



News Alert – July 22, 2014

Courts split on whether all consumers can receive ACA subsidies ***Full appellate courts to issue final rulings this fall***

A majority of a three-judge panel for the U.S. District of Columbia Court of Appeals granted conservative plaintiffs their first victory today in their continued challenge to the validity of premium subsidies offered under the Affordable Care Act (ACA). However, a contrary ruling today from a unanimous panel for the U.S. Fourth Circuit Court of Appeals sets up yet another showdown in the U.S. Supreme Court if the split is not resolved by the full courts this fall.

In the aftermath of the U.S. Supreme Court's decision to uphold the entire ACA in 2012, conservative think tanks such as the Cato Institute backed several challenges to the subsidies themselves, insisting that the text of the ACA statute only permitted them to be offered to consumers in health insurance Marketplaces created by states. Federal district courts for the District of Columbia and Virginia both rejected this argument, concluding that Congress clearly sought to make the subsidies available in both state-based and federally-facilitated Marketplaces (FFM), as to exclude them from the latter would defeat the very purpose of the ACA.

However, two Republican-appointed judges on the D.C. panel concluded "with reluctance" that "Section 36B [of the ACA] plainly makes subsidies available only on [Marketplaces] established by the state" despite the "significant consequences" that will result if such an opinion is upheld. The lone judge appointed by a Democratic president dissented, arguing that such an interpretation is "implausible" when the provision is not pulled out of context but instead read as part of the ACA "as a whole".

The decision has no immediate impact as the White House immediately pledged to appeal to the full appellate court. Seven of the D.C. court's 11 judges were appointed by Democrat presidents, including four recent appointees of President Obama.

The conservative plaintiffs are likewise expected to appeal the Fourth Circuit's denial of their claim to the full court, where eight of the 14 judges were appointed by Democrat presidents, as were all three judges that upheld the lower court's decision.

The full appellate courts are expected to issue their rulings in the fall. Should both courts find for the plaintiffs and the U.S. Supreme Court decline to hear an appeal, the subsidies could presumably be stripped away from FFM consumers for the 2015 open enrollment period starting November 15th.

However, if the conflict in the panel decisions remains in place, the Supreme Court would be expected to hear their appeal. This means that a final decision would likely not be reached before June 2015 and FFM subsidies would not be removed before the 2016 open enrollment period.

Two similar cases have yet to be heard in the Indiana and Oklahoma district courts. As a result, the Supreme Court may likely wait for those to be resolved, potentially delaying any resolution past 2016.

The loss of FFM subsidies could make coverage unaffordable and effectively deny access to care for millions of consumers in the 34 states where the federal government is expected to fully or partly operate Marketplaces in 2015. According to the Robert Wood Johnson Foundation, roughly 4.5 million FFM consumers received ACA subsidies in 2014.



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