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The Affordable Care Act Dodges Another High Court Bullet

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The U.S. Supreme Court's 6-3 decision in King v. Burwell does more than resolve a question of statutory construction about whether Congress intended for federal tax subsidies to be available to reduce consumer spending on health insurance coverage purchased through federally run exchanges. The Supreme Court's decision in favor of the Obama administration seems to have, once again, preserved the core underpinnings of the Affordable Care Act.

Three years ago, we were anxiously awaiting the announcement of the Supreme Court's decision in National Federation of Independent Business v. Sebelius. This case challenged the constitutionality of the ACA's requirement that all Americans maintain minimum essential health coverage or pay a tax penalty. This provision, still commonly referred to as the "individual mandate," is a key prong of the shared responsibility policy underlying the ACA and, although some argue a tepid mandate in its final form, remains a prerequisite for health insurers conceding to offer guaranteed issue, ACA-compliant coverage to individuals and small groups.

With National Federal of Independent Business upholding the constitutionality of the individual mandate and, thus, allowing the individual mandate to remain intact, one might have assumed that the ACA was immune to further court challenges that could undermine the ACA's foundation and effectiveness in reforming the individual health insurance market. However, if the Supreme Court would have decided King v. Burwell in favor of the plaintiffs — which it did not — the outcome would have weakened the individual mandate considerably in those 34 states, which have not adopted their own health insurance exchange and could nullify the effectiveness of the ACA's employer pay-or-play provisions, often referred to as the "employer mandate," in those states as well.

How Did We Get Here?

To facilitate a more transparent, user-friendly marketplace for the sale of health insurance to consumers, the ACA authorizes the establishment of health insurance exchanges through which standard types of benefit plans are sold and consumers, subject to qualifying income levels, become entitled to federal tax subsidies to reduce their health insurance premiums and out-of-pocket spending. These federal subsidies are available to consumers only when they purchase their health insurance policies through an ACA-exchange. As meticulous as the ACA may be in certain places, the ACA, arguably, only authorized the availability of tax subsidies to low and moderate income consumers who purchase health insurance coverage "through an Exchange established by the State." This phrase — "through an Exchange established by the State" — is repeated nine times throughout the ACA.

Only 15 states and the District of Columbia established their own health insurance exchange. In the remaining 34 states, the exchange is operated by the federal government and, in certain instances, by the federal government in partnership with the state. Therefore, argued the plaintiffs in King v. Burwell and similar cases, ACA subsidies should not be permitted to reduce the cost of health insurance purchased through exchanges that are run by the federal government. Furthermore, the plaintiffs contend the IRS, which by regulation extended federal subsidies to health insurance purchased through both state and federally run exchanges, did not have the administrative authority to change the express statutory language of the ACA to broaden the availability of law's subsidies.

The D.C. Circuit and an Oklahoma federal district court ruled that the ACA clearly and unambiguously authorized subsidies only when health insurance is purchased on state-based exchanges. The D.C. Circuit Court ruling was announced earlier on the same day that the Fourth Circuit, in King v. Burwell, sided with the Obama administration in what the Fourth Circuit characterized as a "close call," permitting the federal government to extend subsidies to consumers purchasing health insurance through federally run exchanges. The Fourth Circuit viewed the ACA as "ambiguous and subject to at least two different interpretations." Therefore, under the doctrine established in Chevron USA Inc. v. Natural Resources Defense Council Inc., when there is an ambiguous statute, courts are permitted to defer to the interpretation of a president's administration. In this instance, such interpretation is reflected in the IRS' regulations extending federal tax subsidies to all consumers, irrespective of whether they purchased their health insurance through a state-based or federally run exchange.

Virginia does not operate its own exchange but relies on a federally run exchange. David King and three other Virginia residents in King v. Burwell raised the same basic arguments that prevailed in the prior federal cases. We learned, however, that the four plaintiffs did not want to purchase comprehensive health insurance of the type required by the ACA for most Americans. The King plaintiffs also believed they would be exempt from the individual mandate because such insurance coverage, if not subsidized for them, would be too expensive. In King, the plaintiffs contended that, because they received subsidies to which they should not have been entitled under the ACA, they lost the ability to qualify for the unaffordability exception to the individual mandate. The unaffordability exception applies when the cheapest available benefit plan offered on an ACA exchange costs greater than 8 percent of a consumer's income.

The relief the plaintiffs sought was to eliminate their eligibility for federal tax subsidies for health insurance that could be purchased on Virginia's federally run exchange which, in turn, would have reinstated plaintiffs' eligibility for the unaffordability exception to the individual mandate. In the end, if the plaintiffs had prevailed, they would neither be required to purchase ACA-compliant health insurance nor be required to pay an individual mandate tax penalty.

In effect, King v. Burwell's question of statutory construction (i.e., whether federal subsidies are available to reduce the cost of health insurance sold through a federally run exchange) had intersected with the application of the individual mandate, already determined to be constitutional under National Federation of Business, for residents of the 34 states that do not run their own exchange.

What Was At Stake in King v. Burwell?

