Covered Clips

A Summary of News and Activities for the Cover Arizona Coalition

Weeks of July 14th and July 21st

**Courts Issue Conflicting Rulings on Health Care Law**

From the New York Times

Two federal appeals court panels issued conflicting rulings Tuesday on whether the government could subsidize health insurance premiums for people in three dozen states that use the federal insurance exchange. The decisions are the latest in a series of legal challenges to central components of President Obama’s health care law.

The United States Court of Appeals for the Fourth Circuit, in Richmond, upheld the subsidies, saying that a rule issued by the Internal Revenue Service was “a permissible exercise of the agency’s discretion.”

The ruling came within hours of a 2-to-1 ruling by a panel of the United States Court of Appeals for the District of Columbia Circuit, which said that the government could not subsidize insurance for people in states that use the federal exchange.

That decision could cut potentially off financial assistance for more than 4.5 million people who were found eligible for subsidized insurance in the federal exchange, or marketplace.

The law “does not authorize the Internal Revenue Service to provide tax credits for insurance purchased on federal exchanges,” said the ruling, by a three-judge panel in Washington. The law, it said, “plainly makes subsidies available only on exchanges established by states.”

Under this ruling, many people could see their share of premiums increase sharply, making insurance unaffordable for them.

The courts’ decisions are the not the last word, however, as other courts are weighing the same issue. And the Washington panel’s ruling could be reviewed by the full appeals court here.

The White House rejected the ruling of the court here and anticipated that the Justice Department will ask that the entire appeals court to review it. Mr. Obama’s aides noted that two district courts have thrown out similar lawsuits and therefore argued that judicial opinions have been mixed at worst. Moreover, they said the ruling Tuesday seemed to fly in the face of common sense.

 “You don’t need a fancy legal degree to understand that Congress intended for every eligible American to have access to tax credits that would lower their health care costs, regardless of whether it was state officials or federal officials who were running the marketplace,” said Josh Earnest, the White House press secretary. “I think that is a pretty clear intent of the congressional law.”

Reacting to the ruling in Washington, a Justice Department spokeswoman, Emily Pierce, said: “We believe that this decision is incorrect, inconsistent with congressional intent, different from previous rulings and at odds with the goal of the law: to make health care affordable no matter where people live. The government will therefore immediately seek further review of the court’s decision.”

“In the meantime,” Ms. Pierce said, “to be clear, people getting premium tax credits should know that nothing has changed. Tax credits remain available.”

The majority opinion in the case filed here, Halbig v. Burwell, was written by Judge Thomas B. Griffith, with a concurring opinion by Judge A. Raymond Randolph, a senior circuit judge.

Another member of that appeals court panel, Judge Harry T. Edwards, also a senior circuit judge, filed a dissenting opinion in which he described the lawsuit as an “attempt to gut” the health care law. The majority opinion, he said, “defies the will of Congress.”

Judge Edwards said that the Obama administration’s reading of the law, considered in “the broader context of the statute as a whole,” was “permissible and reasonable, and, therefore, entitled to deference.”

A similar approach was sounded later by the Fourth Circuit panel, which said, “We find that the applicable statutory language is ambiguous and subject to multiple interpretations.” The court said it would therefore give deference to the reading of the law by the Internal Revenue Service, which issued the rule allowing payment of subsidies for people in all states, regardless of whether the state had a federal or state exchange.

The decision by the appeals court here is important because the federal exchange serves states with about two-thirds of the nation’s population. In federal and state exchanges, people may qualify for subsidies if they have incomes of up to $45,960 for individuals and up to $94,200 for a family of four.

If it stands, the ruling by the District of Columbia court could undercut enforcement of the requirement for most Americans to have insurance. Without subsidies, many more consumers would go without insurance and could be exempted from the “individual mandate” because insurance would be unaffordable for them.

