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The Impact of King v. Burwell on "Applicable Large Employers"

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Reports in the popular media portrayed *King v. Burwell* as a case involving premium tax subsidies used to purchase health insurance from public exchanges or marketplaces under the ***Affordable Care Act (ACA)***. According to an oft-repeated narrative, if the court sided with the challengers, premium tax credits would be denied to low- and moderate-income individuals in some 34 states. (The Kaiser Family Foundation has compiled a list of the affected states that is available here.)

But *King v. Burwell* was about more than just premium subsidies. The outcome of the case also has ramifications for "applicable large employers" (i.e., those with 50 or more full-time and full-time equivalent employees) that are subject to the ACA rules governing employer shared responsibility. If the challenge had succeeded, no assessable payments would be imposed on any such employer in the same 34 states referred to above despite the employer's failure to offer group health plan coverage to substantially all of its full-time employees.

On June 25, the U.S. Supreme Court voted 6-3 to deny the challenge. The majority opinion was written by Chief Justice John Roberts. Justice Antonin Scalia wrote a scathing dissent. For applicable large employers, the decision means that compliance with the ACA's employer shared responsibility rules will go forward as planned. The decision also dashes any immediate hopes that any or all of the ACA provisions affecting employers will be repealed, delayed, or otherwise thwarted.

Background

ACA § 1401 provides that eligible taxpayers may receive income tax credits for purchase of insurance "through an Exchange *established by the State* under 1311 of the Patient Protection and Affordable Care Act." (emphasis added). Section 1311 of the ACA enables, but does not require, the states to establish health insurance exchanges. As explained above, some 34 states have elected not to establish exchanges. ACA § 1321 provides that if a state does not elect to create an exchange that meets federal requirements, the federal government will "establish and operate" an exchange.

The particulars of the dispute in *King v. Burwell* involved a final IRS regulation—26 C.F.R. § 1.36B-2—authorizing the grant of premium tax credits to low- and moderate-income individuals who qualify for and purchase qualified plan coverage under either a state-run public exchange or a "federally-facilitated" public exchange (i.e., an exchange operated by the Department of Health and

Human Services in a state that declines to establish its own public exchange). The challengers argued that, because the plain language of the ACA provided eligibility for premium tax credits only to those persons in states with state-operated exchanges, no credits should be available in a state that has not established an exchange.

In arriving at its holding, the Court rejected the traditional mode of analysis granting deference to regulatory agencies. While prior law generally deferred to the regulators' interpretations of a law, this deference appears to be on the wane. Instead, the Court adopted a more conical approach under which, if the statutory language is clear and unambiguous, the law is enforced according to its terms. But if there is an ambiguity in the statute, the Court will say what the law is. Worth noting is that, using this mode of analysis, the Court could have credibly held for either party.

- The challengers (along with the dissent) claimed that there is nothing ambiguous in the phrase "an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act." Accordingly, the challengers should prevail. There is no need to investigate further.

- The government claimed the phrase in issue is ambiguous when read in the context of the entire law and its purposes. Moreover, according to the government, the law's other provisions lead to the inescapable conclusion that Congress did not intend to so limit subsidies.

The majority adopted the latter approach.

In a move that alternately dismayed and infuriated those sympathetic to the challengers, the Court's majority determined that the disputed clause was ambiguous when read in the larger context of the law, particularly with respect to the Act's guaranteed issue and community rating requirements. Saying that the provision ought to be interpreted in a manner "that is compatible with the rest of the law," the Court held that:

"Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation, but those requirements only work when combined with the coverage requirement and tax credits. It thus stands to reason that Congress meant for those provisions to apply in every State as well."

The majority also voiced concern that any other interpretation "would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid." Thus, said the Court's majority, the Code § 36B's tax credits are available to individuals in states that have a Federal Exchange.

Justice Scalia's dissent, despite its belligerent tone, is well reasoned and worth noting. *King v. Burwell* neither involves nor settles any constitutional question. It is, rather, a case of statutory construction. While there is some disagreement in the matter, the consensus view (accepted by the Court) is that the disputed clause was the result of a drafting error. So—at least in a colloquial sense—the real issue before the Court was the extent to which it is the Court's job to fix Congress' mistakes.

The Impact on Employers

Employers hoping for a potentially destabilizing blow to the ACA have been left empty-handed. *King v. Burwell* effectively puts an end to judicial and other challenges to the ACA. The case also puts an end to any hope for a reprieve from assessable payments under the ACA's employer shared responsibility rules for employers whose operations are centered in states that have not established their own exchanges. Of course, the political fallout from the case is a different matter entirely. Talk of challenges and repeal will likely continue as a matter of campaign strategy for some time.

As a result of the Supreme Court's ruling in *King v. Burwell*, employers should be prepared to fully comply with the employer shared responsibility rules and the corresponding reporting rules. And while the ACA provisions imposing a tax on high-cost health plans were not in issue here, there is nothing to suggest that these rules, too, will not go forward as scheduled. Simply put, the ACA is in all likelihood here to stay.

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