



News Alert – March 6, 2014

Key Justice casts doubt on Supreme Court challenge to ACA subsidies

The U.S. Supreme Court used oral arguments this week to debate whether roughly 7.5 million consumers in federally-facilitated Marketplaces (FFMs) will be able to continue receiving premium tax credits and cost-sharing subsidies under the Affordable Care Act (ACA).

The Competitive Enterprise Institute filed lawsuits on behalf of individual plaintiffs in Virginia and the Washington, DC against Internal Revenue Service regulations making ACA subsidies available to all consumers in the new health insurance Marketplaces. The suits claimed that the words “established by the state” in one provision relating to the subsidies meant that Congress intended that they only be available to consumers in the 14 states creating their own Marketplaces (including DC).

Both lower courts immediately dismissed the claims. A three-judge panel for the U.S. Fourth Circuit Court of Appeals unanimously upheld the dismissal, stating that a reading of the ACA “as a whole” led to “only one sensible conclusion” that Congress wanted the subsidies to be available to all Marketplace consumers. However, a three-judge panel from the DC Court of Appeals concluded “with reluctance” that the words must be read literally to mean that federally-facilitated Marketplace (FFM) consumers are ineligible for ACA subsidies, as did a lower court in Oklahoma in separate case filed by that state’s attorney general.

The full appellate court in DC court threw out the panel’s contrary decision and was set to hear the case in December. However, the U.S. Supreme Court surprisingly intervened in the Virginia case (*King v. Burwell*) before the DC appeals court ruled, setting the stage for a decision this June could dramatically limit the affordability of FFM coverage.

All of the lower court decisions followed the political ideology of the judges and oral arguments on the high court largely held to these partisan divisions. Chief Justice John Roberts, the lone conservative justice to side with his liberal colleagues in previously upholding the entire ACA, offered little insight into his leanings on this case. However, conservative Justice Anthony Kennedy suggested he was at least open to switching sides, telling the plaintiffs that “there’s a serious constitutional problem if we adopt your argument.”

Kennedy agreed with liberal Justice Sotomayor that denying subsidies to states defaulting to the FFM would be viewed as unduly trying to coerce states in creating their own Marketplace. This was the same rationale used by both liberal and conservative justices in 2012, when ruling that states must be given the discretion to opt-out of the Medicaid expansion under the ACA without penalty. (The court could adopt a similar remedy by giving FFM states the discretion whether to accept the ACA subsidies).

However, Kennedy was not one of the justices that chose the opt-out remedy in 2012 and instead voted to strike down the entire ACA. As a result, counsel for the government largely avoided this issue.

Roughly 87 percent of FFM consumers currently receive subsidies that averaged \$268 per month last year, reducing monthly premiums by an average of 72 percent (\$374 to \$105). The consulting firm Avalere Health estimated last week that eliminating the subsidies would increase FFM premiums by an average of 255 percent, including a 338 percent jump for the largest Marketplace in Florida and a staggering 779 percent spike in Mississippi.

Conservative justices generally acknowledged that eliminating subsidies would dramatically increase premiums, but insisted that Congress would act to fix the statute. Justice Alito even suggested that the court could give Congress up to a year to do so before FFM subsidies would be lost.



Under pressure from Republican governors, some Congressional Republicans have already proposed measures to continue the subsidies for up to 18 months should they be struck down, though at a lower level than under the ACA.

The Obama Administration insists they have no “back-up plan” in the event of an adverse decision. However, commentators largely expect that they would try to temporarily transfer funds from other general accounts, re-classify the seven Marketplaces only partly operated by the federal government as a state-based Marketplace, and give FFM greater incentives to move to state control.

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