The ruling also could undermine the requirement for larger employers to offer health coverage to their employees. That requirement is enforced through penalties imposed on employers if any of their employees receive subsidies to buy insurance on an exchange.

The case is one of many legal challenges to the Affordable Care Act in the last few years. The Supreme Court upheld the law in 2012, but said the expansion of Medicaid was an option for states, not a requirement, and about half the states have declined to expand eligibility.

The administration suffered a defeat in a recent struggle over access to contraceptives. The Supreme Court ruled on June 30 that family-owned for-profit corporations like Hobby Lobby Stores were not required to provide coverage of birth control to their employees if the companies objected on religious grounds.

The health care law authorized subsidies specifically for insurance bought “through an exchange established by the state.”

Obama administration officials said that an exchange established by the federal government was, in effect, established by a state because the secretary of health and human services was standing “in the shoes” of states when she established exchanges.

When the health care law was adopted in 2010, Mr. Obama and Congressional Democrats assumed that states would set up their own exchanges. But many Republican governors and state legislators balked, and opposition to the law became a rallying cry for the party.

The lawsuit in Washington was filed by several people, supported by conservative and libertarian organizations, in states that use the federal exchange: Tennessee, Texas, Virginia and West Virginia. They objected to being required to buy insurance, even with subsidies to help defray the cost.

One of the plaintiffs, David Klemencic, who has a retail carpet store in Ellenboro, W.Va., said: “If I have to start paying out for health insurance, it will put me out of business. As Americans, we should be able to make our own decisions in matters like this.”

Similar lawsuits challenging subsidies under the Affordable Care Act are pending in other courts, which could reach different conclusions. In February, a federal district judge in Richmond, Va., upheld subsidies in the federal exchange. While plaintiffs’ interpretation of the law has “a certain common sense appeal,” the judge said, “there is no evidence in the legislative record” that Congress intended to make tax subsidies conditional on a state’s decision to create an exchange.

Stuart F. Delery, an assistant attorney general, told the appeals court here in March that Congress had intended for subsidies to be available nationwide to low- and moderate-income people, regardless of whether they obtained insurance on a federal or state exchange.

Subsidies, in the form of tax credits, are a crucial element of the Affordable Care Act. Without them, insurance would be unaffordable to millions of Americans. The Congressional Budget Office estimates that subsidies this year will average $4,400 for each person who receives a subsidy.

The plaintiffs said that Congress had confined the subsidies to state exchanges for a reason: It wanted to provide an incentive for states to establish and operate exchanges, rather than leaving the task to the federal government.

Obama administration officials said that argument was absurd. The overriding purpose of the Affordable Care Act, they said, was to ensure access to health care for nearly all Americans, wherever they live.

Of the eight million people who selected private health plans from October through mid-April, 5.4 million obtained coverage through the federal exchange, and most of them qualified for subsidies that reduce their premiums.

http://www.nytimes.com/2014/07/23/us/court-rules-against-obamacare-exchange-subsidies.html?hp&action=click&pgtype=Homepage&version=LedeSum&module=first-column-region&region=top-news&WT.nav=top-news

**Major New Blow to Health Care Law**

From Scotusblog

Posted Tue, July 22nd, 2014 11:15 am by Lyle Denniston

In a potentially crippling blow to the new federal health care law, a federal appeals court ruled on Tuesday that the government may not provide subsidies to encourage people to buy health insurance on the new marketplaces run by the federal government.  The U.S. Court of Appeals for the District of Columbia Circuit, in a two-to-one decision, ruled that those subsidies are only available on “exchanges” run by state governments.  The two opinions in the ruling and the dissenting opinion are [here](http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/Halbig.pdf).

As of now, only fourteen states and Washington, D.C., operate those insurance marketplaces, and the federal government has stepped in to provide the same facility in the other thirty-six states.  Under the new decision, striking down a two-year-old government regulation, subsidies will be confined to the state-run exchanges.

