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On the Verge of Melt-Down: Core of ACA at Risk and Remedial Options Scant If Supreme Court Rules Against Government in *King v. Burwell*

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Important dates for the ACA:

- On *November 7, 2014*, the Supreme Court took what appears to be an unusual step in accepting review of *King v. Burwell* without the necessity or the benefit of a clear split on the outcome of the issues the case raises among the Circuit Courts of Appeal.
- On *December 22, 2014*, the Court set *March 4, 2015* as the date for oral argument on the case. The Court's decision will resolve whether federal tax subsidies are available for eligible residents in the 34 States[1] that have opted not to establish their own exchanges.
- After *January 1, 2015*, federal funding for States to establish exchanges is gone. When tax returns are due in 2015, reconciliations of tax subsidies already granted to exchange enrollees are to be reconciled. Is this the perfect storm for the Affordable Care Act (the ACA)?

Speculation surrounds the Supreme Court's motivation in allowing *King v. Burwell* to "jump the line," as it were. And the stakes riding on the outcome are substantial: as has been widely observed, a decision against the government could, without exaggeration, largely gut the ACA in the 34 States that have chosen not to establish their own exchanges. As of now approximately 4 million individuals have enrolled through the federally facilitated exchanges in those states.

Below we summarize the key issue in the case, and focus, not only on the well-documented impact of a finding against the government on those 4 million (and growing number of) Americans, but on what steps could be taken to ameliorate such an outcome and the likelihood that such steps will be taken. Spoiler alert: with federal support for establishing State exchanges no longer available after January 1, 2015, the prospect for States that have so far refused to establish their own exchange to consider doing so looks bleak.

King v. Burwell and *Halbig v. Burwell* are the key cases advancing through the federal courts that address the question of whether federal tax subsidies are available in States that have chosen not to establish their own exchanges and where, therefore, the federal government has done so. Simply described, the cases revolve around interpreting the meaning of the ACA provision establishing the tax subsidy and two other provisions that bear (or not, depending on one's judicial philosophy – see below) on the subsidy provision. The "subsidy provision" states that, through the Internal Revenue Service (IRS), federal tax subsidies are available for persons who obtain coverage "through an Exchange established by the State" and whose income is too great for them to qualify for Medicaid but does not exceed 400% of the federal poverty level. A separate ACA provision requires the States, by 2014, to establish their own exchanges. The third, yet again a separate provision, states, however, that, if a State opts not to follow that requirement, then the federal Department of Health and Human Services may establish the exchange for that State. As noted above, currently 34 States have opted for not setting up their own exchanges.

The IRS has chosen to interpret the "subsidy provision" to allow for federal tax subsidies for coverage obtained through the federal exchanges as well as through exchanges established by the 16 States and the District of Columbia. The challenge to the IRS interpretation is based on a strict reading of the "subsidy provision" without reference to the other two provisions cited above, or for that matter to any other section of the ACA. The

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argument is that subsidies are available only for exchange policies offered in the 16 States and the District of Columbia but not in the other 34, and that IRS allowance for subsidies in all of the States goes beyond its statutory authority.

The legal issue in play turns on application of the so-called *Chevron* doctrine, which established a two step process for a court to determine how federal legislation delegating authority to administrative agencies should be interpreted. The first step is ascertaining whether Congress has directly addressed the exact question at issue. If so, then a reviewing court is to give effect to that unambiguous Congressional intent. If a court finds ambiguity, or if the legislation is silent on the issue, then greater discretion is given to the agency in interpreting the language. A three-judge panel of the District of Columbia Circuit Court of Appeals, in *Halbig v. Burwell*, found the language of the "subsidy provision" to be unambiguous (an exchange established by a State is one established by a State and not one established by the federal government), and therefore concluded that the IRS did not have authority to apply the provision as broadly as it did. In doing so it repudiated an argument that the three provisions described above, as well as other portions of the ACA, need to be read together to understand what Congress meant by the language of the "subsidy provision," and that no one provision could be taken in isolation. However, the full Circuit Court of Appeals agreed to hear the case *en banc*, that is, by the full court and not just a three-judge panel.

The Fourth Circuit Court of Appeals came to the opposite conclusion in *King v. Burwell*, on the same day, finding that, in order to understand what Congress meant by the "subsidy provision," the provision needs to be read together with the other two provisions referenced above as well as the integrated structure of the ACA (Congress would have understood the impact of not making subsidies available for coverage obtained through federally facilitated exchanges, even if it expected all or most of the States to set up exchanges without federal facilitation). That Court therefore gave deference to the IRS and supported its interpretation. Even without a full Circuit Court decision in *Halbig v. Burwell*, the Supreme Court has decided to take up review of *King v Burwell*.

