Part I: Is PPACA on the Road to Recovery?

August 3, 2015

The recent decision in *King v. Burwell*[1] by the Supreme Court of the United States sent a strong message to critics of the Patient Protection and Affordable Care Act of 2010 ("PPACA")—the Supreme Court will not allow "inartful drafting"[2] to invalidate vital provisions of PPACA. Chief Justice Roberts, writing for the majority explained, "[i]n democracy, the power to make the law rests with those chosen by the people….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."[3]

I. Past Challenges to PPACA

If you recall, since President Obama signed PPACA into law on March 23, 2010,[4] the Supreme Court has heard two cases where fundamental provisions of PPACA were at risk of being struck down.

A. Individual Mandate & Medicaid Expansion

On June 28, 2012, the Supreme Court in *National Federation of Independent Business v. Sebelius*[5] addressed the constitutionality of PPACA's provisions containing an individual mandate to purchase health insurance and the expansion of Medicaid through State funding. Chief Justice Roberts explained that the individual mandate was constitutional because it fell within Congress's power under the Taxing and Spending Clause of the Constitution;[6] however, the Medicaid expansion provision was unconstitutional because it threatened to take away existing funding to States for Medicaid, as opposed to preventing States from receiving additional funding, if States failed to adopt the expansion.[7]

[1] King v. Burwell, No. 14-114, slip op. (U.S. June 25, 2015), *available at* http://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf.
[2] *Id.* at 14.
[3] *Id.* at 21.
[4] *President Obama Signs Health Reform Into Law,* WHITEHOUSE.GOV, Mar. 23, 2010, *available at* https://www.whitehouse.gov/photos-and-video/video/president-obama-signs-health-reform-law.
[5] National Federation of Independent Business v. Sebelius, Secretary of Health and Human Services, No. 11-393, slip op. (U.S. June 28, 2012), *available at* http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf.
[6] U. S. Const., Art. I, §8, cl. 1, which gives the federal government its power of taxation; *see also National Federation of Independent Business*, No. 11-393, slip op. at 5, 44.
[7] *National Federation of Independent Business*, No. 11-393, slip op. at 55.

B. Tax Subsidies Under State & Federal Exchanges

Three years later, on June 25, 2015, the Supreme Court in *King v. Burwell*[8] considered whether PPACA's tax credits were available to individuals who purchased insurance on the Federal Exchange, as adopted by the States.[9] Chief Justice Roberts wrote in the majority opinion that through "reliance on context and structure in statutory interpretation" such tax credits are allowed "for insurance purchased on any Exchange created under the Act."[10]

[If you have not yet had an opportunity to read the 47-page opinion in *King v. Burwell*, a summary of the case follows in Part II of this article.]

II. Pending Challenges to PPACA

In the first five years of PPACA, the Supreme Court has stepped in twice to resuscitate key provisions—first, to save the individual mandate and then, to save the tax subsidies. Now that our nation's highest court has upheld two of the most fundamental reforms under PPACA, is PPACA finally on the road to recovery? Experts say, not yet.

A. Appropriation of Congressional Funds

One of the most serious, remaining legal threats to PPACA is the claim that federal money paid to insurance companies in an effort to bring down the cost of insurance plans under PPACA is a misappropriation of Congressional funds.

On November 21, 2014, the U.S. House of Representatives (the "House of Representatives") filed a complaint against Sylvia Mathews Burwell as Secretary of the U.S. Department of Health and Human Services ("HHS") and Jacob J. Lew as Secretary of the U.S. Department of Treasury (the "Treasury") for alleged "unconstitutional and unlawful actions taken by the Administration of President Barack Obama."[11]

The complaint in *House of Representatives v. Burwell* primarily alleges that HHS and the Treasury "have violated, and are continuing to violate, the Constitution by directing, paying, and continuing to pay, public funds to certain insurance companies to implement a program authorized by [PPACA], but for which *no funds* have been appropriated."[12] The complaint indicates this will cost taxpayers $175 billion over the next ten years.[13]

