By David Leo, President of WMI® Mutual Insurance Company & WMI TPA®

King vs. Burwell ...

Just when we thought the Affordable Care Act (aka Obamacare) was settling in as the law of the land, a few anti-Obamacare individuals have raised an issue that has made us rethink the permanence of the law. On March 4, 2015, their challenge made it all the way to the U.S. Supreme Court in the case of *King v. Burwell* (Case No. 14-114). Although a ruling isn't expected until sometime this summer, this case has both sides holding their breath.

By way of background, the ACA amended the Internal Revenue Code to allow the federal government to pay financial subsidies to taxpayers who enroll in Obamacare health insurance marketplaces. These subsidies, which are available to taxpayers earning up to 400% of the federal poverty line (FPL) (*i.e.*, $47,080 for an individual and $97,000 for a family of four), are only available if the taxpayer purchases insurance through an official ACA marketplace. These marketplaces, called "exchanges," serve both individuals and small employers, and they are set up and run either by the individual states or, by default, the federal government. Therein lies the rub.

The specific statutory language at issue is found in §1311 and §1401 of the ACA. That language purports to limit subsidies to exchanges that are *established by [a] State* (emphasis mine). Despite what would appear to be clear textual language that limits subsidies to <u>states</u> that have established their own ACA exchanges, the IRS has broadly interpreted and applied that language, and has been paying subsidies to any taxpayer who enrolls in any ACA exchange, regardless of whether it is a state-run exchange or the federal healthcare.gov exchange. That, the plaintiffs argue, is contrary to the clear language of the statute, and is an overreach by the federal government.

The plaintiffs argue the words "established by the state" are clear and intentional. They believe the law was specifically written in that way to encourage and induce (but not coerce) states into setting up their own exchanges so their citizens could receive subsidies. More specifically, these plaintiffs challenged the U.S. Treasury Department's broad interpretation and administration of the law's subsidy provisions, because they believe it exceeds the clear statutory language of the ACA. As support, they rely on famed (albeit disgraced) ACA architect and MIT economist Jonathan Gruber, who is quoted in January 2012 as saying, "*What's important to remember politically about this is if you're a state and you don't set up an exchange, that means your citizens don't get their tax credits.*"

On the other side of the argument, the federal government contends the plaintiffs' overly restrictive reading of the four words at issue is merely a matter of semantics and legal linguistics. They believe such a literal reading would be out-of-context, unduly restrictive, coercive, and un-American (and possibly even unconstitutional). The administration argues the ACA was written and intended to treat all Americans equally, regardless of whether a particular citizen happened to live in a state that was operating its own ACA exchange or was relying on the federal exchange.

The effects of a Supreme Court decision in the plaintiffs' favor would be devastating to the ACA. According to recent reports from the U.S. Department of Health and Human Services, just over 11 million Americans are getting their insurance through a state or federal exchange. The *New York Times* estimates somewhere in the neighborhood of 7.5 million individuals purchase their insurance through the federal exchange and receive subsidies. (By some accounts, this figure is closer to 9 million.) According to other reports, 87% of those who purchase their health insurance through healthcare.gov receive premium subsidies worth an average of $268 per person per month. Those subsidies cover an average of 72% of the full cost of the insurance, so it's easy to see that without subsidies, most newly insured Obamacare beneficiaries won't be able to afford coverage, they'll drop it, and the system will collapse. This is why Obamacare supporters are crying "ACAgeddon" if those subsidies are suddenly ripped out from under those who purchase their insurance from healthcare.gov. (O.K., they're not using that term, but perhaps they should be.)

The federal government runs the ACA exchange for 36½ states. The WPMA states are split when it comes to state/federal exchanges: Montana relies on the federal government; Hawaii, Idaho and Washington run their own state exchanges; Utah is split (hence the ½ state) with the federal government running the individual exchange and the state running the small employer "SHOP" exchange; and New Mexico and Nevada are unclear, as they started out with state-based exchanges, but switched over to healthcare.gov when they couldn't make them work.

