SCOTUS Finds Obamacare Insurance Subsidies Legal

On June 25, 2015, the Supreme Court of the United States (SCOTUS) announced its decision to uphold the legality of health insurance subsidies for individuals participating in federally-run insurance exchanges. In a six to three landmark decision, with the majority opinion written by Chief Justice John Roberts, the Court upheld the federal government’s interpretation of the Patient Protection and Affordable Care Act (ACA), also known as Obamacare, allowing the Internal Revenue Service (IRS) to issue tax credits, or subsidies, to participants who purchase insurance on federally-funded and run exchanges.

The case, David King, et al. v. Sylvia Burwell, Secretary of Health and Human Services, et al., originated when four private citizens who expected to be subject to tax penalties under the ACA’s Individual Mandate (i.e., the plaintiffs) argued that the IRS’s Health Insurance Premium Tax Credit rule, which gives the IRS the authority to grant subsidies to participants of health insurance exchanges, only applied to state-run exchanges. The plaintiffs’ argument is derived from a portion of the ACA that explains how the U.S Department of Treasury will calculate the subsidies for individuals, which includes the statement “established by the State under [section] 1311,” which the plaintiffs interpreted to mean that Congress intended tax subsidies to be used exclusively for state-run exchanges. The case was dismissed by the Eastern District Court of Virginia on February 18, 2014, as a result of the court’s application of the Chevron doctrine, which allowed the court to defer to the interpretation currently in place (i.e., allowing federal exchange participants to receive subsidies), a decision that was affirmed on appeal by the Fourth Circuit on July 22, 2014. The plaintiffs subsequently filed a writ of certiorari with the SCOTUS, which was granted on November 7, 2014.

During oral arguments on March 4, 2015, some of the justices expressed concern regarding the effects of a finding that subsidies for federally-run exchanges are illegal, a concern that affected their voting decisions. Justice Sonia Sotomayor discussed the “death spiral” that would occur if federal exchange participants did not receive subsidies, pointing to the loss of healthy participants and the addition of older and/or non-healthy participants that would follow, causing insurance premiums to dramatically escalate. Perhaps even more noteworthy, Justice Anthony Kennedy, who typically favors states’ rights, expressed similar concerns for the effect that such a decision would have on the 34 states that currently use federally-run exchanges.

Emphasizing and expounding upon the opinion of Justice Sotomayor, Justice Kennedy noted that a decision against the government had the potential to violate the states’ constitutional rights because it would force states to “choose between the death spiral [or] creating an exchange.” In its majority opinion, the SCOTUS took into consideration the legislative purpose of the ACA when it determined what the ambiguous phrase “established by the State” meant. Supporters of this method, known as purposivists, believe a balance between Congressional intent, purpose, and plain language is necessary when interpreting laws that contain ambiguities. In the majority’s opinion, the Court decided to compare the ambiguous language to the “broader structure of the Act to determine whether one of Section 36B’s ‘permissible meanings produces a substantive effect that is compatible with the rest of the law.’” When analyzing the issue in King v. Burwell, the Court chose not to use the more common Chevron approach. In the majority opinion, Chief Justice Roberts explained that the Court avoided the use of Chevron because this was “an ‘extraordinary’ question of deep economic and political significance,” thus, the Court would not defer to the IRS unless specifically told to do so by Congress. The majority opinion also noted that the IRS “has no expertise in crafting health insurance policy,” so Congress would not likely have assigned to the IRS the task of deciding what the language meant. Instead of utilizing the Chevron approach, the Court analyzed the issue under the major questions doctrine, which dictates that if Congress wanted to “delegate interpretive authority over a major policy question to an administrative agency” it must explicitly say so. Had the Court applied the Chevron approach, a future political party change in Congress or the White House might have resulted in an interpretive change of the ACA’s language, based on political opinions. Instead, the major questions doctrine protects the Court’s decision from future political party changes in both Congress and the White House, thus safeguarding subsidies for federal and state exchanges under Section 36B of the ACA.

