Halbig v. Burwell and King v. Burwell are administrative law cases challenging the Internal Revenue Service’s (IRS) interpretation of the Affordable Care Act (ACA). The cases center on the interpretation of the law’s language and specifically the phrase “Exchange established by the State under Section 1311.” The IRS interprets this phrase to mean “Exchange established by a State under Section 1311, or an Exchange established by the Federal government under Section 1321.” The correct interpretation of this phrase is important because it is in Section 1401 of the ACA, which is the clause that determines who is eligible to receive subsidies to pay for their insurance. Currently 36 states have declined to establish an Exchange and the people living in those states are purchasing their insurance through an Exchange established by the Secretary of the Department of Health and Human Services (HHS).

This is a breakdown of the analysis provided by the courts in delivering the opinions in Halbig and King on July 22, 2014.

Decisions

In the cases of Halbig and King, the courts accepted the standing of the plaintiffs (appellants) based on the injuries they suffered as a result of being subject to the individual mandate penalty. Under the government’s interpretation of the statute, the plaintiffs were subject to the penalty because with the help of the subsidies in dispute the cost of health insurance would be below 8 percent of their income, and their failure to purchase that insurance will trigger the penalty. The courts also found that the APA was not a hindrance to justiciability of the case because the plaintiffs do not seek monetary relief or a tax refund, but rather an injunction. Because these two preliminary matters were easily overcome, the courts were able to address the merits of the cases.

Halbig

In Halbig, the Plaintiffs won under the analysis of Chevron Step One, which considers ‘did Congress speak directly to the question at issue?’ According to the DC Circuit, Congressional intent is demonstrated by the words and sentences used in the statute. The statute provides that subsidies are available in (1) Exchanges, (2) established by the state, (3) under §1311.

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1 Justiciability is a preliminary determination that there is standing, a case or controversy, ripeness, no mootness, and no call for deciding a political question or granting an advisory opinion.

2 The Chevron analysis is a precedent used by the courts to determine the legality of agency action. Step One considers whether the language of the statute is dispositive and therefore precludes agency action that does not conform with the explicit terms of the law. If the courts find that the language is too ambiguous to preclude certain agency actions, in Chevron Step Two the courts will consider merely whether the agency actions are reasonable; if the agency rule is not arbitrary or capricious the presumption is in favor of the agency decision.
Assuming that we accept the government’s argument that “such” Exchange established under §1321 is effectively an Exchange established under §1311 (which is an inexplicit legal fiction the Court found unlikely to have been hidden the way it is), that still does not fulfill the §36B requirement that the Exchange is “established by the State.” The omission of the “Established by the State” language from §1321 which authorizes the Secretary of HHS to establish federal Exchanges matters because Congress knew how to create equivalency between Exchanges – it did just that in equating Exchanges established in US Territories with State Exchanges so that Exchanges in those Territories are to be considered “Exchanges established by the State under §1311.” Since this tells us that Congress knew how to create equivalency between the different Exchanges, the fact that it did not create equivalency when creating §1321 federal Exchanges demonstrates its intent that the Exchanges be treated differently.

The Dissent argues that the literal reading of the law leads to absurd results. However, the Court held that finding absurdity requires crossing a very “high threshold of unreasonableness.” There are plausible interpretations of all the provisions the government finds absurd under the plaintiff’s reading of the law, and therefore they are not truly absurd.

These facts alone were sufficient for the Court to reach its conclusion.

The Court next continued, arguendo, to consider whether the plain meaning of the statute is demonstrably at odds with the legislative history, as the government suggested. They found the CLASS Act and the establishment of Exchanges in US Territories both provide examples of the statute doing precisely what the government claims it would never do – create a dichotomy between types of consumers. The fact that Congress had taken steps elsewhere that could have similar results to providing subsidies only in Exchanges established by the States shows there is no reason for the Court to conclude that this possibility was something Congress would not have contemplated or outright rejected.

Because the language of the statute was plain, and there were no overriding reasons for the Court to believe that Congressional intent was anything other than the language expressed in the statute, the Court held that the provision of subsidies in Exchanges established by the federal government were unauthorized, and therefore illegal.

King

The Fourth Circuit reached the opposite conclusion of the DC Circuit. They found that while a literal interpretation of the statute would align with the plaintiffs’, ignoring the reasoning used by the DC circuit and reading the provisions at issue in the context of the other 2,000 pages of the statute would lead to an understanding more akin to that put forward by the government. With these conflicting positions in mind, the Fourth Circuit found Congressional intent could be ambiguous after reading only the statute and instead began looking at legislative history.
The Court found a comment made by Sen. Max Baucus (D-MT) pinning the Finance Committee’s jurisdiction over health reform to the conditional tax subsidies too tenuous of a connection to constitute dispositive legislative history. They also found the Senate HELP Committee draft health reform bill which conditioned subsidies on a state’s adoption of “insurance reform provisions” to be of too little weight to be relevant in understanding the final legislation. The Court also found an insurance reporting provision that would seem mildly inconsistent under plaintiffs’ reading to be insufficient to fully support the government’s statutory construction of the statute.

Because the Fourth Circuit found the text of the statute ambiguous with no clarifying legislative history, it was lead to Step Two of Chevron – is the agency interpretation permissible? Is the agency rule arbitrary or capricious? The Court found that the agency interpretation fulfills the broad goals of the ACA and stabilizes the individual mandate leg of the three-legged stool. Because the text is ambiguous and the agency rule seems to align with the basic goals of the law, the Fourth Circuit found it reasonable for the IRS to believe that Congress meant for the federal and state exchanges to be interchangeable in the same way “Pizza Hut and Dominos” are interchangeable (Yes, that was an actual example provided by the Court, and No, apparently they do not have taste buds).

