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Health Care—Insurance

Another Trip to Supreme Court Likely for ACA But En Banc D.C. Circuit May Divert En Route

The Affordable Care Act may be headed back to the U.S. Supreme Court following a pair of conflicting appellate decisions on July 22 (*Halbig v. Burwell*, 2014 BL 201816, D.C. Cir., No. 14-5018, 7/22/14; *King v. Burwell*, 2014 BL 201873, 4th Cir., No. 14-1158, 7/22/14).

The same-day circuit split could mean another trip to the Supreme Court for the controversial Affordable Care Act, court watchers told Bloomberg BNA.

But they caution that an en banc U.S. Court of Appeals for the District of Columbia Circuit—including several judges confirmed in the wake of the Senate's recent ''nuclear'' rules change involving nominations—could be a speed bump.

The decisions involve a major feature of the Affordable Care Act and will ''likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly,'' according to Judge Thomas B. Griffith's opinion for a divided D.C. Circuit.

In a 2-1 opinion, that court invalided an IRS rule allowing tax credits for policies sold through federally facilitated exchanges.

But later that day, the Fourth Circuit unanimously upheld the IRS rule.

Going Nuclear. ''We will be seeking an en banc review from the D.C. Circuit Court,'' Justice Department spokeswoman Emily Pierce told Bloomberg BNA in an e-mail July 22.

She noted that the court stayed its decision pending the completion of the rehearing process.

''En banc review is quite likely'' now that the Senate has gone nuclear, Nicholas Bagley, a professor at the University of Michigan Law School, Ann Arbor, Mich., who teaches administrative and health care law, said.

Last fall, the Senate invoked the ''nuclear option'' to remove the requirement that judicial nominees need at least 60 votes in confirmation proceedings to avoid a filibuster.

''After filibuster reform, a strong majority of the court—seven to four—doesn't adhere to the rigid mode of statutory construction that you see in the majority opinion,'' Bagley told Bloomberg BNA in an e-mail July 23.

''They'll likely vote to rehear a case of such exceptional importance,'' he said.

Rick Hasen, a professor at UC Irvine School of Law, Irvine, Calif., who holds a chair in law and political science, agreed, saying that the ''partisan divide'' on the D.C. Circuit makes it likely that the panel decision actually gets reversed.

''That's not because Republicans dislike Obamacare and Democrats like it,'' he told Bloomberg BNA in a July 23 e-mail.

''It is because Republican Presidents nominate judges who are more likely to read laws narrowly and not take other factors into account.''

He noted that while the two senior judges who participated in the panel could be part of the en banc proceedings, they ''likely would cancel each other out.''

Notably, Senior Judge A. Raymond Randolph—a George H.W. Bush nominee—voted to invalidate the rule, while Senior Judge Harry T. Edwards—a Jimmy Carter nominee—voted to uphold the rule.

No Split, No SCOTUS? Hasen said that if the D.C. Circuit reverses, the Supreme Court may not take the case because there would no longer be a circuit split.

Ron Pollack, executive director of Families USA, agreed.

Predicting that the full D.C. Circuit of 11 judges will likely reverse the panel decision, he said in a telephone press briefing that the Supreme Court is unlikely to take the case.

The D.C. Circuit's ruling ''will never go into effect,'' he said.

But in an e-mail to Bloomberg BNA July 23, Josh Blackman, a professor at South Texas College of Law, Houston, said that the plaintiffs challenging the rule in the Fourth Circuit case will, in all likelihood, ''immediately'' file a petition requesting Supreme Court review.

This creates ''a race for the Court house,'' Blackman, who teaches constitutional law and focuses on the Supreme Court, wrote on his blog.

The plaintiffs challenging the law in the D.C. Circuit could then ask the court to delay its en banc proceedings until after the Supreme Court decides whether to take the Fourth Circuit case, Blackman said.

This would effectively prevent a circuit-split-killing reversal, he said.

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Blackman added that the plaintiffs in the Fourth Circuit case likely have their certiorari petition ''ready to roll,'' and that the petition could be filed in time for the justices' fall conference.

This means that the Supreme Court could hear the case as early as spring, the University of Michigan's Bagley said, but it probably won't be until later.

If the Supreme Court does take the case, it is hard to know what they will do, UC Irvine's Hasen said.

But Blackman noted, ''John Roberts wasn't willing to kill Obamacare in 2012 when no one was relying on it. Why would he do so in 2015 when millions are relying on it?''

Critical Subsidies. Opponents of the Affordable Care Act applauded the D.C. Circuit's ruling, saying it upheld the language of the ACA.

The law states that subsidies are available for people buying plans on ''an Exchange established by the State.''

The IRS rule interpreted the ACA as also allowing subsidies for plans purchased on the federally facilitated exchange—commonly known as HealthCare.gov.

