HOBBS STRAUS DEAN & WALKER

2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

# MEMORANDUM

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TO: Tribal Health Clients

FROM: HOBBS, STRAUS, DEAN & WALKER LLP

Re: *D.C. Circuit Strikes Down Key ACA Provision; Fourth Circuit Affirms Same Provision*

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In separate decisions issued yesterday, two United States Courts of Appeals issued contradictory opinions on a key aspect of the Affordable Care Act (ACA). In *Halbig v. Burwell*, the D.C. Circuit invalidated an IRS rule making premium tax credits available for low income individuals on the Federal Exchanges, ruling that premium tax credits are available only on Exchanges established by the States. In *King v. Burwell*, the United States Court of Appeals for the Fourth Circuit reached exactly the opposite conclusion, holding that the IRS could issue a rule allowing premium tax credits to be made available through the Federal Exchanges. These decisions focused entirely on the Exchange-related provisions of the ACA, and do not in any way implicate or threaten the viability of the Indian Health Care Improvement Act, which was enacted in a wholly separate provision of the ACA.

## Background

The Exchange related provisions of the ACA are designed to reform the insurance industry by mandating that insurance companies can no longer deny coverage or charge higher premiums based on an individual's health status. In order to prevent individuals from only seeking insurance once they are sick, and to keep the insurance industry economically viable, the ACA requires everyone to purchase insurance through the Individual Mandate.[1] In order to ensure that low income individuals can afford to comply with that mandate, the Act provides for premium assistance in the form of tax credits that dramatically lowers the cost of insurance for low income individuals.

The ACA allows States to implement their own health insurance Exchanges. If a State chooses not to implement its own State-based Exchange, then the federal government steps in and operates a "federally-facilitated marketplace" exchange in the

[1] Members of federally-recognized tribes are not subject to the Individual Mandate, and Indians who are not members of federally-recognized tribes but otherwise eligible for IHS services are eligible for a hardship exemption to the individual mandate.

State. To date, 36 States have elected not to implement their own Exchanges, and the federally-facilitated marketplace is operating in those states.

The Decisions

Both cases involved the exact same issue – whether the IRS could lawfully promulgate a regulation that makes premium tax credits available in the federally facilitated marketplace, or whether premium tax credits are only available in States that have created their own exchanges. In both cases, appellants argued that the IRS acted beyond its authority because Section 36B of the Internal Revenue Code, enacted as part of the ACA, only allows premium tax credits to be made available to individuals who purchase insurance through an exchange "established by the State under Section 1311 of the Act." Because the Federally-Facilitated Exchanges are established under Section 1321 of the Act, they argued, the premium tax credits are not available in the Federally-Facilitated Exchanges.

The D.C. Circuit, by a 2-1 vote, agreed with this textual argument. According to the D.C. Circuit, the "ACA unambiguously restricts the section 36B subsidy to insurance purchased on the Exchanges 'established by the State," and as a result the Court found the IRS regulation to be unlawful. The Court held that because the language of the Statute was unambiguous, it did not need to defer to the IRS' interpretation. The Court recognized that its ruling "will likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for insurance markets more broadly." However, the Court characterized itself as bound by the text of the Statute, and concluded that "section 36B unambiguously forecloses the interpretation embodied in the IRS rule and instead limits the availability of premium tax credits to state-established Exchanges."

The Fourth Circuit, by a 3-0 vote, reached the opposite conclusion, holding that the IRS rule could lawfully make the premium tax credits available on the federal exchanges. The Fourth Circuit first examined the text of the Statute, pointing out that the language in Section 1311 must be read in context with the rest of the Act. The Court noted that the section of the Act that allows the federal government to run the exchange provides that HHS must establish "such exchange." According to the Court, this indicates that when it operates "such Exchange," the federal government is in fact operating a State Exchange. The Court also pointed to language in the statute that requires both the state and federal exchanges to report on the premium tax subsidies they provide. This is further indication, according to the Court, that Congress intended premium assistance to be made available through the federal exchanges as well as the state exchanges.

Although the Court indicated that it believed the HHS had the better of the statutory argument, it ultimately concluded that the text of the statute, taken as a whole, was inconclusive and ambiguous. Because it found the statute to be ambiguous, the

Court then turned to determine whether the IRS interpretation of the statute was reasonable and found that it was. According to the Court, "widely available tax credits are essential to fulfilling the Act's primary goals and [] Congress was aware of their importance when drafting the bill." The Court noted that the individual mandate is required to increase revenue for insurance providers, which in turn helps mitigate the cost of the guaranteed-issue and community-rating provisions which make insurance more widely available to everyone. According to the Court, premium subsidies are then required in both the federal and state established exchanges in order to increase market participation among low and middle income individuals. "Denying tax credits to individuals shopping on federal Exchanges," the Court noted, "would throw a debilitating wrench into the Act's internal economic machinery."

Potential Impacts in Indian Country

Both cases will almost certainly be appealed, which means that it will be some time before this issue is finally resolved. The Administration has indicated that it intends to review the D.C. Circuit's decision *en banc*, which means seeking a review by the entire panel of judges who sit on the D.C. Circuit. The appellants in the Fourth Circuit may also seek review to the entire Fourth Circuit *en banc*, or appeal directly to the Supreme Court. It seems likely that one or both parties to these cases may seek review by the Supreme Court to resolve this issue. It would take the votes of four justices on the Supreme Court to take the case up on review.

In the interim, the D.C. Circuit decision creates great uncertainty for the millions of individuals who have received an advanced payment of premium tax credits to purchase insurance on the federal exchanges in 2014. If the premium tax credits are no longer available to them, they may be liable for the full cost of the premiums at tax filing time in 2015 and be unable to pay. The Administration has stated that it will continue to make the premium tax credits available pending an appeal of the D.C. Circuit case.

Although the D.C. Circuit decision does not threaten the constitutionality of the Act as a whole, or any unrelated provisions (such as Medicaid Expansion or the Indian Health Care Improvement Act), if it stands it could lead to significant efforts in Congress to reform or "fix" the bill. We will be closely monitoring these cases as they are appealed and any congressional efforts to fix the bill, if necessary.

For more information about any aspect of these decisions or their potential impact in Indian country, please contact Elliott Milhollin at (202) 822-8282 or emilhollin@hobbsstraus.com; Geoff Strommer at (503) 242-1745 or gstrommer@hobbsstraus.com.