CENTER FOR HEALTH LAW & POLICY INNOVATION
HARVARD LAW SCHOOL

122 Boylston Street, Jamaica Plain, MA 02130
Phone: 617-522-3003 • Fax: 617-522-0715
Web: www.chlpi.org • Email: chlpi@law.harvard.edu

The Newest Threat to the ACA:

An Overview of the Halbig and King Decisions

Introduction

On July 22, two different U.S Courts of Appeals issued conflicting opinions on whether an IRS rule, that holds that individuals purchasing private health insurance in both federal- and state-run exchanges are eligible for tax subsidies, is a valid interpretation of the Affordable Care Act (ACA). At issue is language in the ACA that the plaintiffs' argue limits such subsidies only to state-run exchanges. These rulings represent differing views on yet another challenge to the ACA.[i]

The latest challenge: whether the ACA limits the availability of advanced premium tax credits to individuals who purchase health plans through state-run, and not federally-run, exchanges.[ii]

The recent challenge to the ACA is to the validity of an IRS rule[iii] that allows individuals to receive tax subsidies (also known as premium tax credits, or advanced premium tax credits) for qualified health plans purchased on either state-run or federally-facilitated exchanges.[iv] In particular, plaintiffs in several courts across the country allege that the ACA only authorizes subsidies for individuals who purchase plans through state-run marketplaces, and not those run by the federal government. To support their contention, they point to the section of the ACA that describes how premium tax credits are calculated.[v] When describing what premium assistance means, this section refers to taxpayers who purchase qualified health plans "through *an exchange established by the state*."[vi] The plaintiffs argue that this particular language means that only individuals who purchase health plans in marketplaces set up specifically by individual states are eligible for tax credits. They further suggest that this was intentional on the part of lawmakers in order to place additional pressure on states to establish their own exchanges. They therefore contend the IRS exceeded its authority in allowing individuals in federally facilitated exchanges to be eligible for tax credits.

By contrast, the federal government (the defendant in each case) argues that, read in the context of the ACA as a whole, this language does not limit subsidies to exchanges run by state governments. Rather, the government points to a provision of the ACA that provides that if a state does not establish its own exchange, the federal government shall establish "such exchange."[vii] The government argues that this provision means that the federal government "stand[s] in the state's shoes" and creates an exchange "on behalf of the state," thereby creating "an exchange established by the state."[viii] Because of this, the government argues, premium subsidies in federally-facilitated exchanges should be available. The government also points to other provisions of the ACA to add context to the "established by the state" language. One such

provision specifically requires all exchanges to report annually on the tax subsidies obtained by individuals who purchase insurance, including through federally-facilitated exchanges. It argues that this requirement would be pointless if in fact subsidies were only available in state-based exchanges. Finally, the government maintains that the overarching goal of the ACA is to extend access to coverage to as many individuals as possible, and that limiting subsidies only to individuals in state-based exchanges would be contrary to that objective.

Conflicting Decisions from the Courts

When a court must determine the validity of an agency rule that is made under the authority of a statute, the court must interpret the meaning of that statute. In doing so, legal precedent dictates that the court must determine if the statute's language is clear and unambiguous. [ix] If the statute's language is clear and unambiguous, then the court must decide whether the government agency's rule does or does not conflict with the unambiguous meaning of that law. However, if the law is determined to be ambiguous, then the court must generally defer to the interpretation of the government agency, if its interpretation is found to be a reasonable one.

In *Halbig v. Burwell*, the U.S. Court of Appeals for the District of Columbia found that the language of the section at issue was clear and unambiguous: the ACA calculated subsidies for exchanges "established by the state" and federally-facilitated exchanges were not in fact established by a state. It reasoned that even if federally-facilitated exchanges should be treated as state-run exchanges, it was not in fact "established by the state" as the language at issue requires. The Court asserts that if Congress had wanted to allow individuals in exchanges established by the federal government to receive subsidies it would have stated it explicitly. It found that other provisions of the ACA that defendants' assert contradict the state-only interpretation are not actually incongruent with an interpretation of the rule as allowing for subsidies in state-run exchanges only. It found that since these other provisions can still be enforced with a literal interpretation of the "established by the state" language, there is no ambiguity. On that basis, the Court found that the language of the ACA plainly and unambiguously restricted the IRS's authority to creating a rule that provided for subsidies in state-run exchanges only.

