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one more take on the Halbig decision and its aftermath

As anyone who has been following the implementation challenges of the Affordable Care Act (ACA) is aware, July 22 was an important day because of opposing decisions reached by two separate U.S. appeals courts.

A three-judge panel for the U.S. Appeals Court for the D.C. Circuit issued a 2-1 ruling in *Halbig v. Burwell* that the IRS lacks the authority to provide subsidies in exchanges not run by the states. A short while later, a three-judge panel for the 4th Circuit in Richmond ruled unanimously in *King v. Burwell* that Congress intended to allow subsidies to be provided in state and federally run exchanges.

In an interesting aside, Timothy Jost, a professor at the Washington and Lee School of Law, noted that the 4th Circuit appeared to be “lying in wait” for the D.C. Circuit opinion, issuing its opinion at noon rather than its normal release time of opinions at 2:30 p.m., thereby reducing the public-relations impact of the earlier decision.

The Issues

The major issues raised by these decisions concern the “plain reading of the statute,” congressional intent, and the relevance of the “Chevron rule,” which governs administrative agency decisions and says that the courts have to defer to “permissible” constructions of a statute by administrative agencies (in this case, the IRS) in interpreting the law if the law is silent or ambiguous on a point.

As a non-lawyer looking at these issues, I see the first issue as favoring ACA challengers and the third as favoring supporters. The second has been the subject of some disagreement, but most commentators have agreed with ACA supporters that, because the subsidies are such a critical element to expanding coverage and enforcing the individual mandate, there is good reason to assume Congress fully intended that the subsidies should be made available irrespective of where the insurance was purchased. There was a brief flurry of blog posts after a 2012 video was unearthed showing MIT economist Jonathan Gruber—an important adviser to the Obama administration and Congress during 2009-10—saying that limiting the subsidy to state exchanges was meant as a way to pressure states into establishing their own exchanges—a statement that he has since retracted and said was a mistake on his part.

Next Steps

Nothing will happen immediately. The judgment is automatically put on hold until seven days after a 45-day expiration period, during which time the government can request a rehearing via an *en banc* session, which is a review by the full panel of 11 judges of the D.C. Circuit (plus two senior judges). Because the majority have been appointed by Democratic administrations, and the last four relatively recently by the Obama administration, it is presumed they will provide a ruling favorable to the administration.

The plaintiffs in the *King v. Burwell* case have already asked the Supreme Court to review the 4th Circuit decision that rejected their case. By requesting it now, before an *en banc* hearing has occurred, the split decisions between the courts provide a more compelling rationale for review than would exist if the *en banc* review were to side with the Obama administration's interpretation. Some commentators have suggested a Supreme Court review would doom the subsidies in the federal exchanges because of the 5-to-4 split of Republican appointees on the court. That seems an odd assumption, given Chief Justice John Robert's favorable ruling regarding the individual mandate.

The Implications of Halbig Prevailing

The immediate effect of limiting the subsidies only to those states that have established an exchange would be that the 4.7 million people currently receiving income-based subsidies for the purchase of insurance in the federally run exchanges would be deemed ineligible for these subsidies. Assuming no further responses by either by the states or Congress, most of those who purchased insurance in the exchanges likely would stop paying their premiums. After a three-month lag in payment, they would again become uninsured.

However, two probable indirect effects also have been noted.

First, the employer mandate, which has already been raised for potential elimination, would become essentially irrelevant because the penalty takes effect only when an employer's worker gets a subsidy in the exchange—a prospect that would be far less likely to occur. The individual mandate also would become very nearly irrelevant because individuals are already exempted if the premium exceeds 8 percent of their income, and 83 percent of people who would formerly have been eligible for subsidies in the federal exchanges would be exempt, according to an estimate by Larry Leavitt and Gary Claxton of the Kaiser Family Foundation (“The Potential Side Effects of Halbig,” *Perspectives*, Kaiser Family Foundation, July 31, 2014).

A major reduction in the number of people receiving subsidies not only would increase the number of uninsured, but also could lead to serious adverse selection problems because insurers would still be prohibited from charging more for expected high users or individuals with pre-existing health conditions.

Work-Arounds as a Solution?

Amid the general notes of doom and gloom associated with a prevailing *Halbig* ruling, plausible “work-arounds” are already being proposed. For example, states could set up exchanges that make use of the healthcare.gov website and the federal government's eligibility infrastructure or set up their own exchanges, which Congress had always assumed most would want to do. This solution also assumes, of course, that the affected governors and legislatures would want to find resolutions—which may not always be the case, as the Medicaid expansion issue has shown.

In an earlier era, such as when I was running the agency now known as the Centers for Medicare & Medicaid Services, agencies went ahead with the statutory framework as written but sought clarification of unintended ambiguities or inconsistencies posed by complex statutes in “cleanup” bills, in case the original statutory interpretation was later challenged. Given the highly partisan nature of the ACA's passage and the ultimate lack of a reconciliation process in Congress because of the absence of a 60-vote majority in the Senate—which would be needed along with a change in control in the House—the likelihood of bills to clarify or remedy ambiguities and inconsistencies in the ACA anytime soon seems small. If the Senate were to move to Republican control, various reforms that have interested Republicans might be possible and, with them, a more traditional cleanup bill, assuming the administration would not view the reforms as “gutting” the ACA. ●

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