Conceding that the ruling will sharply reduce the number of uninsured individuals who will be able to gain coverage under the Affordable Care Act, the D.C. Circuit majority held that the plain language of the Act is that the subsidies — in the form of tax credits to those with limited incomes — were to be available only on marketplaces “established by the state.”

The insurance exchanges are central to the main goal of the new law — that is, making sure that millions of people now without health insurance are able to get it.  The subsidy scheme at issue in the new decision affects two of the main parts of the new coverage-assuring law:  the individual mandate, requiring individuals to obtain such coverage or else pay a penalty, and the employer mandate, requiring companies with at least fifty employees to assure that they have minimum coverage.

The D.C. Circuit ruled on the subsidy issue in a case pursued by a West Virginia man who does not want to obtain health insurance but would have to pay a penalty if he did not do so.  West Virginia is one of the states that has declined to set up an exchange, so people in that state must go to a federally run marketplace instead.

It would appear that the D.C. Circuit ruling, if it withstands a likely challenge by the federal government, would go far toward making the exchange system far less successful in expanding coverage than the government had hoped, and intended.  Congress would have the power to fix the problem, but there is almost no chance that the Republican-controlled House would go along with any measure seeking to salvage the ACA or make it more effective.  In fact, the House has voted more than four dozen times to repeal the entire law.

“The government urges us, in effect, to strike . . . the phrase ‘established by the state,’ on the ground that giving force to its plain meaning renders other provisions of the Act absurd,” the Circuit Court majority said. “But we find that the government has failed to make the extraordinary showing required for such judicial rewriting of an act of Congress.  Nothing about the imperative to read [the exchange provision] in harmony with the rest of the ACA requires interpreting ‘established by the state’ to mean anything other than what it plainly says.”

Conceding that the stakes in that case were high, affecting millions of individuals now receiving subsidies through the federally run exchanges, the majority said that “high as those stakes are, the principle of legislative supremacy that guides us is higher still.”

Circuit Judge Thomas P. Griffith wrote the court’s main opinion.  Senior Circuit Judge A. Raymond Randolph wrote a one-page concurring opinion, but noted that he joined the Griffith opinion in full.

Circuit Judge Harry T. Edwards wrote a lengthy dissenting opinion, commenting that the aim of the challengers in the case was “to gut” the health care law.  His main argument was that the language of the law dealing with the subsidy issue was ambiguous, and that the majority “strains fruitlessly to show plain meaning where there is none to be found.”

The Obama administration has the option of asking the en banc Circuit Court to reconsider the case, or of going directly to the Supreme Court.  If the government chooses the en banc alternative, it could have a more favorable reception: one of the judges in the panel majority would not be able, as a senior judge, to join in that review, and four new judges on the Circuit Court were put there by President Obama’s nominations and they would be free to take part.

<http://www.scotusblog.com/2014/07/major-new-blow-to-health-care-law/>

**White House: Health Subsidies Not Halted by Ruling**

Associated Press

The White House says health subsidies under the Affordable Care Act will continue to flow for the time being despite a major setback delivered by a federal appeals court.

The ruling potentially derails billions of dollars in subsidies for many low- and middle-income people who bought policies. But White House spokesman Josh Earnest says while the case works its way through the courts, it has "no practical impact" on tax credits. He said the White House is confident in Justice's legal case.

Earnest says there's mixed legal opinions on whether people who buy insurance through state-based markets can get subsidies.

The ruling affects consumers in the 36 states served by the federal marketplace.

<http://bigstory.ap.org/article/white-house-health-subsidies-not-halted-ruling>

**Uncompensated Care in Arizona Declines**

A hospital financial survey conducted by the Arizona Hospital and Healthcare Association shows a continuation of a trend that began in January, showing a significant drop in uncompensated care as shown in the graph below.

