SCOTUS Saves the Affordable Care Act (Again)

06.29.2015 | By Douglas W. Schwartz

The U.S. Supreme Court handed down its much-anticipated *King v. Burwell* decision on June 25, and (again) gave the Obama administration a huge victory by safeguarding its signature legislation, the Affordable Care Act (ACA).

To understand what was at stake here, one needs to understand the three legs of healthcare reform underlying the ACA. Leg # 1 prohibits insurers from denying coverage or raising premiums based on a person's medical history. Because this requirement could otherwise cause insurers to face a financial death spiral by forcing them to cover pre-existing conditions of a pool of older, sicker insureds, Leg # 2 requires younger, healthier people into the health insurance pool as well by penalizing them if they do not obtain health insurance (the so-called individual mandate). Because many people cannot otherwise afford insurance in order to enter the pool, Leg # 3 provides federal subsidies toward their premiums.

Two other ACA provisions interlace these three legs. First, the ACA encouraged states to set up their own web-based exchanges whereby insurers could offer policies directly to consumers. If a state did not set up its own exchange, the federal government would step in and operate one (www.Healthcare.gov) for it. Second, the ACA penalizes large employers (essentially, those with 50 or more full-time employees) that do not offer adequate health insurance coverage to their full-time employees (the so-called employer mandate), the purpose being to prevent them from dumping employees on federal or state exchanges and letting them be subsidized by the federal government. If a full-time employee gets a subsidy because his or her employer offers lousy (or no) coverage, then the employer gets penalized for that employee.

In June 2012, the U.S. Supreme Court in *National Federation of Independent Business v. Sebelius* upheld (in a 5-4 decision with Chief Justice Roberts writing the majority opinion) the individual mandate against a constitutional attack by the ACA's opponents.

King did not similarly involve a constitutional challenge; instead, the controversy was what the test within the four corners of the ACA itself provided. Specifically, an ACA provision (now section 36B of the Internal Revenue Code) makes subsidies available for coverage that is enrolled in through an Exchange established by the State under the ACA, but the IRS in issuing regulations allowed subsidies to be provided to people enrolling in a state *or the federal* exchange. California set up its own exchange (www.coveredca.com) as did 13 other states, but 36 states decided not to operate their own exchanges and instead glommed onto the federal.

The plaintiffs in *King* maintained that the statute said what it said: Subsidies were available only to enrollees on a state exchange and the IRS overstepped its bounds by making subsidies available to enrollees on the federal as well. The government countered that such a reading was absurd because it would leave enrollees in 36 states without subsidies, thereby making insurance unaffordable and triggering the very insurer death spiral that the ACA was designed to prevent.

Again Justice Roberts penned a decision (this time 6-3) siding with the government. The majority said that the words an Exchange established by the State in section 36B were ambiguous when considered in the context of the rest of the text of the ACA and, given the ambiguity, the Court's job was to interpret the statute in a way that furthered Congress' intent – here, to prevent an insurer death spiral that would destroy the insurance markets and sink healthcare reform. The majority did *not* rely on the so-called *Chevron* test (named after a 1984 opinion, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, under which courts are to defer to an administrative agency's reasonable interpretation of a Congressional mandate in issuing regulations). The issue here, the majority said, was not the IRS's interpretation of section 36B (Congress never intended the IRS to have regulatory discretion in this area) but rather that Congress intended that subsidies be available for enrollees on all exchanges in order for the health care reform to work. The majority's approach means, as a practical matter, that any future Republican administration cannot undo the subsidies through regulation; rather, such action would require Congressional action. (Justice Roberts did get in some jabs at the slapdash way in which Congress passed the ACA in 2010, blaming that process for the statute's poor drafting which the Court was now being asked to unravel.)

Justice Scalia (joined by Justices Thomas and Alito) wrote a dissent (which is piquant or acerbic depending on whether you like Justice Scalia's style), saying essentially that the words an Exchange established by the State mean exactly that and that the Court should not try to divine or clean up whatever drafting issues Congress in 2010 had created. The Court, Scalia complained, seemed to be going out of its way with *King* and *National Federation* to try to find any way to save a pet piece of legislation. Perhaps, Scalia asked, the ACA should be called SCOTUSCare?

So what are the take-aways from *King*?

- Had *King* gone the other way, the employer mandate would not have worked because the employer penalty is triggered if an employee goes on an exchange and gets a subsidy (if there is no subsidy, there could be no penalty). With the decision in favor of the government, the employer mandate is not going anywhere and it is time to comply – large employers must offer coverage this year and start reporting next year.
- Californians never had to worry because our state had set up its own exchange and they were therefore eligible for subsidies even had *King* gone against the government. However, the Court's decision means that individuals in states that did not set up exchanges and receiving subsidies (between 6 and 8 million depending on what article you read) will not lose them.
- Insurers need not worry about the dreaded death spiral (well, at least not as a result of subsidies being lost for enrollees on the federal exchange – there could be other causes).

- The decision is a blessing in disguise for Republicans (even though they might have gained some schadenfreude from an anti-government decision). Had *King* gone the other way, Republicans in Congress would have been under enormous pressure to come up with a legislative solution saving the subsidies, and red state governors would have been under enormous pressure to set up state exchanges.
- *King* was the ACA opponents' last hurrah in court. Even though Republicans may run on a platform of repealing it for 2016, repeal is easier said than done because the ACA's tendrils will be deep in the US economy and society even if we have a Republican administration and Congress in 2017. So, regardless of whether you think the ACA is a bad idea or dislike the way Congress passed it in 2010, it is time to deal with it.