Insight

Building the Case for Halbig v. Burwell: What States Knew

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Executive Summary

At the heart of *Halbig v. Burwell*[1] and the series of cases that are following it through the federal court system is an attempt to understand what state and federal legislators were thinking last year, two years ago, even four years ago when the Affordable Care Act (ACA) passed. While many experts and lawyers in this case have hypothesized about Congress' intent, contrary to the claims of the Government, at least one establishing and one non-establishing state understood the language of the statute to condition subsidies on state establishment of Exchanges when they made their determination on whether to establish an Exchange. Furthermore, this understanding was timely in the chronology of ACA implementation.

Introduction

Halbig and its sister cases attempt to settle the question: if the ACA explicitly says that premium subsidies are only available in "an Exchange established by the State under Section 1311,"[2] does the Internal Revenue Service (IRS) have the authority to offer those subsidies to individuals who purchase their insurance in an Exchange established by the Secretary of Health and Human Services (HHS) under Section 1321 of the ACA?

The government in Halbig argues that the IRS does have this power because, while the phrase "established by the State under Section 1311" is itself quite clear, its meaning is obscured by the general intent of the 906 page law: i.e.—to make care 'affordable.'[3] The plaintiffs contend, in part, that it was perfectly within reason that Congress intended to limit subsidies only to Exchanges "established by the State under Section 1311," not to make insurance unaffordable for citizens of states that did not establish Exchanges, but to create an incentive to encourage them to do so.[4]

Evidence to shore up this claim has thus far been difficult to find. This weakness in the plaintiffs' case was questioned by Judge Edwards within minutes of commencing oral arguments in the DC Circuit: "How did all the states miss this? […] Indeed one of the brief's points is that no state made the equation that the availability of subsidies was a factor in deciding whether to create an exchange. No one."[5]

The plaintiffs have produced evidence that 11 Texas democrats in the House recognized the language for what it was,[6] that major news sources as early as 2011 were talking about this feature of the law,[7] even Jonathan Gruber, a paid technical advisor to HHS and advisor to Congressional Democrats was advising that states should establish Exchanges in order to secure their subsidies.[8] The following aims to demonstrate that, despite the claims of the Government as described by Judge Edwards, state legislators heard these warnings and took them to heart.

Confusion Following Passage of the ACA Diminished the Coercive Effect of the Law, Despite Its Intent

In the first 15 months following the passage of the ACA, there was a great amount of confusion among state and federal lawmakers about what exactly the law contained. The ACA itself was 906 pages long when first published by the Government Printing Office, and the Health Care and Education Reconciliation Act was an additional 55 pages.[9] By March of 2013, regulations implementing the ACA comprised 20,000 pages.[10]

Before the bill passed, then-Speaker of the House Nancy Pelosi argued that "we have to pass the bill so that we can find out what's in it."[11] After passage, many remained unclear about what was in the law, how the many provisions would be implemented, and whether they were constitutional. State leaders were hesitant to make decisions about the law without more information. Lieutenant Governor and Director of the Ohio Department of Insurance, Mary Taylor expressed the sentiment of many: "Ohio has not decided on a course of action for exchange s because of tremendous uncertainty coming from the federal government as well as the pending Supreme Court decision expected early this summer."[12]

Governor Dave Heinman of Nebraska articulated the position held by many that "it would be a costly mistake to spend millions of taxpayer dollars building an exchange before the Supreme Court issues its decisions in a challenge to the health law […]"[13]

Similarly, Virginia Governor Robert McDonnell wrote a letter on behalf of the Republican Governors' Association expressing confusion about and opposition to the ACA's Maintenance of Effort requirement and its relationship to Exchange establishment, particularly in the wake of the Supreme Court's decision in NFIB v. Sebelius.[14] McDonnell quoted the National Governors' Association's annual Fiscal Survey of the States, which concluded "the potential impact of health care reform in 2014 is a real unknown at this time."[15] In response to the Governors' letter, the Director of CMS, Marilyn Tavenner argued that it was in states' interests to establish an Exchange and expand Medicaid according to the intent of the ACA.[16] She further stated: "We expect that, as states explore their options, they will recognize that this is a good deal. Significant new federal funding will flow to their states."[17] The letter promised that more guidance would become available in the 18 month leading up to the 2014 full implementation of the law – leaving states to learn to come to their own understanding of the law in the meantime.