**Expansion States Show More Sizable Drop in the Uninsured**

From Say Ahhh! Blog

The [latest study](http://hrms.urban.org/quicktakes/Number-of-Uninsured-Adults-Continues-to-Fall.html) from the Urban Institute yesterday found the uninsurance rate for nonelderly adults dropped 6.1 percent in expansion states compared to only 1.7% in states that haven’t expanded.  (Noting the huge discrepancy, Urban authors write: “This represents a decline in the uninsurance rate of 37.7 percent in the expansion states and only 9.0 percent in the nonexpansion states.”)  Here’s the Urban Institute’s chart:



**Uninsured Rates Drop Dramatically in the First Quarter of 2014**

From Say Ahhh! Blog

Recent surveys show a substantial decrease in the overall number of Americans without health insurance.  The [Commonwealth Fund](http://www.commonwealthfund.org/publications/issue-briefs/2014/jul/Health-Coverage-Access-ACA) showed a drop from a 20% uninsured rate to 15%, [RAND](http://www.rand.org/pubs/research_reports/RR656.html) showed a decline from 20.5% to 15.8% and [Gallup](http://www.gallup.com/poll/172403/uninsured-rate-sinks-second-quarter.aspx) showed a decline from a high of 18% to 13.4%.

This chart from the Gallup survey illustrates the overall decline in the uninsured rate the most clearly:



**Biggest Insurer Drops Caution, Embraces Obamacare**

From Kaiser Health News

UnitedHealthcare, the insurance giant that largely sat out the health law’s online marketplaces’ first year, said Thursday it may sell policies through the exchanges in nearly half the states next year.

“We plan to grow next year as we expand our offering to as many as two dozen state exchanges,” Stephen Hemsley, CEO of UnitedHealth Group, the insurance company’s parent, told investment analysts on a conference call. He was referring to coverage sold to individuals.

The move represents a major acceleration for the company and a bet that government-subsidized insurance, sold online without regard for pre-existing illness, is here to stay. UnitedHealthcare sells individual policies through government exchanges in only four states now.

Even analysts who follow the company closely seemed surprised.

“You’re making a really big move,” Kevin Fischbeck, an analyst for Bank of America, told the company’s executives. “You’re going to do a couple dozen states. You’ve really moved in. What’s giving you the confidence … that it’s going to be stable next year?”

The answer, the bosses said, is that the marketplaces look sustainable, even without some of the reinsurance and risk-spreading backstops put in place for carriers in the first few years. They know the prices now, they said. They know the regulations. They know how consumers are behaving.

“We felt that the markets that we’re looking at now are much more established,” said Gail Boudreaux, who runs UnitedHealth Group’s insurance division.“We’ve always felt that it was part of our strategy and plan – that this is a good, long-term market.”

Broad participation by UnitedHealthcare will increase competition and should help keep premiums down, according to theory and research. A [recent paper](http://capsules.kaiserhealthnews.org/index.php/2014/05/study-limited-competition-raised-obamacare-prices) by economists Leemore Dafny, Jonathan Gruber and Christopher Ody found that if UnitedHealthcare had sold policies through the exchanges this year in every state where it already does business, premiums would have been 5 percent lower.

The company expects substantial shopping and price comparison when open enrollment begins Nov. 15 — despite the administration’s proposed [regulations on automatic re-enrollment](http://www.modernhealthcare.com/article/20140626/NEWS/306269938) that may give incumbents an edge.

“We believe there’ll be some shopping, even though people don’t have to shop,” said Jeff Alter, head of UnitedHealthcare’s employer and individual insurance division. “The natural consumer play of an exchange is going to cause a shopping experience.”

**Providers, Insurers Grapple with Narrow-network Backlash**

From Modern Healthcare

Narrow networks are a reality of the new health insurance landscape. Nearly half of all insurance plans sold on the public exchanges in 2014 were narrow network plans, defined as those with less than 70% of area hospitals included, according to [**an analysis**](http://healthcare.mckinsey.com/hospital-networks-updated-national-view-configurations-exchanges) by the research firm McKinsey & Company.