If the D.C. Circuit's decision is affirmed, it will prohibit distributing federal subsidies to make health plans affordable for an estimated 5 million enrollees in health plans purchased through the federally run marketplaces operating in 36 states.

''*Halbig* did not cause those effects. These are the effects of the Patient Protection and Affordable Care Act, the statute that Congress enacted,'' Michael Cannon, director of health policy studies at the Cato Institute, said in a press briefing, referring to the D.C. Circuit opinion.

Cannon co-authored an amicus brief supporting the plaintiffs in that case.

''If those effects are undesirable, Congress needs to fix them,'' he said.

He added that the cost of the subsidies is estimated to be $36 billion in 2016.

But Families USA's Pollack said that these ''subsidies make a critical difference in terms of whether the premiums are affordable.''

Under the ACA, premium tax credits are available to people with incomes between 100 percent and 400 percent of the federal poverty level, and about 85 percent of approximately 8 million people who purchased ACA marketplace plans for 2014 did so with the help of the subsidies.

Opposite Predictions. If the D.C. Circuit ruling stands, Families USA's Pollack and Jonathan Adler, a professor of law at Case Western Reserve University who co-authored the amicus brief with Cannon, predicted opposite effects in states that haven't created ACA marketplaces.

Pollack said that states with Republican governors that opposed the ACA may move to establish marketplaces so state residents could receive subsidies, despite their opposition to the program.

But Adler, in the Cato Institute press briefing, said that it would be ''difficult for states to establish exchanges if this ruling is upheld. You'd be asking every state to impose an employer mandate.''

Under the ACA, large ''shared responsibility'' payments are imposed on employers when their employees qualify for subsidies in the marketplaces.

And Cannon also pointed out that a prohibition on subsidies in federally operated marketplaces would result in exempting residents in those states from the law's individual mandate.

That mandate requires that most people have health insurance coverage, and has been a major source of controversy.

However, if the D.C. Circuit's decision is upheld, Congress could amend the law to allow the subsidies in the federally operated marketplaces, or states without state-based marketplaces could establish them, Caroline Pearson, a vice president at health-care consulting firm Avalere Health LLP, told Bloomberg BNA in an e-mail July 22.

But ''the politics make this difficult,'' she said.

''If all of this fails, the federal government is likely to pursue an administrative fix that would circumvent the court decision,'' Pearson said.

The Department of Health and Human Services would ''effectively deem all of the exchanges to be state-based, but continue operating them through HealthCare.gov.''

Conflicting Opinions. The need for such fixes arises from the D.C. Circuit's conclusion that Congress specified in the ACA, 26 U.S.C. § 36B(a), that tax credit subsidies would be available only to subsidize the purchase of insurance on exchanges ''established by the State under Section 1311'' of the ACA.

Federal exchanges, which are established under ACA Section 1321, clearly aren't established by the states under Section 1311, the court said.

It said it was reluctant to reach that conclusion, given the ''significant consequences.''

''But, high as those stakes are, the principle of legislative supremacy that guides us is higher still,'' the court said.

The Fourth Circuit, in a decision by Judge Roger L. Gregory, reviewed the identical rule and found that the statutory language was at best ambiguous.

The court found that the IRS's interpretation was reasonable and entitled to deference.

In particular, the court said that the reference to state-run exchanges in Section 36B didn't exclude the possibility that Congress intended subsidies to be available in all states, regardless of whether the exchanges were established by a state under Section 1311 or the federal government under Section 1321.

''Given that Congress defined 'Exchange' as an Exchange established by the state, it makes sense to read § 1321(c)'s directive that HHS establish 'such Exchange' to mean that the federal government acts on behalf of the state when it establishes its own Exchange,'' the court said.

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In concluding that the IRS's regulatory interpretation was entitled to deference, the court said it was persuaded primarily by the rule's advancement of the act's broad policy goals.

The court said that ''the economic framework supporting the Act would crumble if the credits were unavailable on federal Exchanges.''

Judge Andre M. Davis and Judge Stephanie D. Thacker joined the Fourth Circuit's opinion.

The plaintiffs challenging the rule in both *Halbig* and *King* were represented by Michael Anthony Carvin, Jacob Moshe Roth and Jonathan Andrew Berry, of Jones Day, Washington. The government was represented in both cases by Alisa B. Klein, Mark B. Stern, Beth S. Brinkmann, and Stuart F. Delery, all with the Department of Justice, Washington.

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Full text of Halbig at http://www.bloomberglaw.com/public/document/Halbig_v_Burwell_No_145018_2014_BL_201816_DC_Cir_July_22_2014_Cou.

Full text of King at http://www.bloomberglaw.com/public/document/King_v_Burwell_No_141158_2014_BL_201873_4th_Cir_July_22_2014_Cour.