ACA Federal Subsidies: What Does The Text Say?

And What Could The U.S. Supreme Court Ruling Mean to Their Future?

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The Supreme Court of the United States will soon decide whether the Internal Revenue Service (IRS) may permissibly promulgate regulations to extend tax-credit subsidies to health insurance coverage purchased by individuals through exchanges established by the federal government under section 1321 of the Patient Protection and Affordable Care Act (ACA).

The Issue Before the Fourth Circuit

In *King v. Burell*, 759 F.3d 358 (4th Cir. 2014), a group of Virginians determined they did not wish to purchase health insurance and wanted to be exempt from the individual mandate, which generally requires all Americans to purchase health insurance. Virginia's exchange was established by the federal government, not by the Commonwealth of Virginia. The plaintiffs challenged an IRS regulation that granted premium tax credits to individuals who purchased health insurance either on a state-run *or* federally facilitated insurance "exchange." These tax credits enabled these individuals to afford health insurance under the law and prevented their exemption from the individual mandate. The Fourth Circuit addressed whether the ACA's plain language, statutory conflicts or legislative history supported the IRS's approach and found that the premium tax credit provision of the ACA permitted the IRS's interpretation.

Section 36B of the Internal Revenue Code, which was enacted as part of the ACA, permits federal tax-credit subsidies to individuals who purchase health insurance coverage through an "Exchange established by the state under section 1311" of the ACA. The subsidy is the sum of the "monthly premium assistance amounts" (which are partially based on the monthly premium paid by the taxpayer for his/her health plan) for all months in which the taxpayer is enrolled in a health plan through an "Exchange established by the state under section 1311."

Section 1311 of the ACA states that "[e]ach state shall … establish an American Health Benefit Exchange." However, section 1321 clarifies that a state may "elect" to establish an exchange. If a state elects not to establish an exchange, "the Secretary [of HHS] shall … establish and operate such exchange within the state."

The question becomes: are individuals who purchase health insurance on an exchange established not by a state, but rather, on behalf of the state by the federal government, entitled to a tax credit? Currently 34 states relied on the federal government to establish federally-facilitated exchanges.

In dispute is the statutory language which states "Exchange established by the state" and can be read, in its strictest sense, to preclude federal subsidies to individuals who purchase health insurance on a federally-facilitated exchange, *i.e.*, established by the federal government.

When analyzing the text of a law, a court applies the *Chevron* test. The first step requires a court to consider the "plain meaning" of a statute and determine whether the

regulation at issue responds to it. If it does, that is the end of the inquiry, and the regulation stands. However, if the statute is susceptible to multiple interpretations, the court moves to step two—deferring to the agency if its regulation is based on a permissible construction of the statute.

The Virginia plaintiffs argued the statutory language simply "says what it says, and that it clearly mentions state-run Exchanges under §1311." If Congress meant to include federally-run exchanges, it would not have used the language enacted. The Fourth Circuit agreed that, standing alone, the language "Exchange established by the state" indicated that federal subsidies are limited to those who purchase health insurance on a state-run exchange.

However, in considering the overall context of the language and various other references to "exchange" in the ACA, the court found that the language was ambiguous and a permissible construction would encompass a federally-facilitated exchange. For example, §1321(c) provides that the Secretary shall establish and operate "such Exchange" within the state. Therefore, a plausible construction of the phrase "established by the state" would be that HHS steps in and creates an Exchange *on behalf of the state*, where necessary. In such a case, HHS's actions would be included in the language "established by the state."

Accordingly, after concluding that the legislative history did not shed light on the issue, the court deferred to the agency on the basis that its reading and interpretation of the statute was permissible.

What Happens If the Supreme Court Strikes Down the IRS Regulation?

It is complicated to predict what might happen if the Supreme Court reverses and strikes down the IRS regulation. If one were to listen to many in the political sphere, we would be left with the impression that a reversal would mean the death knell for the ACA. This is likely an exaggeration.

