IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*, *Plaintiffs,* *v.* KATHLEEN SEBELIUS, *et al.*, *Defendants.*	Civ. No. 13-623 Judge Richard W. Roberts

DECLARATION OF W. THOMAS HAYNES

I, W. Thomas Haynes, do hereby declare:

1. I own and manage TBP Solutions, LLC, an Atlanta, Georgia based firm that provides consulting and other services to employers and insurers, primarily in the employee benefits arena. TBP Solutions is also a licensed accident and health broker in both the group and individual markets in several states. Prior to my current work with TBP Solutions, I served as the Executive Director of The Coca-Cola Bottlers' Association ("CCBA"), where I ran a sponsored group health benefits program, originally for CCBA members, but later for members of several other trade associations and employer groups, including several nationally known entities.

2. While serving as Executive Director of CCBA, I also served as the President of the Trade Association Healthcare Coalition ("TAHC"), a coalition of trade associations seeking solutions that would allow them to better serve their members by developing health care programs for those members that deliver better benefits at lower prices than those available from group carriers. In 2005 and 2006 I testified on two occasions before Congressional Committees at the invitation of Republican Committee Chairs on the problems facing small employers and

the trade associations that serve them in developing viable alternatives to the fragmented, heavily regulated, state insurance markets. Later, in 2009, I was invited to testify on two occasions before the House Small Business Committee on health care reform measures that were then under consideration by Congress (including the PPACA), this time by the Democratic Chairwoman of that Committee. I was also invited to attend at least two meetings of small business representations with Congressional staff members involved in the drafting of the PPACA, to provide small business input in that drafting process.

3. I have been retained by the Plaintiffs and their counsel in this case to provide feedback on various aspects of the PPACA, including the on-going process by which carriers, employers, brokers and other insurance professionals are seeking to determine how to order their affairs in preparing for further PPACA implementation. I have also been asked to review the various pleadings filed by the parties in this case, particularly as they relate to the timing of the litigation of this matter and the need for resolution of the claims filed by the plaintiffs prior to various deadlines established by the PPACA.

4. Because of my work with both insurers and employers, I closely monitor the reaction of both those communities and the brokerage community to various aspects of the PPACA. I also counsel my own clients and potential customers on PPACA implementation. Finally, I monitor and participate in a wide variety of public discussions of health care reform involving insurance professionals, including a LinkedIn health care discussion group on health care reform with over 20,000 participants, mostly brokers, benefits consultants, insurers and other industry professionals involved in PPACA implementation.

5. In reviewing the pleadings in this case, I note that the government's apparent position is that since this case is about the availability of tax subsidies to individuals for 2014

and the applicability of possible tax assessments to employers in the future (originally for 2014, now apparently 2015), resolution of this matter prior to the completion of the applicable tax years is both legally inappropriate and unnecessary. Leaving the issue of legal propriety to the lawyers, it is my view that the government's view of the real-world implications of the timing of the resolution of this matter misses the obvious, fundamental point, that the tax subsidies and tax assessments contained in the PPACA are simply a vehicle for influencing changes in insurance and health care benefits markets, with much of the focal point being behavior associated with the January 1, 2014, renewal cycle. Since the passage of the PPACA, both the enforcement agencies and the industry have indentified October 1, 2013, as the "target date" for this new post-PPACA health insurance and health benefits world. Employers remain under an October 1 deadline to inform employees of their plans to offer coverage that meets the "value" and "affordability" standards of the PPACA (irrespective of of the one-year delay on assessments), since that information is needed by employees to determine both their subsidy eligibility and their individual mandate obligations.

6. Given the changes in the individual and group markets created by the PPACA's new set of insurance regulations and given that subsidies are only available for coverage purchased on the exchanges, and then only for employees and their families that do not have workplace access to coverage meeting the "value" and "affordability" standards, several entrepreneurs and brokers have recognized that subsidy availability may make it wise for employers to drop group coverage in favor of offering exchange-qualified individual policies on a "private exchange." As an example, for the last few months, I have monitored the marketing activities of some of those entrepreneurs, including primarily a firm named Health Partners of America ("HPA") from Birmingham. HPA has conducted a series of regular broker seminars,

with reported attendance in excess of 400 brokers, marketing an HPA-recommended solution that combines (1) employer discontinuation of group coverage, (2) a private exchange, managed by HPA, that provides a portal for offering individual coverage, including plans approved for public exchange availability, (3) links that allow eligible individuals to apply for subsidies through the public exchanges, presuming they meet subsidy eligibility requirements and (4) an optional employer "defined contribution" strategy (facilitated by HPA or its broker clients), whereby an employer previously contributing to group coverage would redeploy its benefit dollars to reimburse employees for either individual major medical coverage or other benefits. The leadership of HPA has predicted the eventual demise of the group health market because of PPACA guaranteed issue and underwriting reforms that make the individual market more attractive than previously and because of the unique advantage of access to PPACA subsidies associated with elimination of group benefits under the "defined contribution" approach.

7. With the employer mandate delay, HPA and other promoters of the individual market private exchange solution have argued that the primary obstacle to implementation of their strategy had been lifted for 2014. HPA's more recent marketing materials argue that discontinuation of group coverage may be necessary for smart employers to attract employees, because employees that are eligible for subsidies are not likely to want to work for a company that offers a group plan that eliminates their subsidy eligibility.