[8] *King*, No. 14-114, slip op. (U.S. June 25, 2015).
[9] *Id.* at 5.
[10] *Id.* at 21.
[11] Complaint at 1, U.S. House of Representatives v. Burwell, No. 14-1967 (D.D.C. Nov. 21, 2014), *available at* https://jonathanturley.files.wordpress.com/2014/11/house-v-burwell-d-d-c-complaint-filed.pdf.
[12] *Id.* at 3.
[13] *Id.*

HHS and the Treasury filed a motion to dismiss the complaint on January 26, 2015, arguing that "the House has no standing to bring this suit."[14] In the motion, they explain that the case involves a dispute between branches of the federal government on how to interpret federal law and "federal courts do not sit to referee this sort of an institutional dispute."[15] HHS and the Treasury add that the House of Representatives has not identified a particular injury suffered by it as a result of the actions by President Obama's Administration.[16] In addition to these jurisdictional problems, HHS and the Treasury argue that the House of Representatives has failed to clearly assert "any cause of action for its claims."[17]

On May 28, 2015, Judge Rosemary Collyer of the U.S. District Court for the District of Columbia heard oral arguments in the case. Various media outlets reported that Judge Collyer put the Justice Department's attorney through a difficult line of questioning, which some commentators took as a sign of optimism for an initial victory by the House of Representatives.[18]

These oral arguments, however, took place prior to the Supreme Court's decision in *King v. Burwell*. While the Supreme Court did not render a decision in *King v. Burwell* on the same legal issues, the Supreme Court's general sentiment in favor of upholding PPACA may persuade lower courts to think twice about ruling against PPACA in the future.

B. Individual Mandate under the Origination Clause

Another remaining legal threat to PPACA is the claim that the individual mandate violates the Origination Clause[19] of the Constitution because PPACA is a bill that raises revenue, but PPACA did not originate in the House of Representatives, as required by the Origination Clause.

---

[14] Motion to Dismiss Complaint at 8, U.S. House of Representatives v. Burwell, No. 14-1967, *available at* https://jonathanturley.files.wordpress.com/2015/01/memorandum.pdf.
[15] *Id.* at 7-8.
[16] *Id.* at 8.
[17] *Id.*
[18] *See, e.g.,* Spencer S. Hsu, *Judge Weighs Bid to Toss House GOP Suit Against Obama Health-Care Law*, WASHINGTON POST, May 28, 2015, *available at* http://www.washingtonpost.com/local/crime/judge-weighs-bid-to-toss-house-gop-suit-against-obama-health-care-law/2015/05/28/fbbb1226-04b6-11e5-8bda-c7b4e9a8f7ac_story.html; Associated Press, *Administration Asks Judge to Toss House Healthcare Suit*, MODERN HEALTHCARE, May 28, 2015, *available at* http://www.modernhealthcare.com/article/20150528/NEWS/305289975; Dylan Scott, *Judge Initially Skeptical of Plea to Dismiss House GOP's Obamacare Lawsuit*, NATIONAL JOURNAL, May 28, 2015, *available at* http://www.nationaljournal.com/congress/judge-initially-skeptical-of-plea-to-dismiss-house-gop-s-obamacare-lawsuit-20150528.
[19] U. S. Const., Art. I, §7, cl. 1, which provides that bills for raising revenue must start in the House of Representatives, but the Senate may propose and concur with amendments, as is the case with other bills.

Sissel v. Dep't of Health & Human Services[20] involves a case that was filed on July 26, 2010 by Matt Sissel, an artist and business owner, who argued that the individual mandate to purchase health insurance violates the Commerce Clause[21] of the Constitution because the individual mandate "is not a regulation of commerce, but purports to compel affected Americans…to engage in commerce"[22] and Chief Justice Roberts said "the Commerce Clause does not authorize such a command."[23] Sissel also asserted that the individual mandate to purchase health insurance violates the Origination Clause because a "tax that raises revenue"[24] violates the Origination Clause if it "originated in the Senate, not the House."[25] The lawsuit was put on hold for several years while the Supreme Court decided *National Federation of Independent Business v. Sebelius*, which was the first PPACA challenge heard by the Supreme Court.