If the Supremes rule on behalf of the plaintiffs, thus prohibiting the IRS from paying subsidies and allowing tax credits to healthcare.gov purchasers, to characterize the *King vs. Burwell* fallout as chaos would be an understatement. Here's why …

the case that could destroy Obamacare

- **If the *New York Times* is right** that 7.5 million American's will lose their Obamacare subsidies, many of them will no longer be able to afford health insurance. Currently, these individuals are paying about $100 for something that costs about $400. Unless they are very sick or anticipating expensive medical treatment, it is highly unlikely they will be able to afford the additional $300 premium cost, so they will drop coverage. Of course, those who are older and sicker or require medical treatment will find a way to pay the formerly subsidized portion of the premium (it's simply a matter of math), and the dreaded insurance death spiral will begin. Adding insult to injury, not only would these individuals, who couldn't afford insurance in the first place, lose their subsidies, but also according to both the Urban Institute and the Robert Wood Johnson Foundation, the average annual premium in the federal exchange states would jump 35%! There can be no doubt that such a result would further exacerbate the insurance death spiral, which would devastate the ACA marketplaces and would certainly bleed into the non-ACA insurance markets in those states. [For those of you who aren't familiar with the term "death spiral," it refers to the cycle that occurs when only the sick purchase health insurance. This "adverse selection" leads to higher per person claim costs (since there is no longer premium coming in from individuals who don't incur claims), which, of course, leads to higher premium costs, which causes more "less sick" individuals to drop coverage, which leads to higher claim costs, which leads to higher premium costs, which causes even more "less sick" individuals to drop coverage, and so on.]
- **Some states** might try to quickly establish a state exchange in order to ensure continuity of subsidies to the citizens who would otherwise lose them, but the affordability and feasibility of that effort would be problematic. Moreover, seven state legislatures have passed restrictions on further compliance with the ACA without explicit approval by the legislature. Those states are Georgia, Missouri, Montana, New Hampshire, North Carolina, Utah and Wyoming. Therefore, if the Supreme Court rules that tax credits aren't available in the federal exchange states, those state legislatures would have to take formal legislative action or their citizens would lose their tax credits. Several states have already said they will not do this. Republicans in Congress are already scrambling to do *something* to help those who would have had, and then lost health insurance; however, while Congressional Republicans have been working on a fallback position to cushion the blow, conservative Republicans are unwavering in their opposition to Obamacare and are refusing to do *anything* that could even be considered friendly to the toxic law. All the while, the Democrats in Congress are apoplectic and opposed to anything that will undermine the ACA or President Obama's legacy.
- **One positive result** for the anti-Obamacare faction is that if the subsidies are no longer available in the federal exchange, penalties on employers will go away (*e.g.*, play-or-pay, penalty for failing to offer "affordable" insurance coverage, penalty for failing to cover "substantially all" employees). Since those penalties are only triggered if and when an employee receives a subsidy in an ACA exchange, they won't ever (indeed, can't ever) be triggered. Relief from penalties would also be available for certain individuals who would otherwise be required to purchase coverage or pay the individual mandate penalty, because if those individuals can no longer find "affordable" coverage (since they would be responsible to pay the full unsubsidized premium amount), they will be penalty-proof.

It's a fool's errand to try to handicap the U.S. Supreme Court, so I'll simply wrap up this article with a general observation. The three most conservative justices (Thomas, Scalia and Alito) appear to be solidly in the plaintiffs' camp. The four liberal justices {Ginsburg, Breyer, Sotomayor and Kagan) seem to be rock solid in the government's camp (despite Justice Kagan's recent dissent in the *Yates vs. United States* (Case No. 13-7451) where she cuttingly and somewhat condescendingly wrote, "[W]hatever the wisdom or folly of §1519 [the statute at issue in that case], this Court does not get to rewrite the law. 'Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.' Rodgers, 466 U. S., at 484. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design."} That leaves two justices (Roberts and Kennedy), either of whom could be the deciding swing vote, and both of whom are playing their cards close to the vest.
Stay tuned!

As Always ...

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