



King v. Burwell & a Proposed Legislative Solution:

A White Paper Prepared by eHealth, Inc. and Thomas Barker of Foley Hoag LLP

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Introduction

On March 4, 2015 the Supreme Court of the United States is scheduled to hear oral arguments in the case of *King v. Burwell*. At issue in the case is whether or not the Department of Treasury, through the Internal Revenue Service, exceeded the authority Congress granted it in issuing regulations permitting individuals enrolled in the federally-facilitated health insurance exchange – popularly known as Healthcare.gov – to claim federal subsidies toward the purchase of qualified health plans. A decision in the case is expected later this spring and a finding for the plaintiffs (those arguing the regulations are illegal) may have a dramatic impact on the future of the Affordable Care Act (ACA), on the national health insurance market, and on the lives of millions of consumers.

The purpose of this paper is to review the case and its potential impact on American health insurance consumers and to propose a legislative solution, in the event of a finding for the plaintiffs, which will satisfy the needs of consumers while facilitating a smooth transition to a post-*King* marketplace.

A Summary of the Issues in *King v. Burwell*

The plaintiffs in *King v. Burwell* have disputed the legal authority of the federally-facilitated health insurance exchange (Healthcare.gov) to authorize the disbursal of premium tax credits – federal subsidies – to persons qualifying for them under the ACA.

Specifically at issue in *King v. Burwell* are several references throughout the text of the Affordable Care Act to “Exchange[s] established by the State.” In particular, section 1401 of the ACA adds new section 36B to the Internal Revenue Code, establishing standards for individuals to receive subsidies or tax credits for enrolling in qualified health plans in an exchange. Under the standards set forth in section 36B, the subsidy amount entitled to an eligible individual is based, in part, on the monthly premium that individuals pay when enrolled in “an Exchange established by the State.”¹

The plaintiffs contend that based on a plain language interpretation of the ACA, individuals enrolled in coverage through Healthcare.gov as a federally-facilitated exchange (i.e., an exchange *not* established by a state) should not be entitled to a tax credit or subsidy. The IRS, however, when issuing regulations implementing this provision, interpreted the language of the statute broadly, making tax subsidies available to any individual enrolled in a qualified

¹ Internal Revenue Code of 1986 § 36B(c)(2)(A)

health plan “through an Exchange,” defined in regulation as an exchange established and operated by a State *or* the federal government.

The legal issue at play turns on the application of the so-called *Chevron* doctrine, which establishes a two-step process for courts 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.

If the Supreme Court in *King v. Burwell* finds that the legislative language in question is clear and that subsidies are only available for individuals enrolled in qualified health plans through state-run exchanges, then the Court is likely to find for the plaintiffs, overturning the IRS regulations permitting the disbursement of subsidies for persons enrolled in coverage through Healthcare.gov.

The Consumer Impact of a Decision for the Plaintiffs

While eHealth takes no position on the legal merits of the case, the disastrous impact for consumers of a decision for the plaintiffs in *King v. Burwell* is beyond dispute. As the nation’s first and largest private online health insurance marketplace, serving the needs of American health insurance consumers for more than 17 years, eHealth believes that a decision for the plaintiffs could lead to severe financial distress and the potential loss of coverage for millions of consumers, and a radical destabilization of the individual and family health insurance marketplace.

If the IRS regulations in dispute are invalidated, health insurance markets in the 37 states currently served by Healthcare.gov will likely enter a period of crisis. At some time following a decision for the plaintiffs in *King v. Burwell*, the IRS will need to stop issuing tax subsidies to consumers who enrolled in coverage through Healthcare.gov, likely triggering countless terminations of health insurance policies when individuals are unable to afford the increased monthly payments on their plans.

According to data [recently published](#) by the Department of Health and Human Services, more than 6.5 million Americans who enrolled in coverage through Healthcare.gov are currently receiving federal subsidies for 2015. The average individual subsidy recipient pays a net premium of \$105 per month for his or her coverage, and receives a subsidy of \$268 per month. If

these subsidies are taken away following a *King v. Burwell* decision, the average individual net premium would go from \$105 to \$373 per month, an increase of 255%.

