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HEALTH CARE LAWYERS & ADVISORS

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## Courts Issue Opposing Opinions Regarding Federal Tax Credits in States with Federal Health Benefits Exchanges

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On July 22, 2014, the U.S. Court of Appeals for the District of Columbia Circuit and the Fourth Circuit issued conflicting opinions concerning the availability of premium tax credits for individuals residing in states where the federal government, rather than the state government, has established the state's Health Benefits Exchange (Exchange). In *Halbig v. Burwell*, a divided (2-1) panel of the D.C. Circuit held that the tax credits made available under the Affordable Care Act (ACA) to help individuals of modest means pay for health insurance purchased through an Exchange are only available in states that have established an Exchange and are not available in states with Federally Facilitated Exchanges.<sup>2</sup> Shortly thereafter, a three-judge panel of the Fourth Circuit unanimously reached the opposite conclusion in *King v. Burwell*, upholding the availability of tax credits for individuals in all states, regardless of whether coverage is purchased on an Exchange established by the state.<sup>3</sup> The circuit split created by these two decisions significantly increases the likelihood of further review by an *en banc* court of the D.C. or Fourth Circuit or by the Supreme Court. Ultimately, if premium tax credits are not available on Federally Facilitated Exchanges, the number of people that obtain health coverage through Exchanges in those states is likely to substantially decrease, thereby increasing the uninsured population.

### The Circuit Split

In both decisions, the courts focused on the ACA's requirement that an individual enroll in a plan "through an Exchange established by the State" in order to be eligible for subsidies including premium tax credits.<sup>4</sup> The government argued that numerous other provisions of the ACA suggest that Congress intended for tax credits to be available in any Exchange, whether established directly by a state or Federally Facilitated. The Fourth Circuit panel concluded that the relevant ACA provisions are ambiguous enough to warrant deference to the Treasury Department's regulation providing subsidies for individuals enrolled through any Exchange, with Judge Andre Davis writing separately to emphasize his belief that the administration's interpretation is objectively correct.

In contrast, the D.C. Circuit panel held that a Federally Facilitated Exchange is unambiguously not an "Exchange established by the state," and thus, that tax credits are unavailable to individuals in those states. The panel majority in the D.C. Circuit considered other provisions in the statute dealing with tax credits, and found that none of the ACA provisions cited by the government would be rendered wholly unworkable by this reading, suggesting that Congress intended for the tax credits to be limited to Exchanges directly established by states. In his dissenting opinion, D.C. Circuit Judge Harry T. Edwards

concluded that the administration's construction of the statute is reasonable and warrants judicial deference.

The D.C. Circuit ordered the lower court to vacate the IRS regulation allowing individuals in all states to get tax credits to help pay for insurance in the Exchanges. However, that order does not go into effect immediately. The administration has already announced that it will seek *en banc* rehearing of the case by the full D.C. Circuit, which, if granted, would mean that the appeal would be reheard by all 11 active judges on that court. The two senior judges who participated on the original panel would also have the option of participating in an *en banc* review. Meanwhile, the plaintiffs in *King* may seek *en banc* review by the Fourth Circuit. In addition, the administration and/or the *King* plaintiffs may file a petition for a writ of certiorari in the Supreme Court to resolve the circuit split. Further review by the circuit courts and/or the Supreme Court is more likely than usual because of the existence of the split and the nationwide importance of the legal issue.

### **Halbig's Potential Impact for Health Care Providers**

If the D.C. Circuit ruling takes effect and Congress fails to take remedial action, the millions of individuals that live in states with Federally Facilitated Exchanges would lose access to subsidies and be responsible for the full cost of their health insurance premiums. (See Table, below, for a list of Federally Facilitated Exchanges.) Over 80% of individuals enrolled in health plans through the Exchanges use subsidies to pay for all or part of their premiums.<sup>5</sup> Without these subsidies, many individuals may be unable to afford or less likely to purchase coverage. In addition, the absence of subsidized coverage options might cause premiums to increase in Federally Facilitated Exchange markets because the risk pool would be further skewed toward a sicker, older population rather than young families. This chain of events, if realized, could have a profound impact on the size of the uninsured population.

Providers in the 29 states with Federally Facilitated Exchanges may experience significant increases in patient debt if the *Halbig* ruling is implemented, as individuals face higher costs for their premiums and eventually disenroll and other individuals decline to enroll in Exchange plans over the coming years.

These decisions have no impact in the fifteen states that have established State Based Exchanges, and federal subsidies will continue to be available to eligible individuals regardless of the final outcome of these appeals. The remaining seven states have entered into partnerships with the federal government to establish and operate their respective Exchanges. Operation of these Partnership Exchanges vary based on the amount of responsibility the state was willing to undertake. No court has addressed whether subsidies are available where coverage is purchased on one of these Partnership Exchanges. (See Table below.)

We are available to provide advice and counsel concerning the impact of ongoing litigation around the ACA. For additional information, please contact John Hellow or Glenn Solomon in Los Angeles at 310.551.8111; Katrina Pagonis in San Francisco at 415.875.8500; or James Segroves or Marty Corry in Washington, D.C. at 202.580.7700.

Table: Breakdown of State Based, Partnership and Federally Facilitated Exchanges

State Based Exchanges (15)	Partnership Exchanges (7)	Federally Facilitated Exchanges (29)	
California	Arkansas	Alabama	North Carolina
Colorado	Delaware	Alaska	North Dakota
Connecticut	Illinois	Arizona	Ohio
District of Columbia	Iowa	Florida	Oklahoma
Hawaii	Michigan	Georgia	Pennsylvania
Kentucky	New Hampshire	Idaho	South Carolina
Maryland	West Virginia	Indiana	South Dakota
Massachusetts		Kansas	Tennessee
Minnesota		Louisiana	Texas
Nevada		Maine	Utah
New York		Mississippi	Virginia
Oregon		Missouri	Wisconsin
Rhode Island		Montana	Wyoming
Vermont		Nebraska	
Washington		New Mexico	
		New Jersey	

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<sup>2</sup> No. 14-5018 (D.C. Cir. July 22, 2014)

<sup>3</sup> No. 14-1158 (4th Cir. July 22, 2014)

<sup>4</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1401(a), 124 Stat. 119, 216 (2010) (codified at I.R.C. § 36B(c)(2)(A)(i)).

<sup>5</sup> See HHS Summary Enrollment Report for the Initial Annual Open Enrollment Period.