(Continued on next page)
In contrast, the dissent, written by Justice Antonin Scalia, admonished the majority’s “interpretive jiggery-pokery” of the law and accused the majority of transforming itself into a legislative body when the majority, in his opinion, “rewrote” three parts of the law to match what it wanted the law to say. To emphasize his point that the SCOTUS was becoming too involved, Justice Scalia commented that perhaps Obamacare should instead be called “SCOTUScare.” In his dissent from the majority’s analysis of what Congress meant when it used the word “State” in the phrase “exchange established by the State,” Scalia expressed his frustration when he pointed out that not only did the Court accept that “State” means a state, it also accepted that “State” could refer to all states and/or the federal government. It is this dual interpretation of the word he called an “impossible impossibility.” He also argued that the Court ignored how Congress used the word “State” in seven other areas of the ACA, and asserted that the use of the word elsewhere demonstrates that Congress intended the phrase to mean states generally, not the federal state.

Justice Scalia’s dissenting opinion demonstrates the view of new textualism, a theory of interpretation that focuses on the plain meaning of words when analyzing legislative language. Advocates of new textualism discourage the consideration of any legislative history when interpreting the language of laws. Applying this theory to the ACA, Justice Scalia asserted his belief that the only true interpretation of the ACA’s statutory language is found by defining the actual words, which was why interpreting “State” to mean anything other than a state was incomprehensible to him. The dissenting justices did not consider the language to be ambiguous, so they did not recognize a need to compare the language to the overall purpose and intent of the ACA.

In an apparent “dig” at Justice Scalia’s dissenting opinion, Chief Justice Roberts, in the majority opinion, directly quoted a portion of an opinion written by Justice Scalia in 2001, stating, “Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” In the King v. Burwell decision, the majority pointed out that “in petitioners’ view, Congress made the viability of the entire Affordable Care Act turn on the ultimate ancillary provision: a sub-sub-sub section of the Tax Code. We doubt that is what Congress meant to do.” Here, in King v. Burwell, the majority seems to reference Justice Scalia’s previous belief from his 2001 opinion, wherein he points out that Congress does not “hide elephants in mouseholes.” In contrast to his previous opinion, Justice Scalia’s current dissenting opinion argues a single word’s meaning was meant to control the legality of the ACA’s subsidies.

The majority opinion clearly asserts that “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B [of the ACA] can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.” This landmark decision again affirms the legality and constitutionality of the ACA, thus strengthening the law’s viability for the future.

The second installment in this two-part series will discuss the impact this decision will have on consumers, insurance markets, and more. It will also discuss any additional challenges to the ACA that can be expected over the next few years.

© HEATH CAPITAL CONSULTANTS

(Continued on next page)
Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of HEALTH CAPITAL CONSULTANTS (HCC), a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including; valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Masters in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institute of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, the author of several books, the latest of which include: "Accountable Care Organizations: Value Metrics and Capital Formation" [2013 - Taylor & Francis, a division of CRC Press], “The Adviser’s Guide to Healthcare” – Vols. I, II & III [2010 – AICPA], and “The U.S. Healthcare Certificate of Need Sourcebook” [2005 - Beard Books]. His most recent book, entitled "Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services" was published by John Wiley & Sons in 2014.

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious “Outstanding Student Award in Business Valuation” conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS).

Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of HEALTH CAPITAL CONSULTANTS (HCC), where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the author of the soon-to-be released “Adviser’s Guide to Healthcare – 2nd Edition” (AICPA, 2014), numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: The Accountant’s Business Manual (AICPA); Valuing Professional Practices and Licenses (Aspen Publishers); Valuation Strategies; Business Appraisal Practice; and, NACVA QuickRead. Additionally, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); the Physicians Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (ACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).

John R. Chwarzinski, MSF, MAE, is Senior Vice President of HEALTH CAPITAL CONSULTANTS (HCC). Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, and economic and financial analysis.

Jessica L. Bailey, Esq., is the Director of Research of HEALTH CAPITAL CONSULTANTS (HCC), where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the Journal of Health Law and Policy.

Richard W. Hill, III, Esq. is Senior Counsel of HEALTH CAPITAL CONSULTANTS (HCC), where he manages research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and conducts analyses of contractual relationships for subject enterprises. Mr. Hill is a member of the Missouri Bar and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law.