What is certain, however, is that without further congressional action, a significant aspect of the ACA would no longer apply in 34 states. Primarily, this would mean millions of Americans in those 34 states would lose their ability to receive a subsidy to help defray the cost of health insurance. It is unclear how many of these individuals would then no longer be able to afford their health insurance. Depending upon the parameters of the Supreme Court's ruling, the impact of this ruling on individuals could also be immediate or delayed until the next open enrollment period to ensure some stability in the marketplace. There is also a question of whether subsidies already paid by the ACA would be recouped from individuals improperly receiving them in 2014. While these issues remain unresolved, they will nevertheless have far reaching implications.

A Supreme Court reversal would also impact employers and their employees. Many employers have struggled to fully understand and comply with the ACA's requirement to offer "affordable" coverage. This calculation of affordability and the determination of when penalties would be assessed depended in large part upon whether at least one of their employees qualified for a federal subsidy. A reversal could mean employers will have less of a worry over potential penalties for not offering "affordable" coverage and, therefore, would have less incentive to ensure "affordable" coverage was available to their employees. In such a situation, it will be interesting to see which states take a proactive posture and reconsider implementing a state-run exchange to ensure access to federal subsidies for their residents.

What Might Be Done If the Supreme Court Strikes Down the IRS Regulation?

With Republicans now firmly in control of the House of Representatives and Senate, there is certain to be tension with the Obama administration over any reforms to the ACA. Any effort by Republicans to unilaterally tinker with the ACA will surely be met by a Presidential veto. Without a two-thirds majority, Republicans will not be able to override a veto without the help of Congressional Democrats. If the Supreme Court strikes the regulation, the more likely scenario will be that Republicans will simply do nothing and let the subsidy disappear for those people residing in states with a federally-facilitated exchange. Although this course of action would be met with approval by those against the ACA, it does not come without significant political risk for the estimated millions of people who will lose their subsidies, not to mention the added burden on the states' health-care systems as a result of those people becoming uninsured due to the prohibitive cost of obtaining private insurance.

Being eternal optimists, we would posit, in the alternative, that a Supreme Court ruling striking down these subsidies may create the conditions necessary for legislative compromise, which could lead to the passage of reform to correct some of the less popular aspects of the law. One option being discussed is a shift to a more market-oriented system whereby Americans would have access to a broader array of health insurance plans rather than being limited by the government-mandated plans. Some agree with Larry Kudlow's statement that, "As a 60-something, relatively healthy person, I don't want lactation and maternity services, abortion services, speech therapy, mammograms, fertility treatment or Viagra … So why do I have to tear up my existing health-care plan, and then buy a plan with far more expensive premiums and deductibles, and with services I don't need or want?" Kudlow's Corner, Kudlow: Liberal Entitlement-State Dream is Crumbling, Nov.

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1, 2013, www.cnbc.com/id/101164217#. Perhaps the solution to higher health-care premiums is not federal mandates and subsidies, but freely permitting health insurance companies to sell their policies across state lines, thereby increasing competition in the health insurance market. Whatever form it might take, the hope is that the need to compromise might breed creative solutions to a system that even President Obama admits can be improved.

A Cautious Prediction

The future of the ACA rests again in the hands of the Supreme Court. Will Chief Justice Roberts, who was rumored to have initially voted to strike down the individual mandate but changed his vote because the conservative Justices sought to strike down the entire law, have a change of heart and side with his conservative colleagues to strike down subsidies for those living in federally-facilitated exchange states? Or, will he decide that it is not as simple as strictly interpreting the ACA's text, because limiting federal subsidies to individuals purchasing insurance on a state-run exchange will violate the spirit and purpose of the entire law? And, do not overlook Justice Antonin Scalia, whose conservative approach to statutory construction recognizes that the overall context of the problematic language must be considered so as not to thwart the purpose of a statute. Bottom line: the future of the ACA will most probably lie in the hands of a single Justice, who may force Congress and the White House to finally work together to find common ground on health-care reform.

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