A decision against the government in the case would, as noted above, deny federal tax subsidies to persons otherwise eligible to use them to buy policies on the exchanges in the 34 affected States. Further, without subsidies many of the residents of those States would not be able to afford to purchase policies. Therefore they would be exempted from the ACA's individual mandate. And because employers in those States would not have any employees accessing exchange products using federal subsidies, they would not be subject to the ACA's employer mandate. Finally, the policies that were offered on exchanges in those 34 States could be actuarially skewed and subject to unstable underwriting because of the much smaller population likely to obtain policies through the exchanges.

Since the Supreme Court is not obliged to explain why it asserted jurisdiction in the case when it did, there is of course speculation as to its motives, whether benign (wishing to resolve this issue as soon as possible because of the stakes involved) or less so (a majority of the Court already has a predetermined desired outcome, which would not favor the government). Without speculating on the motivation of the Justices, it is worth noting that the core issue raised in this case, interpreting legislative language, is one that has generated a deep philosophical split on the Court. For example the Court's dominating judicial philosopher, Justice Scalia, eschews reliance on legislative history in any form (Committee reports, statements on the floor, etc.) to ascertain Congressional intent, and looks only to the "plain language" of what Congress wrote. Under such an approach, the government's position is tenuous. Whether he will sway four other Justices on an issue of such significance may be known as early as June. Similarly whether this becomes another case like *National Federation of Independent Business v. Sebelius*, in which the Chief Justice crafts a compromise that saves the baby while perhaps throwing out the bathwater and the tub as well, also remains to be seen.

While the immediate problems that arise with a decision unfavorable to the government are evident, as described above, a relatively unexplored question is whether and how an adverse decision can be remediated. The answer seems to be: not at all.

Potential fixes fall into four categories:

- *First*, Congress could clear up the ambiguity by amending the "subsidy provision" to extend the subsidies to federally facilitated exchanges. Likelihood: close to zero with the new Congress.

- *Second*, Congress could extend past January 1 the availability of federal funds to support the bulk of the costs needed to underwrite State development of exchanges. Likelihood: maybe a little more than zero if States without exchanges lobby for the extension, but that seems improbable and would be met with strong resistance from the majority of the Congress even if such efforts were made.
- *Third*, States that have hitherto chosen not to establish their own exchanges might reconsider and proceed to do so in light of the potential harm of denying their residents access to affordable policies. Likelihood: minimal. Without an extension of federal funds there is no financial incentive for the States to do so, and even when federal funds were available they chose not to do so anyway, in part for ideological reasons and in part because federal funds would not have covered the full cost of the development and implementation of the exchanges. This is not like the situation with expanding Medicaid coverage, where, when the Supreme Court gave the States the option of whether to do so or not, many chose not to, but a number of these States have gradually come back to the table on this issue. While there were a number of reasons for that reversal among some of the States, probably the two principal ones were the availability of significant federal funding for the expansion (100% declining to 90% of the cost) and recognition that expansion could be used to experiment with more ideologically compatible reforms to the Medicaid program (use of managed care models and the willingness of CMS to support those approaches). So one should not count on the States to see strong reason for coming around on the exchanges.
- *Fourth*, in light of having no additional federal financial support for exchange start-up costs, States could establish a legal exchange but still rely on federal support to run it. In essence, States could create State-established exchange entities and contract with the federal government, including healthcare.gov, to continue providing services that, notwithstanding a simple legal maneuver, have already been provided by the federal government for the past two years. Analysts have noted that, while this approach could serve as a legal workaround, the State political leadership would still have to agree to such a maneuver in order to preserve tax subsidies for exchange coverage.

Consequently, a Court decision adverse to the government will be, as described above, a perfect storm for the ACA in 34 States: no federal funding for the exchanges in those States after January 1 means a near certainty that none of them will move in the direction of setting their own up; without federal tax subsidies the individual mandate would not be in effect for those residents who could not afford coverage without them; the employer mandate would then not be in effect for that population; and adverse selection would force premiums up for those who did access exchange coverage. Remarkable to think that a single Justice could have such an impact on national policy. But then again, there was *Bush v. Gore.*

If you have any questions about this topic, please contact the author(s) or your principal Mintz Levin attorney.

Endnotes

[1] This number of 34 is commonly cited. However, one State, Utah, is running the small business marketplace while the federal government is running the individual marketplace. Further, DC is a State-run exchange, but technically does not count as a State. The current Kaiser Family Foundation numbers, which may be the most reliable and are found at (http://kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/ , identify: 27 federally-facilitated Marketplaces and 7 State-Partnerships, or the 34 States that would be "penalized" if the Supreme Court in *King v. Burwell* finds for the plaintiff. An interesting question is whether the three partnership States (Oregon, NM, NV) are considered federal or State for this purpose. It appears that they are considered States but that might become debatable.

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