



Insight

Navigating the King v. Burwell Fallout: A Roadmap

BRITTANY LA COUTURE | JUNE 16, 2015

If the Supreme Court rules for the plaintiffs in *King v. Burwell*, there will be widespread confusion. This is because there are five major actors involved—the judiciary, administration, Congress, states, and insurers—each with their own set of decisions to make, each of which could change the American health care system.

The Judiciary

Assuming the [Supreme Court](#) sides with the plaintiffs and finds that there is no legislative authorization for the Affordable Care Act's (ACA) premium tax subsidies to be sold through federal exchanges, the Court's actual opinion may take several forms.

Option 1: The Court may hold that its opinion is effective immediately, or even retroactively, requiring the IRS to “claw back” the subsidies it has already paid out to Americans who would otherwise be unable to afford their current health insurance plans. The administration is unlikely to try to enforce such a claw back measure, there is no legal obligation for the IRS to “claw back” payments it has made, and no one would have standing to challenge that decision, so this part of the decision would essentially be unenforceable. However, this ruling *would* mean that no new subsidies may be paid out and many Americans would lose their coverage at the end of the month.

Option 2: The Court may also grant a stay of their opinion, which usually last from 30-90 days. This means that the Court's opinion would not become legally effective for some time. This will give the other actors in this case time to react and ease the transition for the roughly [6.6 million](#) people who would lose subsidies. If the Court rules for *King*, a stay like this is very likely to be granted.

Option 3: The Court has another option akin to the stay described above. The Court could find that the plaintiffs in *King* have the better argument, but that there must be further fact-finding on some issue or another before the decision may become effective. The case will have to be remanded to the district level and will begin the slow process of making its way back to the Supreme Court as both parties continue to fight for a moral victory. The issues most likely to beg further review in this case have to do with scope and the plaintiffs' standing. The administration has argued at the district level that the plaintiffs do not have proper standing to bring the case; this issue has satisfactorily been settled in the plaintiffs' favor in three courts, but some of the liberal Justices seemed interested in this question during oral arguments. The other issue that may need resolution through further fact finding is the proper scope of the ruling: should it apply only to the four named plaintiffs? Should it apply only to the state of Virginia? To 14 states, or 36, 38, or 49?[\[1\]](#) The Court may recognize this ambiguity and request further fact-finding. If this is not done at the request of the Court, it will almost certainly happen as a matter of course through subsequent litigation.

The Administration

If the Court rules for *King*, the administration will be facing conflicting incentives.

Option 1: the administration may be tempted to try to preserve the president's signature domestic achievement by following through on an early implied threat that the administration would continue paying the subsidies even if the court prohibits it. Such action is not entirely without precedent. What is more likely is that the administration will attempt to limit the scope of the ruling to the four plaintiffs named in the case. Eventually this action would be challenged by other *King*-like plaintiffs, but it would significantly delay the Court's rule from becoming effective law.

Option 2: the administration can change its operating standards and simply "deem" federally facilitated exchange (FFE) states as having established state exchanges. This will be most problematic in states where no cooperative action has been taken whatsoever by state legislators. There are fourteen states that explicitly stated they are not running state based exchanges (SBEs), yet they perform some ACA mandated function, such as plan management (which most states did before the ACA passed anyway). Another seven hybrid states could more plausibly be "deemed" to be SBEs—even though they are run through healthcare.gov—because the state proactively sought to engage in setting up and establishing an exchange.

Option 3: the Department of Health and Human Services (HHS) also has the option of "streamlining" the establishment process by altering the Blueprint requirements to make them relaxed enough for any state action to be considered "establishment."

Because of the timing issues involved in any of the above approaches, the administration would have to make these changes without any notice and comment period. The regulations would likely be challenged for this reason, or based on the fact that the exchanges were not established by the statutory deadline, but either way it would buy several months before the impact of the Court's ruling is felt. However, the administration may not want to delay the impact.

Option 4: HHS could attempt to contract with states to continue running their exchanges as an agent of the state, therefore making it an SBE without realizing any actual changes in the way the exchanges are run. This action would, however, require cooperation from state governments.

Option 5: The administration could follow through on what it has been telling the public and do nothing to try to save the law. This approach could help preserve the ACA in the long term by placing responsibility for designing a solution squarely on Republicans, and using any problems that arise in the interim as fuel for a Democratic presidential campaign against the Republican alternative.

Option 6: The administration also has the legal authority to make premium tax subsidy payments at reasonable intervals other than monthly. Because of this, the IRS may opt to wait until the last day before the Court's ruling goes into effect (this will be dependent on whether the Court grants a stay), and at that time instead choose to make payments quarterly rather than monthly. This would enable them to pay out tax credits several months in advance, which would also help to ease the transition into a post-*King* landscape.