On July 29, 2014, Judge Judith Rogers of the D.C. Circuit found that Sissel's claims failed under precedent set by the Supreme Court's interpretation of the Commerce Clause in *National Federation of Independent Business v. Sebelius*[26] and failed under other cases decided by the Supreme Court that interpreted the Origination Clause.[27] Thus, the court dismissed *Sissel v. Dep't of Health & Human Services* for failure to state a cause of action.

On October 6, 2014, Sissel filed a petition for rehearing en banc[28] arguing that the case should be reheard because the court's decision conflicted with existing Supreme Court and Circuit Court precedent and the issue is of "exceptional importance," both of which are reasons that would warrant a rehearing of the case.[29]

On October 17, 2014, HHS filed a response to the petition to rehear the case en banc at the request of the court and argued that Sissel misinterpreted precedent from past Supreme Court cases concerning the Commerce Clause.[30] Additionally, HHS argued that Sissel incorrectly concluded that PPACA is a bill to raise revenue under the Origination Clause, or in the alternative, if PPACA is a bill to raise revenue, it "was an amendment to a House-originated bill for raising revenue."[31]

---

[20] Sissel v. Dep't of Health & Human Services, No. 13-5202, slip op. at 2, 17 (D.C. Cir. Oct. 6, 2014), *available at* http://www.pacificlegal.org/document.doc?id=1543.
[21] U. S. Const., Art. I, § 8, Clause 3, which provides that Congress has the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."
[22] *Sissel,* slip op. at 5.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 10.
[27] *Id.* at 16.
[28] If the petition for a "rehearing en banc" is granted, then all of the sitting judges in the D.C. Circuit will participate in rendering a decision in the case, rather than a three-judge panel, which may hear most cases.
[29] Petition for Rehearing En Banc at 5-7, Sissel v. Burwell, No. 13-5202, *available at* http://www.pacificlegal.org/document.doc?id=1662.
[30] Response in Opposition to Petition for Rehearing En Banc at 8, Sissel v. Burwell, No. 13-5202, *available at* http://www.pacificlegal.org/document.doc?id=1688.
[31] *Id.*

As of the date of this publication, the court has not issued a decision as to whether it will rehear the case of *Sissel v. Dep't of Health & Human Services.* In the Fifth Circuit, the plaintiff in *Hotze v. Burwell* is also waiting for a response on whether the court will rehear the case en banc and similarly argues that PPACA, as a bill to raise revenue, violates the Origination Clause.[32]

The Pacific Legal Foundation ("PLF") is a public interest law firm representing Sissel and it predicts that the Origination Clause issue is likely to make it to the Supreme Court for ultimate resolution.[33]

C. Contraceptive Mandate under Religious Freedom Restoration Act

Several other remaining legal challenges to PPACA concern the requirement that group health insurance plans cover preventive services, including women's contraception. While this legal issue does not jeopardize PPACA as a whole, it has become a costly source of on-going litigation, which has the potential to diminish the extent of some reforms under the law.

On July 14, 2015, in the case of *Little Sisters of the Poor v. Burwell*, the Tenth Circuit ruled against religious non-profit organizations challenging PPACA's contraceptive mandate, since various agencies in the federal government have adopted an accommodation that allowed religious non-profits to "opt out of providing, paying for, or facilitating contraceptive coverage."[34] The Tenth Circuit held that "the accommodation scheme relieves Plaintiffs of their obligations under the [contraceptive] Mandate and does not substantially burden their religious exercise under [the Religious Freedom Restoration Act of 1993] or infringe upon their First Amendment rights."[35]