An estimated 6.4 million Americans, residing in states with federally run exchanges, stood to lose federal subsidies that help make their health insurance more affordable if the Supreme Court had ruled in favor of the plaintiffs in King v. Burwell. With the loss of affordable health insurance options in these 34 states (exclusive of Medicaid for those eligible), it seemed likely that the percent of uninsured Americans — 11.5 percent, or 36 million people last year — could have begun to creep back toward pre-ACA levels.

In addition to the human toll, if the Supreme Court had embraced the arguments as put forward by the

plaintiffs, the individual mandate could be rendered moot for Americans with modest incomes residing in states with federally run exchanges. Generally, the individual mandate requires certain Americans to pay a tax penalty if they fail to purchase qualifying health insurance when that insurance is affordable. With unsubsidized health insurance now unaffordable in their states (i.e., due to the claimed unavailability of ACA subsidies), many more Americans would no longer have faced a tax penalty for failing to purchase health insurance. Typically, those opting out of coverage would have been the young and healthy. Their premiums are counted on most by health insurers participating in the ACA exchanges to avoid a death spiral created when a disproportionate number of the sickest and costliest individuals enroll in health insurance which, inevitably, will lead to dramatic rises in insurance premiums for those remaining in the insurance market.

Furthermore, in states with federally run exchanges, the employer mandate would seem to have become meaningless. The employer mandate imposes a tax on large employers (typically with 50 or more full-time employees) that fail to offer their full-time employees any health insurance at all or that offer their full-time employees health insurance that is considered substandard or unaffordable under ACA's rules.

In either case, to be subject to the mandate's tax penalty, the offending employer must have at least one full-time employee who purchases health insurance through an ACA exchange using federal tax subsidies. That is, consistent with the ACA's shared responsibility philosophy, the employer becomes liable for the mandate's tax penalty only after the federal government has incurred liability for the federal tax subsidy extended to the employee offered no or inadequate health insurance from his or her employer.

Without the risk that the federal government would be paying subsidies to employees residing in federal exchange states following a hypothetical decision for the plaintiffs in King v. Burwell, large employers in these states which, willingly or unwittingly, violate the ACA's employer rules, seem to avoid financial responsibility for the tax penalty otherwise due. Perhaps such employers would make rationale business decisions to scale back their health insurance offerings absent an effective mandate. Such decisions, if pervasive, could result in more employed individuals searching for quality and affordable health insurance coverage for themselves and their families that would no longer be subsidized through the federally run exchange in their state or available from some of their employers. These circumstances, over time, could have contributed to increasing numbers of uninsured and underinsured Americans in the federal exchange states.

Although these considerations may not have been prevalent among the nation's largest of businesses or those who work for them, they could have been practical considerations for businesses whose employee count is closer to the threshold of 50 full-time employees that constitutes a large employer for ACA's employer mandate.

What Did the Supreme Court Decide in King v. Burwell?

The majority decision in King v. Burwell, authored by Chief Justice G. Roberts Jr., seems to have rejected the notion that the ACA, in its entirety (at least) is ambiguous with respect to the availability of federal subsidies to "any 'applicable taxpayer'" who would be entitled to such subsidies to defray the costs of health insurance purchased on an ACA exchange. It seems that the Supreme Court believes that the ACA's unambiguous intention is to improve the individual health insurance market, across all of the U.S., by implementing three fundamental reforms: (1) guaranteed issue coverage required to be offered by health insurers; (2) a mandate for individuals to purchase health insurance coverage or pay a tax penalty; and (3) the availability of government subsidies to make health insurance more affordable and to incentivize individuals to purchase the coverage in lieu of paying the penalty.

In addressing the intentions of the ACA, the Supreme Court recounted that, previous efforts to reform

the health insurance market have failed dramatically without both the individual mandate and tax subsidies. The Supreme Court remarked that the combination of losing tax credits and losing an "effective coverage requirement" could push a state's individual insurance market into a "death spiral." Furthermore, one study, noted the Supreme Court predicted that "premiums would increase by 47 percent and enrollment would decrease by 70 percent" if federal subsidies were to be eliminated in states with federally run exchanges.

The bottom line: The Supreme Court determined that the ACA, as a whole, had a consistent intent, even if ambiguous provisions and inartful drafting can be found within the statute. In closing, the majority opinion held that:

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress' plan, and that is the reading we adopt.

Although the reasoning of the Fourth Circuit in King v. Burwell (i.e., that the federal subsidies could be upheld on the basis of the Chevron doctrine) was dismissed by the Supreme Court, the judgment of the Fourth Circuit was affirmed by a 6-3 decision, with Justice Anthony Kennedy and Chief Justice Roberts voting with the majority.

The Supreme Court's decision in King v. Burwell serves to preserve the individual health insurance market in those 34 states that are not running their own exchanges — an outcome which seems to be intended by the Supreme Court's majority. Further, the Supreme Court's decision fends off a weakening of the individual mandate and complete stifling of the employer mandate in federal exchange states, which would have dealt a serious blow to the ACA's key underpinnings in those states. Any changes to the ACA that would so significantly affect the law's fundamental tenets are now left to be decided by the Congress and Obama administration.

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