As a result, a large percentage of these subsidized consumers may be expected to cancel their coverage as too costly. Furthermore, those who retain insurance are likely to be sicker than those who drop coverage, which will skew the risk pools and expose insurers to large, unanticipated losses. In turn, without a government solution, this may force insurers to significantly increase premiums in order to balance risks, which may create a self-reinforcing ascending spiral of costs that pushes the price of individual and family health insurance beyond the reach of most lower-income and middle-income Americans.

A Proposed Legislative Solution

Whether action is taken at the state or federal level, a quick and comprehensive solution will be required to address the needs of impacted consumers if the Supreme Court finds in favor of the plaintiffs in *King v. Burwell*.

Governors of the 37 states served by Healthcare.gov will, absent any legislative action at the federal level, be forced to choose between participating in a law many of them vehemently oppose (by setting up their own state-run exchange) or answering to hundreds of thousands of citizens who will no longer have access to affordable health insurance. Based on the experiences of states that have already gone through the process of establishing state-run exchanges, it is clear that such a process is time and resource intensive, and prone to failure.

As such, eHealth proposes legislative action at the federal level to both address the needs of consumers and relieve state governments of the burden and risk of building and launching their own state-run exchanges. eHealth's proposal would create a private market-driven solution to the problem, allowing states to leverage the technical competencies and marketplace expertise of existing web-based agents and brokers to establish and run state-recognized "private exchanges." Unlike their state counterparts, existing web-based agents and brokers already have the systems and knowledge in place to efficiently operate such exchanges.

eHealth's proposed solution would permit states to certify private exchanges both to enroll individuals in health plans and to assist individuals in applying for subsidies (in the form of premium tax credits and cost-sharing reductions) for health plans sold through the private exchange.

Key features of eHealth's proposed legislative solution would include the following:

- Within 90 days after the enactment of the law, states previously served by Healthcare.gov will notify the Secretary of Health and Human Services whether they intend (1) to certify one or more private exchanges for operation in the state; or (2) to operate an American Health Benefit Exchange alongside one or more private exchanges certified by the state. In either case, consumers would have the option of using a tax credit to which they are entitled while enrolling in a health plan through a private exchange.
- Private exchanges must be certified by the state in which they operate, must maintain a website for the purpose of enrolling individuals in health plans, must be capable of displaying plan rating information, and must demonstrate the ability to receive tax credit information for individuals enrolling in health plans.
- Under the legislation, the Secretary will be required to design a process to provide private exchanges with the minimum information necessary to enroll individuals in health plans, and to communicate to consumers eligibility for advanced premium tax credits and cost-sharing reductions.

In order for any effective solution to become a reality, compromise will be required on the part of both Democrats and Republicans. eHealth's proposed fix described above can easily be wrapped into a larger compromise bill acceptable to both parties. eHealth believes a necessary compromise may involve Republicans agreeing to re-establish access to subsidies in exchange for Democrats allowing the individual mandate to lapse.

When combined with an expansion of access to subsidies through private exchanges, loss of the individual mandate need not harm the enrollment objectives of the Affordable Care Act. eHealth believes that the certification of private exchanges, guaranteeing consumers access to the subsidies that make coverage affordable, will prove sufficient to maintain healthy enrollment levels.

In Closing

eHealth believes that legislation such as that described above would provide a commonsense, politically-viable, and cost-free solution to a post-*King* world, one that can serve the needs of consumers and state governments, and encourage stability in the health insurance market.

Licensed web-based agents and brokers like eHealth are already operating private exchanges today and enrolling subsidy-eligible consumers in states served by Healthcare.gov. Utilizing their expertise to enroll additional subsidy-eligible consumers on behalf of state authorities

would offer state governments a straightforward, no-cost answer to the challenges they will face, and ensure as seamless a transition as possible to a post-*King* marketplace.

In such a scenario, money allocated to fund government-run exchanges in the coming fiscal year could potentially be reduced, saving additional taxpayer dollars, or those funds could be re-allocated to expand government health insurance subsidies to more of the American middle class.

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