presentation, preserved on the AEI website, Christina said any challenge to the Patient Protection and Affordable Care Act should focus on "something that really is functionally critical to the operation of the act." He cited the health insurance exchanges as "particularly attractive targets."

His reading and rereading of the law paid off when he discovered language indicating that federal tax credits were to be offered in states that set up their own exchanges — but no mention was made of similar subsidies in federal exchanges.

'LAWYERLY AND ACADEMIC NOODLING'

The legal argument was fleshed out early in 2011 by Jonathan Adler, a law professor at Case Western Reserve University. Asked to write a paper for a University of Kansas School of Law conference, he read the 906-page law, "which it's clear a lot of people didn't do." He concluded that tax credits were dangled as an incentive for states to create the online exchanges, which administration and congressional proponents deny.

Then Michael Cannon, a health policy economist at the libertarian Cato Institute, discovered that the Internal Revenue Service was preparing regulations that would allow tax credits in federal as well as state exchanges. That, he said, was not the letter of the law.

As is typical in legal circles, the emerging theory made the rounds of the academic press, from the *Kansas Journal of Law and Public Policy* to *Tax Notes*. It didn't gather much public attention until Oklahoma Attorney General Scott Pruitt filed the first of four lawsuits.

What began as "lawyerly and academic noodling," Cannon says, became a real threat to the health care law once that lawsuit was filed. "I thought, 'Thank God, the cavalry has arrived.' "

Michael Carvin, one of the losing Supreme Court litigators in the 2012 lawsuit brought by states and employers, took over as counsel in two other cases, based in Virginia and Washington. The Competitive Enterprise Institute, led by Michael Greve and Sam Kazman, bankrolled the effort.

At the time, few expected that dozens of states would refuse to create exchanges. The Obama administration argues that it is merely standing in for those states, and the tax credits authorized by the Internal Revenue Service are both logical and legal.

Timothy Jost, a Washington and Lee University law professor with whom Adler and Cannon have jousted for years, says the challenge lacks merit.

"If the court approaches the statute as they normally interpret statutes, they should consider the text of the entire statute rather than focusing on a single phrase," he wrote in *Health Affairs*. "If the court regards the statute as ambiguous, they should defer to the agency charged by Congress with interpreting the statute, the IRS."

'PERFECT STORM FOR LITIGATION'

It wasn't until July of this year that a court ruled in the challengers' favor. The first such ruling came in a 2-1 decision from a panel of the powerful U.S. Court of Appeals for the D.C. Circuit. Later that same day, a panel of the 4th Circuit appeals court ruled unanimously for the government.

Without waiting for the full appeals court process to play out, the Supreme Court agreed last month to consider whether, as the challengers contend, the IRS must stop shelling out billions of dollars in tax credits in all but 14 states because their online marketplaces were not "established by the State."

Pruitt wants the Oklahoma case, which won its first round in federal district court in September, added to the Supreme Court's docket when it hears the Virginia case, most likely in March.

Christina, whose power point inadvertently jump-started the effort Dec. 6, 2010, doesn't plan to be there. "It's cold in Washington in March," he says.

Even if they win, Adler says, there will be more opportunities to return to the Supreme Court. The health care law will survive — albeit damaged — for another round of lawsuits.

"This is a full employment act for lawyers," Adler says. "This law creates the perfect storm for litigation."