Written by **Michael Tennant** on May 4, 2013

IRS Sued for Extending ObamaCare Subsidies to Ineligible Individuals

ObamaCare is once more being taken to court. Unlike previous lawsuits, which challenged the Affordable Care Act (ACA) itself, this suit, coordinated by the Competitive Enterprise Institute (CEI), contests the Internal Revenue Service's (IRS) interpretation of a key provision of the law — an interpretation the plaintiffs say unfairly subjects more individuals and employers to the ACA's mandates.

"The IRS rule we are challenging is at war with the Act's plain language and completely rewrites the deal that Congress made with the states on running these insurance exchanges," said Michael Carvin, partner at Jones Day, who is representing the plaintiffs in the lawsuit. (Carvin previously co-argued the ObamaCare cases before the Supreme Court.)

That "deal," the lawsuit explains, was this: Congress gave each state the option of establishing its own insurance exchange or letting the federal government do it. Residents of states that chose to create exchanges would then be eligible for federal subsidies for the purchase of insurance on those exchanges. Residents of states that went the federal route, on the other hand, would not be eligible for such subsidies.

The law is quite clear on this point, according to the complaint:

> The ACA unambiguously restricts premium-assistance subsidies to state-established insurance exchanges. The plain text of the statute makes subsidies available only to individuals who enroll in insurance plans "through an Exchange established by the State under [section] 1311 of the [Act]."… But an exchange established by the federal government under the authority of [section] 1321 of the Act is not "an Exchange established by the State under [section] 1311 of the [Act]."

Twenty-six states have opted not to involve themselves in their exchanges at all, preferring to let the federal government shoulder the entire burden. Another seven are leaving Washington in charge of their exchanges but assisting with their operation. For the purpose of determining subsidy eligibility, these "partnership" exchanges are considered federal, not state, exchanges. Thus, in 33 states, individuals are not eligible for federal subsidies under the ACA.

Last spring, however, the IRS ruled that individuals in states with federal exchanges will indeed be eligible for premium-assistance subsidies. "Specifically," says the lawsuit, "the Rule states that subsidies shall be available to anyone 'enrolled in one or more qualified health plans through an Exchange,' and then defines 'Exchange' to mean 'a State Exchange, regional Exchange, subsidiary Exchange, *and Federally-facilitated Exchange*.'" (Emphasis in original.) The plaintiffs claim that the agency justified this rule via a brief explanation "without any reasoned effort to reconcile it with the contrary provisions of the statute."

Aside from the increased cost to taxpayers that expanding subsidy eligibility entails, the big problem with the IRS regulation is that it subjects certain individuals to ObamaCare's individual mandate when

they would otherwise be exempt from it. That, in turn, subjects their employers to the employer mandate. Both mandates impose penalties for noncompliance.

Under the ACA, individuals are required to carry health coverage. However, if the cheapest ACA-complaint policy available in an exchange costs more than eight percent of a person's annual household income, he is exempt from the mandate and may purchase whichever plan he wants or even no plan at all. If, on the other hand, that person is eligible for a premium-assistance subsidy and the subsidy brings the cost of insurance below eight percent of his income, he now must purchase ACA-compliant insurance or pay a penalty. "Thus, by purporting to make the credit allowable in … states [with federal exchanges]," reads the complaint, "the IRS Rule increases the number of people in those states subject to the individual mandate's penalty."

That's why four of the plaintiffs are individuals of low to moderate income residing in states that have opted not to operate their exchanges. These people prefer the cheaper coverage they have now to the more costly coverage they will be forced to buy under ObamaCare, whose subsidies do not generally cover 100 percent of premiums.

The remaining plaintiffs are small-business owners who face an even more daunting dilemma if the subsidies are extended to their states. ObamaCare requires employers with 50 or more full-time employees — with "full-time" defined as working at least 30 hours per week — to offer affordable coverage to their full-timers or pay a penalty for each of these employees who obtains a federal subsidy for buying insurance on an exchange. As long a business's employees all live in states where they are not eligible for subsidies, their employer is therefore effectively exempt from the employer mandate. By expanding subsidies to states that chose not to establish their own exchanges, "the IRS Rule also has the effect of triggering the employer mandate payment for businesses in" those states, explains the lawsuit.

One of the small-business plaintiffs, Missouri-based Innovare Health Advocates, was "preparing to expand its consumer-driven health insurance plan to cover all full-time employees," of which it has 55, according to the complaint. This plan, however, "would very likely not comply with the ACA." If subsidies are extended to Missourians even though the Show Me State is sticking Uncle Sam with the job of running its exchange, Innovare will be unable to proceed with this plan and will instead be forced to offer its employees insurance that the company believes is inferior to — and more expensive than — the plan it has now.

"Contrary to the clear language in the Affordable Care act, government is directly impeding my ability to design a quality affordable health plan for my employees," said Innovare CEO Chuck Willey, M.D. "The IRS will extra-legislatively extend this onerous benefit requirement (which will increase premiums and costs of care) and impose the employer penalty in states with federally-run exchanges. I maintain the right to choose my own employees' health plan without government intervention into its benefit design and without penalty."

Another plaintiff, Kansas-based Community National Bank, currently offers health insurance to its approximately 80 full-time employees. The Sunflower State, too, has declined to establish its own exchange. "The Bank's directors object to certain morally offensive provisions of the ACA (such as its definition of contraceptive and abortifacient drugs as 'preventive services') and have determined that the Bank would rather drop the health insurance it offers to its full-time employees than comply with those provisions," states the lawsuit. "However, such action would expose the Bank to assessable

payments under the employer mandate, given the IRS Rule." If the regulation stands, the bank says it intends to comply with the employer mandate despite the directors' objections to the contraceptive rule.

The plaintiffs, suing in federal court in Washington, D.C., are asking the court to strike down the IRS rule. ObamaCare opponents wish them well; anything that keeps (some) Americans from being subjected to that monstrosity is to be welcomed. How they will fare in court, particularly if their case reaches the Supreme Court, is another matter entirely. Any court that can rule that a levy both is and is not a tax in the same opinion is hardly one that can be counted on to decide in favor of the plain language of any law, particularly one it has already upheld despite its conflicts with the clear words of the Constitution.

Photo: AP Images