This case follows the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,[36] where the Supreme Court considered whether the Religious Freedom Restoration Act allows HHS to require owners of three closely held for-profit corporations to cover various methods of women's contraception under its employer, group health insurance plan. On June 30, 2014, the Supreme Court ruled that "[t]he contraceptive mandate, as applied to closely held corporations, violates the Religious Freedom Restoration Act."[37]

The Tenth Circuit explains in the majority opinion of *Little Sisters of the Poor* that its decision is distinguishable from the Supreme Court's decision in *Hobby Lobby Stores, Inc.* because an accommodation is available for religious, non-profits to opt out of the contraceptive mandate and no similar accommodation was available to for-profit corporations owned by individuals with sincere religious beliefs.

---

[32] *See generally* Hotze v. Burwell, No. 14-20039, slip op. (5th Cir. April 24, 2015), *available at* http://www.ca5.uscourts.gov/opinions/pub/14/14-20039-CV0.pdf.
[33] Todd Gaziano, *Is PLF's Obamacare challenge headed to the High Court?*, PACIFIC LEGAL FOUNDATION: LIBERTY BLOG, *available at* http://blog.pacificlegal.org/plfs-obamacare-challenge-headed-high-court/.
[34] Little Sisters of the Poor v. Burwell, No. 13-1540, slip op. at 11-12 (10th Cir. July 14, 2015), *available at* http://www.becketfund.org/wp-content/uploads/2015/07/LSP-Op.pdf.
[35] *Id.* at 12.
[36] Burwell v. Hobby Lobby Stores, Inc., No. 13-354 and 13-356, slip op. (U.S. June 30, 2014), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.
[37] *Id.* at 49.

The Becket Fund for Religious Liberty, according to its website, is a non-profit, public-interest law firm that takes credit for the ruling in *Burwell v. Hobby Lobby Stores, Inc.* and asserts that it currently represents the Little Sisters of the Poor.[38] The Becket Fund for Religious Liberty has not ruled out appealing the case to the Supreme Court.

D. Takeaways

Despite the Supreme Court's recent decision in *King v. Burwell*, pending cases that challenge the appropriation of Congressional funds under PPACA and the constitutionality of the individual mandate under the Origination Clause of the Constitution still threaten the viability of PPACA. Additional challenges concerning the contraceptive mandate under PPACA also remain, in addition to a variety of other cases, which are not addressed in this article. However, these additional challenges do not have the potential impact on PPACA that *National Federation of Independent Business v. Sebelius* and *King v. Burwell* threatened to have on the most fundamental reforms under the law. Even so, PPACA faces a time-consuming and expensive road to recovery.

[38] *Little Sisters of the Poor v. Burwell*, BECKET FUND FOR RELIGIOUS LIBERTY, July 21, 2015, http://www.becketfund.org/littlesisters/.

Part II: What Every Health Care Plan Administrator and Provider Should Remember About King v. Burwell

If you have not had an opportunity to read the 47-page opinion in *King v. Burwell* issued by the Supreme Court of the United States on June 25, 2015, here is a summary of the key points every health care plan administrator and provider should remember about this landmark case:

The three main goals of the Patient Protection and Affordable Care Act ("PPACA") are to: (1) prohibit insurance companies from considering the health of an individual when selling health insurance; (2) require all individuals to purchase health insurance unless the cost exceeds eight percent of an individual's income; and (3) make insurance affordable through tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line.[39]

To advance these goals, PPACA permits a State to create a marketplace or "Exchange" on which to sell insurance to individuals by either creating an Exchange (a "State Exchange") or adopting the Exchange established by the Federal Government (the "Federal Exchange"). At the time the Supreme Court issued its decision in *King v. Burwell*, 16 States had created State Exchanges and 34 States had adopted the Federal Exchange.[40]

Furthermore, to specifically ensure the affordability of insurance sold on an Exchange, 26 U.S.C. § 36B of PPACA ("Section 36B") provides that tax credits "shall be allowed" [41] for any "applicable taxpayer."[42] PPACA adds that the amount of a tax credit depends on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the [PPACA]." (emphasis added).[43]