The general confusion among state lawmakers and lack of useful guidance from federal administrators diluted the coercive effect of the statute. Because they were given conflicting information, or no information, pertaining to the establishment of Exchanges, some state leaders may not have been effectively coerced in the manner intended by the statute, but this *ex post facto* result does not alter the original meaning of the text.

Some States Eventually Took Definitive Action Based In Part on Their Understanding of the Coercive Effects of the Law

Early adopters, like California, which announced its intention to establish an Exchange the same day it accepted its planning grant, on September 30, 2010,[18] could not possibly have fully understood the ACA and all its complexity. At that time much of the law remained unsettled – regulatory guidance and litigation would later play a major role in shaping state participation in implementing the law.

States that chose to put off making a final decision on Exchanges were in a better position to be more fully

informed about the effects of the law and respond accordingly. In the end some of these states understood the law to limit premium subsidies to state-based Exchanges, and they took deliberate actions based on that understanding.

At Least One State was Influenced to Establish an Exchange to Avoid Losing Subsidies

On July 13, 2012, two weeks after NFIB v. Sebelius was decided, and the relevant constitutional questions had been addressed, Governor C.L. 'Butch' Otter of Idaho created the Health Insurance Exchange Working Group to research and answer questions faced by state legislators in determining whether to establish an Exchange.[19] The Group was led by the Idaho Director of Insurance, Bill Deal. On October 30, 2012, the Working Group's Exchange Subcommittee produced a report on the relative advantages and disadvantages of each type of Exchange.[20] The report states:

> There are some opinions that should the State of Idaho adopt a SBE [State-Based Exchange], the businesses of Idaho may lose the chance to sue the federal government over the tax for not offering a health insurance plan to its employees… If we don't do a SBE, others are saying that any subsidies that would be available to the State would not be available if Idaho chooses not to set up its own SBE.[21]

Chairman Shore also delivered notes to Governor Otter in which the Subcommittee expressed "concern that if Idaho sets up an exchange, an entitlement will be stablished with regard to subsides."[22] The Subcommittee also informed the Governor that "[w]e do not know what the partnership will look like at this point […] Will subsidies be available with a partnership arrangement?"[23] In their discussion of "The Bad" aspects of not establishing a state-based Exchange, the Subcommittee noted "there has been much talk about the idea that federal subsidies would not be available in a federal exchange."[24]

In a report to the Governor prepared by the Idaho Freedom Foundation and submitted by Rep. Lynn Luker and Working Group member Wayne Hoffman on October 25, 2012, it is argued that absent a state-based Exchange and the attendant federal subsidies, 107,000 Idahoans would find health insurance unaffordable by the ACA's definition.[25] The resulting "affordability exemption" from the individual mandate was viewed by Idaho Freedom Foundation as a positive aspect of refusing to establish an Exchange, but comments later made by governor Otter and his administration reveal they may have viewed this feature of the ACA as both a carrot and a stick, urging them towards establishing the Exchange.[26]

On December 11, 2012, Governor Otter changed his official position[27] and announced Idaho's intention to establish a state-based Exchange.[28] On March 28, 2013 he signed into law HB 248, which established the Idaho Health Insurance Exchange called Your Health Idaho.[29] Despite relying in part on the federal application technology, Idaho spokespeople have made clear that "Your Health Idaho has always been a state-based exchange."[30]

Some States were Persuaded that the Law Described a Trade-off Between Subsidies and the Employer Mandate

While Idaho legislators may have been goaded into establishing an Exchange by the language limiting subsidies to state-based Exchanges, other states were taking their analysis one step further: not establishing an Exchange would deprive the state of federal subsidies; if there are no subsidies, there is no way to trigger the employer mandate penalty.

These states, in not establishing an Exchange, were also compelled to act based in part on their understanding that subsidy eligibility is limited, even though their actions were the opposite of the intended coercive effect. [*]