The Plaintiffs offer one last argument that as a general rule taxes and credits or exemptions must be clearly and narrowly defined. The Court acknowledges this principle, but held that this rule of construction is not enough to supplant Chevron deference to agency action.

Because the Court found the language of the ACA ambiguous, and did not find the IRS’ interpretation of the law to be arbitrary or capricious, the Fourth Circuit ruled that the IRS rule will stand.

**Why Two Courts reached Different Results on the Same Case**

It is interesting that two Circuit-level courts reached opposite conclusions on what are essentially identical cases on the very same day. It inevitably raises the question for many, if the two courts are subject to the same laws and canons of statutory construction, shouldn’t they have reached the same conclusion?

The differences arose because the DC Circuit approached the statutory language without any biases and attempted to understand the intent of the legislators based purely on the words they used and the way in which they used them. The Fourth Circuit, on the other hand, began by attempting to determine whether the IRS interpretation is one that could have been reached by reading the statute. Rather than taking the individual words and clauses of the statute at face value, the Fourth Circuit puzzled together the words in §1311 with those in §1321 to come to the conclusion that there is a possible ambiguity. They then considered other provisions of that statute that do not conflict with the position of either of the parties and found that if the statute is read according to the government’s interpretation, there are other provisions of the law that do not contradict that interpretation. This makes the government’s understanding of the law probable enough to
make the entire statute ambiguous on this point. Where there is ambiguity the Court is lead to consider Chevron Step Two, which was not even reached by the DC Circuit.

In Chevron Step Two agency action nearly always takes the day. The only consideration for the court to consider is whether the agency rule is arbitrary and capricious; if it is not, the agency action is reasonable and will be upheld. In this case the Court found both the statutory and legislative history to be ambiguous; it also found that the agency rule was not arbitrary and capricious, but in fact aligned with the overarching goals of the ACA, and so the rule was upheld.

Future of this Litigation

The differing decisions of the courts in Halbig and King raise the question of what will happen next with this line of cases. The first thing to consider is whether the court in the DC Circuit will grant a stay of the decision, meaning that it will not go into effect until the stay is lifted. The decision does not officially go into effect for seven days after the decision was released, so that means that the government has until Tuesday, July 29th, 2014 to petition the Court to grant the stay. This petition is especially likely to be granted if the Court is considering another petition from the government to grant en banc review.

En banc review is a hearing before the entire Circuit court. There are currently 13 judges in the Circuit who are eligible to participate in the rehearing, including senior judges Brown and Randolph. These reviews are considered extremely rare, and are only granted under extraordinary circumstances because they are effectively an opportunity for the Circuit judges as a whole to overrule the three judge panel that went through the entire case from briefings through oral arguments. Generally en banc review is only granted if there is a split among decisions within the circuit, if there is a substantial amount of weight against the ruling in other circuits, or the ruling has become wildly outdated due to drastic changes in law or circumstances; none of these factors are present in the Halbig case. However, this case has been highly publicized and it is no secret that the Obama administration is extremely unhappy with the opinion of the three-judge panel. The DC Circuit, which recently gained a touch of infamy when its seats were filled with judges pushed through the Senate confirmation procedures thanks to Senate Majority Leader Harry Reid’s (D-NV) “nuclear option,” is now predominantly comprised of Obama appointees; it is possible that their sympathies for the Obama Administration may help sway their decision towards allowing an en banc review. In the Fourth Circuit it is also possible that the plaintiffs will petition for en banc review, but experts seem to be of the opinion that it is more likely they will instead petition the Supreme Court for a grant of certiorari, or an order for the case to be heard before the nation’s highest court.

Parties in either of the cases could petition SCOTUS for cert., and considering the gravity of the issues in question it would not be surprising if the petition was granted. If the plaintiffs in King petition for cert. and are accepted, it is likely that any en banc review of the Halbig case will be stayed until after the Supreme Court gives its decision. However, there is also the possibility that the Supreme Court will decline to hear the case brought
by the plaintiffs in King until the threat to the circuit split has been settled after a decision is rendered by the full court in the DC Circuit.

If the en banc review of Halbig upholds the panel decision, it is almost certain that cert. would be granted to King, and very likely that an appeal from the government in Halbig would be joined with that case. If the en banc review of Halbig overturns the panel’s ruling (which is generally considered to be the more likely outcome), the Supreme Court may decline to hear the cases unless and until there is a circuit split – which is entirely possible as there are two related cases making their way through the courts in Oklahoma and Indiana. It is unlikely the government in Halbig will petition directly to the Supreme Court as this would deny them a second opportunity to appeal an unfavorable ruling.

With all of this in mind, the ultimate decision of whether to grant cert. either this fall, the following, even as late as 2016, may simply come down to the fact that this is an important case that has the potential to impact millions of people and potentially cost or save the US Treasury up to $600 billion a year. Because of the magnitude of the case and the implications it has for the country, the Supreme Court may feel it is their responsibility to hear the case regardless of the presence of a circuit split. In order for the Supreme Court to grant certiorari, four of the nine justices must vote to hear the case. It is likely that some of the split will take place along ideological lines, but it is anyone’s guess as to whether Justices Kennedy and Roberts would vote to hear yet another politicized case; a ‘nay’ vote from both of them would be unlikely in the event of a circuit split, but it would be enough for the Supremes to avoid another Obamacare review.