Congress

The Republican-controlled Congress has several options before it as well. What the two chambers ultimately

agree on doing will be a well-negotiated attempt to ease a transition away from the ACA, without conceding too much ground to the underlying law.

Option 1: Congress could pass the president's "one page fix" which would amend the language of the ACA, making the administration's actions legal. This approach would be a tough sell for many congressional Republicans and many voters for whom a full repeal of the ACA remains a primary legislative objective.

Option 2: Another approach would be a bridge plan that would continue to offer some form of tax subsidy or COBRA extension in all states for some time—such as until 2017—and would include a phase-out period. This type of plan would also involve reducing or eliminating many of the mandates imposed on individuals, employers, and insurers by the ACA.

Option 3: A more permanent alternative to the current subsidy system is another available option. One frequently mentioned version of this plan would give block grants to states that want more responsibility for the health of their citizens, or establish a target tax credit for residents of states that do not wish to take on the responsibility of managing a block grant. Such a proposal would likely also include additional changes to the ACA's mandates and regulations.

Option 4: Congress could also do nothing. This approach would force Americans in the individual market, whether on- or off-exchange, to feel the full effects of the sloppy drafting of the ACA while it is self-destructing. This would also cause huge upheavals in the insurance market and cost millions of people their insurance coverage. However, politically, this is not a realistic option for Congress.

State Governments

State leaders will be assigned some responsibility for whatever results from the *King* ruling, and so they will have to plan for how to deal with the fallout.

Option 1: The first option for state governments is to do nothing. While this option is a political non-starter for other government entities, it is the reaction we are most likely to see in impacted states for three reasons:

- 1) by doing nothing state governments may seem as if they are fighting the implementation of the still unpopular ACA;
- 2) by refusing to take any action, state leaders can [free individuals and employers](#) in their states from the ACA's mandates and penalties; and
- 3) many states will be legally or logistically unable to take action anyway. This is because a handful of state legislatures will be out of session for the summer and special sessions may be difficult to organize. Furthermore, 18 states have Health Care Freedom Acts, which prevent governors from taking steps to implement the ACA without the support of the legislature, or Health Care Freedom Amendments, which will actually limit legislative action as well, unless an amendment to the state constitution can be passed. So at least a plurality of states are likely to choose or be forced onto this path.

Option 2: States may also have the option of establishing their own exchanges in order to secure the premium subsidies for their citizens. In addition to the logistical obstacles described above, there are also statutory obstacles to overcome. For starters, the January 1, 2014 deadline by which states must have established their exchanges has already passed. With it, the deadline for federal funding for startup costs has lapsed, eliminating

the possibility of federal financial support of the states establishing exchanges.

Option 3: States also have the option of contracting with other states to run a state-state partnership exchange utilizing an exchange platform already developed by another state. The ACA contemplates these types of arrangements, which would make this response the most legally sound option available in many states. Some have even suggested that states may be able to contract with CMS to operate a SBE on their behalf using the existing FFE.

Insurers

Insurers' options are relatively limited because they only have the power to respond to the other actors' decisions. What makes matters more complicated is that their rate filings for the 2016 plan year have already been submitted. Insurers will be unable to make any meaningful changes to their business practices until 2017 at the earliest. But in the immediate future they still have some options:

Option 1: Insurers are under statutory deadlines requiring them to inform plan enrollees of any intent to cancel a plan by July 1. Because insurers have no subsequent obligation to actually cancel those plans, it is possible—perhaps likely—that many insurers will send out pre-emptive cancellation notices as a precaution. This action would give insurers the option to leave the exchanges if they so choose.

Option 2: Insurers can continue offering their current insurance products with the knowledge that they may not receive a large portion of the premium in the hope of maintaining enrollment numbers until a government entity restores some form of premium support.

Option 3: Insurers might focus on modifying their plan design to offer more catastrophic plans, which would enable more of those losing subsidies to remain insured. Even without the individual mandate in place, other “Essential Health Benefit” mandates will remain in effect, driving up the cost of insurance, so catastrophic plans will be an important stop-gap measure while the policymakers decide on what they are doing and the market adjusts.

Conclusion

There are many entities with the power to temper or exacerbate both the positive and negative effects of a ruling for the plaintiffs in *King*. The political and policy considerations will be at odds with one another, and the results are, at this point, unpredictable. The best anyone can do is be informed about the potential fallout of the decision, and have a roadmap to help them navigate it.