In 2012, the Internal Revenue Service ("IRS") interpreted Section 36B on tax credits and issued a rule indicating that individuals buying insurance on a State Exchange or the Federal Exchange may qualify for tax credits, since either Exchange constitutes "an Exchange established by the State."[44] *King v. Burwell*, involved a lawsuit filed by four residents of Virginia, who did not want to purchase health insurance on the Federal Exchange adopted by Virginia, in accordance with PPACA. The residents argued that they were not eligible for tax credits because tax credits created by PPACA only applied to individuals purchasing health insurance on a State Exchange, not the Federal Exchange, as was the case in Virginia. Without the tax credits, the cost of health insurance for these residents would exceed more than eight percent of their income and thus, they would be exempt from PPACA's mandate to purchase health insurance.

[39] *See King*, No. 14-114, slip op. at 4-5.
[40] *Id.* at 6.
[41] *Id.* at 5.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 6.

The central issue considered by the Supreme Court in *King v. Burwell* was whether PPACA's tax credits are available to individuals who purchase insurance on the Federal Exchange, as adopted by the States.

On June 25, 2015, the Supreme Court ruled that Section 36B permits tax credits for insurance purchased by individuals on both a State Exchange and the Federal Exchange. Chief Justice Roberts delivered the opinion for the majority, which was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

Chief Justice Roberts explained in the opinion that when language in a statute is ambiguous, in some cases it means that Congress wants the government agency tasked with enforcing the law to interpret the area of ambiguity. However, Chief Justice Roberts clarified that *King v. Burwell* did not involve such situation because it was unlikely Congress intended to delegate the responsibility of interpreting Section 36B on tax credits to the IRS, which "has no expertise in crafting health insurance policy of this sort."[45] Thus, Chief Justice Roberts said it was the decision of the Supreme Court to interpret the meaning of an Exchange "established by the State."[46]

Chief Justice Roberts admitted in the opinion that when the phrase "established by the State" is read out of context, "it might seem that a Federal Exchange cannot fulfill this requirement."[47] However, when read in the context of PPACA, the meaning of "established by the State" is "ambiguous."[48]

The majority opinion then provided the following example to support its position. If the phrase "established by the State" referred only to State Exchanges, then another section of PPACA which says all Exchanges "shall make available qualified health plans to qualified individuals" would not make sense because "qualified individual" is defined as an individual who "resides in the State that established the Exchange."[49] If this definition is read to only mean State Exchanges, then the Federal Exchange could never have any "qualified individuals" and PPACA was created so that every Exchange would have "qualified individuals" benefiting from the protections of the law.[50]

Chief Justice Roberts, writing for the majority, ultimately concluded that "Congress passed [PPACA] to improve health insurance markets, not to destroy them…."[51] and the majority interprets Section 36B in a way that means tax credits apply to individuals purchasing insurance on a State Exchange, as well as the Federal Exchange, since it is "consistent with what we see as Congress's plan, and that is the reading we adopt."[52]

For a complete copy of the Supreme Court's decision in *King v. Burwell*, including the dissenting opinion written by Justice Scalia, visit: http://www.supremecourt.gov/opinions/14pdf/14-114_qol1.pdf.

[45] *Id.* at 8.
[46] *Id.*
[47] *Id.* at 10.
[48] *Id.* at 12.
[49] *Id.* at 10.
[50] *Id.* at 10-11.
[51] *Id.* at 21.
[52] *Id.*

Contact Information

If you have any questions regarding the content of this article, please contact Hilary Bowman at 919.755.8125 or HBowman@wcsr.com or any of the attorneys in the Healthcare Transactions Team.

Womble Carlyle client alerts are intended to provide general information about significant legal developments and should not be construed as legal advice regarding any specific facts and circumstances, nor should they be construed as advertisements for legal services.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

©2015