But given that reality, insurers and providers need to do a better job of providing consumers with accessible, easily understandable information about networks when they shop for coverage. That was the message conveyed by participants in a panel discussion about network adequacy on Monday in Washington sponsored by the [**Alliance for Health Reform**](http://www.allhealth.org/).

Bottom of Form

Provider networks have been a hot button issue since the exchanges launched last October. In many states, [**concerns about the exclusion**](http://www.bostonglobe.com/news/nation/2014/01/20/narrow-hospital-networks-new-hampshire-spark-outrage-political-attacks/j2ufuNSf9J2sdEQBpgIVqL/story.html) of highly regarded hospitals have garnered headlines, and the CMS has [**signaled**](http://www.modernhealthcare.com/article/20140204/NEWS/302049953) that it plans to heighten scrutiny of provider networks going forward. A class-action lawsuit [**filed earlier this month**](http://www.kaiserhealthnews.org/stories/2014/july/09/anthem-lawsuit-over-enrollment-practices.aspx) in California against Anthem Blue Cross accuses the insurer of misleading millions of individuals about whether their doctors and hospitals were covered by exchange plans.

Paul Ginsburg, a healthcare finance expert at the University of Southern California, pointed out that narrow-network plans are not a new phenomenon and that they are a potentially important means of reducing overall healthcare costs. “There clearly is a need for regulation, but there is a very high cost if the regulation goes too far,” he said. Ginsburg singled out “any willing provider” laws, which many states adopted in the mid-90s, when anger over narrow networks first became pitched, as a “particularly misguided” effort to curtail problems.

Insurers carefully assembled the networks capable of delivering high-quality care to consumers whose top concern is price, said Daniel Durham, executive vice president for policy and regulatory affairs at the trade group America’s Health Insurance. “If we just open up to everyone,” Durham said, “we’re stuck back in this fee-for-volume-type system which we all agree we have to move away from.”

Katherine Arbuckle, Ascension Health’s chief financial officer, said better consumer education about provider networks, particularly by insurers, is paramount. She pointed out that the not-for-profit hospital chain used 200 employees to help individuals navigate the exchanges and obtain coverage. “What we’ve learned is this counseling takes a lot of time,” Arbuckle said. “This is especially important with these folks who [**don’t have experience with insurance**](http://www.modernhealthcare.com/article/20140717/NEWS/307179963/reform-update-insurers-providers-may-need-to-work-harder-to-educate) and have cultural and language barriers as well.”

The National Association of Insurance Commissioners is currently reviewing its model network adequacy law, which hasn’t been updated since 1996. According to Brian Webb, the association’s manager of health policy and legislation, the revised legislation is expected to be released in November. Webb indicated that it will provide a broad framework to help guide states, rather than detailed policy prescriptions.

“We don’t think that will work,” Webb said. “Wyoming is just a tad different from Los Angeles.”

People living near state borders sometimes ran into particularly irritating problems with networks, Webb said. In some instances, the plans provided no coverage if a person sought treatment in a neighboring state.

“We’ve got to do better in the 2015 open enrollment period,” Webb said. “We need to make sure everybody has the information they need.”

[http://www.modernhealthcare.com/article/20140721/NEWS/307219940&utm\_source=AltURL&utm\_medium=email&utm\_campaign=am?AllowView=VXQ0UnpwZTVEZmFmL1IzSkUvSHRlRU91alUwZEErSmQ=&mh](http://www.modernhealthcare.com/article/20140721/NEWS/307219940%26utm_source%3DAltURL%26utm_medium%3Demail%26utm_campaign%3Dam?AllowView=VXQ0UnpwZTVEZmFmL1IzSkUvSHRlRU91alUwZEErSmQ=&mh)

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Have something you want us to possibly add to next week’s newsletter? Email Kim VanPelt at kim.vanpelt@slhi.org. As always, special thanks to Meryl Deles for much of the content.