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## Contrasting Opinions in Health Care Law Rulings

Today, the U.S. Court of Appeals for the D.C. Circuit and the Fourth Circuits released opinions regarding the federally run health care exchanges under the ACA. Specifically, the cases explore subsidies provided to individuals purchasing health insurance in federal exchanges.

In both cases, the primary question was whether health care plans purchased through federally run health care exchanges were eligible for tax credits under the ACA. Twenty-seven states opted to not create their own exchanges, and nine created only partial exchanges. In answering this question, the Fourth Circuit in *King v. Burwell* found that the statutory language of 26 U.S.C. § 36(b) was ambiguous when read in the context of the statutes as a whole, and did not clearly express congressional intent. As such, the unanimous 3-0 *King* panel reasoned that “if Congress wanted to create a two-tiered exchange system, it would have done so expressly.” The Fourth Circuit then determined that the statutory interpretation chosen by the IRS was permissible.

The D.C. Circuit reasoning in *Halbig v. Burwell* was in direct contrast, holding 2-1 that the IRS regulation authorizing tax credits in federal exchanges under the ACA was invalid, particularly because the “ACA unambiguously restricts the section 36(b) subsidy to insurance purchased on Exchanges ‘established by the State.’” The *Halbig* court reasoned that under 26 U.S.C. § 36(b), such tax credits are limited to health care plans purchased “through an exchange established by the State,” which limits eligibility to *only* those plans purchased from a state-run exchange.

Those in support of the *Halbig* decision remark that *Halbig* has “reaffirmed the principle that the law is what Congress enacts—the text of the statute itself—and not the unexpressed intentions of hopes of legislators.” The Fourth Circuit reasoning, in contrast, represents a more “purposive” interpretation, according to Professor Nicholas Bagley of University of Michigan Law School. Such an approach is generally more lenient in providing flexibility for textual ambiguities.

While legal experts do not expect the losing party to petition the Fourth Circuit for a rehearing en banc, the administration will soon announce their request for en banc consideration by the entire D.C. Circuit. Interestingly, this announcement was already predicted in the Edwards dissent, in which he refers to the majority opinion as a “proposed judgment,” suggesting the likelihood of the case being reheard and eventually superseded.

Some question if this case is U.S. Supreme Court-bound. A rehearing and reversal of today’s *Halbig* decision would result in a removal of the inconsistency currently in place between the Fourth and D.C. Circuits. Professor Jonathan Adler of Case Western Reserve University School of Law, a proponent of the *Halbig* theory from its outset, noted this afternoon that the Roberts Court seems particularly attracted to cases in which there is a circuit split, and that its removal may decrease the likelihood of Supreme Court review. This is especially true in light of the fact that the *Halbig* and *King* cases lack “meaningful

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differences.” Adler also noted that if the Supreme Court were to review the case, that he predicts the decision would be a “close” one and “challenging for many” of the justices.

If the *Halbig* decision is ultimately upheld, it’s unclear if the government would honor the D.C. Circuit decision as a nationwide invalidation of the rule, or would instead simply overrule the court’s judgment, and extend it to a more localized geographic region, or even to the individual plaintiffs. In addition, 36 states may again be faced with the choice of whether or not to create a state exchange. If choosing not to do so, such states would potentially face immense political pressure for neighboring states providing the tax credits for their own individual citizens.

*This document is intended to provide you with general information regarding the recent court rulings on health care. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*

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