8. HPA's solution (and other similar approaches) is being actively marketed to brokers in Georgia and other states that have opted not to implement state exchanges. Indeed, in a recent webinar held on August 29, HPA noted that it had largely completed its work of establishing the links to the federally facilitated exchanges for purposes of subsidy applications, but was at a far earlier stage in working with the states that had established their own exchanges

and was not certain that those states would actually cooperate with HPA in the subsidy application process. In other words, HPA's implementation appears to be focused on the states that have not moved forward with PPACA exchanges, despite the uncertainty associated with the availability of subsidies in those states under the plaintiffs' theory in this case.

9. I have detected very little broker awareness of the debate over the availability of subsidies in states with federally facilitated exchanges, either in private discussions with other brokers or in the LinkedIn discussion group. Based on what I have seen to date, I believe that most industry participants are operating on the assumption that subsidies will be equally available in all 50 states. Those participants are proceeding on the assumption that employers in non-participating states should also take into account the interest of their employees in retaining access to those subsidies when making benefit decisions for 2014.

10. The presumed availability of subsidies in non-participating states is, in my view, very likely to influence the recommendation of brokers to employers and the decisions by those employers as to whether to offer a group health program for 2014. Moreover, that assumption is also likely to influence the structure of the programs chosen by employers that do decide to continue or begin to offer some form of group health benefit. As has been known by industry participants for some time, the PPACA structure creates some significant disincentives relative to the inclusion of spouses in employer group health programs. While nearly all employer programs that I have seen traditionally seen include options for both spousal and dependent coverage, the PPACA was written in a way that makes dependent coverage in group programs mandatory, but spousal coverage not only optional, but contrary to the interest of employees in many situations. This structure, now referred to as the "PPACA marriage penalty", arises from the fact that the employer mandate measures affordability of a group plan based only on the

affordability of the employee-only contribution, as a percentage of household gross income, while the subsidy and individual mandate calculations measure both coverage requirements and affordability based on the cost of coverage for the entire family, as a percentage of household gross income. Because of this structure, employees with access to qualifying workplace coverage that requires them to pay all of the cost of including spouses and dependents in that coverage (a common contribution strategy in the marketplace and a permissible one under the PPACA) either need to accept that coverage or pay an individual mandate assessment, even though they would have been eligible for highly subsidized exchange coverage had the employer simply not offered any group coverage at all.

11. Because of this "marriage penalty" structure, some brokers are advising their clients to discontinue spousal coverage, unless they want to subsidize that coverage, since the exclusion of spouses from the employer group program will make at least spouses potentially eligible for PPACA subsidies. Given the increasing awareness of this issue because of media reports and the substantial stakes for some employees (where the lost subsidy may be the full cost of coverage for a non-working spouse), I would expect additional employers to continue to restructure their programs to exclude spouses. Again, based on what I have observed to date, I would expect that those employer decisions in non-implementing states will be made without regard to the claims in this case, such that brokers and employers will make those subsidy-motivated program structure decisions based on the assumption that spouses will have access to subsidies in states with federally facilitated exchanges.

12. As noted above, employers are required to provide employees with notice of their plans relative to group coverage, including potential changes in group coverage that they are considering, between now and October 1. Given the absence of any employer mandate penalty, I

would expect many employers to make subsidy-motivated decisions to eliminate coverage or modify spousal coverage, with an eye toward explaining those decisions to employees as advancing their own interests.

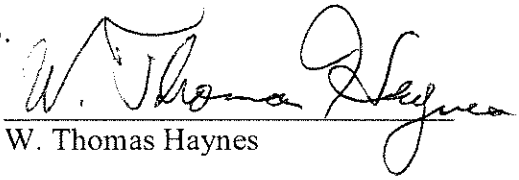
13. Because those decisions are likely to be made, at least initially, in the next 30 days or less, and will thereafter be finalized between now and November or early December, it is critical that the issues in this case be addressed on an expedited basis. If, hypothetically, no decision were made by this Court relative to the legality of the IRS rule until early 2014, and an ultimate decision were in favor of the plaintiffs, many employers in federal exchange states would have already made final program decisions based on a false expectation that their employees would benefit from elimination or curtailment of their group plans. For those employers, all of their employees might end up paying more for coverage than would have been the case had the plan been continued. Conversely, a small minority of brokers and employers may already be aware of the uncertainty associated with subsidy availability resulting from the pendency of this lawsuit and as a result forego approaches that might otherwise benefit their employer clients and their employees if the IRS rule is upheld between now and mid-October.

14. Both the public interest and the professed objectives of the PPACA would be best advanced by a determination by this court of the merits of the plaintiffs' claims well in advance of January 1, 2014. In all probability, the delay in the employer mandate, in combination with the impact of employer coverage on subsidy access, is likely to result in a net reduction of the number of smaller employers offering group coverage in the thirty-four states that are not implementing their own exchanges. The net impact of the market behavior that will result from that expectation will be a reduction in the number of citizens eligible for employer coverage, an increase in billed premiums (since all expert predictions are that individual market pricing will,

on the average, be higher than both existing group pricing and projected exchange and non-exchange group pricing), and a drain on the federal Treasury associated with increased subsidy costs. Once employers make decisions based on the landscape that appears to exist in October or November, reversal of that decision will be costly and difficult if the outcome of this litigation is inconsistent with their expectations. In the interim, many employees will have lost group benefits, some to receive subsidies that may prove to be short-lived and some with no offsetting benefit whatsoever (employees not eligible for subsidies because of income). Whether the ultimate decision in this case is in favor of the plaintiffs or the IRS rule, employers and the public need to know the answer to prior to finalizing their benefit decisions for 2014.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 9th day of September, 2013.



W. Thomas Haynes