By contrast, in *King v. Sebelius,* the U.S. Court of Appeals for the Fourth Circuit found neither plaintiffs' nor the governments' arguments to be entirely persuasive.[x] The Court found reason in plaintiffs' argument that in one section, the plain language of the ACA section at issue seems to refer to subsidies only in state-run exchanges. On the other hand, it also found reason in defendants' argument that such language is contradicted by, and does not make sense in light of, other provisions of the ACA. The Court reasoned that because the language at issue is "susceptible to multiple interpretations," it is ambiguous. Therefore, the Court was directed by legal precedent, to uphold the IRS ruling so long as it was reasonably in line with one permissible interpretation of the ACA.[xi] The Court found that the IRS interpretation that subsidies were meant to be available to individuals in both federally-facilitated and state-based exchanges was a reasonable one, in line with the overall goals of the ACA, and upheld the IRS rule.

Next Steps

While *King* was decided by the full U.S. Court of Appeals for the Fourth Circuit, *Halbig* was only decided by a three judge panel of the U.S. Court of Appeals for the District of Columbia. This means that while the next step in the *King* case is for plaintiffs to appeal to the U.S. Supreme Court, the next step in the *Halbig* case is for an *en banc* appellate review by the full U.S. Court of Appeals for the District of Columbia.[xii] The U.S. Supreme Court could decide to hear the *King* case from the Fourth Circuit as soon as the appeal is made; however, it is likely that it will wait for the *en banc* decision of the full U.S. Court of Appeals for the District of Columbia before it decides whether to hear the *King* case. If the full U.S. Court of Appeals for the District of Columbia and Fourth Circuit Courts still disagree after the *en banc* decision, the Supreme Court is more likely to hear an appeal. In the meantime, premium subsidies are safe. Any change will be decided, at the earliest, in 2015. We will keep you posted!

---

[i] Since its enactment in 2010, there have been many challenges to the Affordable Care Act, including, most notably, *NFIB v. Sebelius*, in which the United States Supreme Court upheld the individual mandate but effectively made Medicaid expansion optional for states. More recently, in *Burwell v. Hobby Lobby*, the Supreme Court found that closely held corporations (such as Hobby Lobby), may request an accommodation (based on religious objection) to the requirement that employer sponsored insurance plans provide coverage, without cost-sharing, of all methods of birth control approved by the FDA. Employees of such businesses will have access to birth control, but it is presently unclear how such coverage will be provided, as the government has yet to respond to this issue since the decision was rendered (the government can either expand the existing program that provides for such coverage for employees of non-profit corporations or it can create an entirely new program). Despite these rulings, the ACA continues to provide health coverage to millions of Americans, with over 8 million people newly enrolled in health coverage through marketplaces, with an additional 4.8 million in Medicaid.

[ii] The following represents a summary of the two conflicting cases. For further details please refer to the cases themselves: *Halbig v. Burwell*, 2014 U.S. App. LEXIS 13880, 2014 WL 3579745 (D.C. Cir. July 22, 2014); *King v. Burwell*, 2014 U.S. App. LEXIS 13902, 2014 WL 3582800 (4th Cir. Va. July 22, 2014).

[iii] 26 C.F.R. § 1.36B-1(k) (2012).

[iv] To ensure that millions more Americans can purchase health care, the ACA provides for the establishment of "exchanges" on which people can purchase health insurance. These exchanges can be run by either the state or federal government.

[v] 26 U.S.C. 36B (2011).

[vi] 26 U.S.C. § 36B (2010).

[vii] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1321, 123 Stat. 119 (2010).

[viii] Halbig v. Burwell, 2014 U.S. App. LEXIS 13880, 2014 WL 3579745, 20 (D.C. Cir. July 22, 2014); King v. Burwell, 2014 U.S. App. LEXIS 13902, 2014 WL 3582800, 15 (4th Cir. Va. July 22, 2014).

[ix] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[x] Although the court did say that the defendants' argument outweighed plaintiffs' argument.

[xi] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[xii] An *en banc* review of the three-panel decision means that all 11 Justices of the U.S. District Court for the District of Columbia would review and decide the case.