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King v. Burwell: A Loss of Subsidy Does Not Mean a Loss of Coverage

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An important distinction is getting lost in commentary on the possible effects of a Supreme Court decision in the case of *King v. Burwell*. It is the distinction between how the Court's ruling would affect "insurance subsidies" versus how it would affect "insurance coverage."

Should the Court reject the Obama Administration's regulatory interpretation of the provisions of the Affordable Care Act (ACA) at issue in the *King* case, the Treasury would be barred from paying premium subsidies to individuals who, while meeting all other eligibility criteria, live in any of the 34 states that have not established their own exchanges. Thus, the "insurance subsidies" would not be available to such individuals. However, that does not mean that those individuals would automatically lose their "insurance coverage."

Existing Coverage Protections

A loss of subsidy does not automatically mean a loss of coverage. Insurance plan enrollment in the exchanges is governed by other provisions of the ACA, as well as by pre-ACA federal and state insurance laws that apply to the broader market.

Special Enrollment Protections. The ACA instructed the Secretary of Health and Human Services (HHS) not only to establish "annual open enrollment periods" during which eligible individuals may purchase subsidized coverage through an exchange, but to also provide for enrollment outside of open season under certain circumstances.[1] Such so called special enrollment periods are triggered when an individual experiences a qualifying event specified in regulation such as gaining or becoming a dependent due to marriage, birth, or adoption or moving to another state.[2] An individual also can qualify if he or she is "determined newly eligible or newly ineligible for advance payments of the premium tax credit or has a change in eligibility for cost-sharing reductions."[3] Thus, anyone losing subsidies as a result of the Court's ruling would qualify for a special enrollment period.

Substitute Coverage Protections. The regulations further specify that in such circumstances, the individual must be allowed to "enroll in or change from one Q[ualified] H[ealth] P[lan] to another."[4] That means the individual must be given the choice of any other plan—at any coverage level and from any insurer—that is offered in his state through the exchange. Thus, individuals could stay with their current plans or could switch to less expensive plans.

Data released by HHS on the 2015 exchange open enrollment period show that many subsidized exchange enrollees did not select one of the less expensive plan options available to them. Specifically, HHS reported that among subsidy-eligible enrollees, 77 percent could have picked a plan with a monthly after-subsidy cost of $50 or less but that only 38 percent of them actually did so.[5] This indicates not only that the availability of subsidies encouraged enrollees to "buy-up" to more expensive coverage, but also that should the Court rule that those subsidies can no longer be paid, they could respond by "trading down" to less expensive coverage.

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Discontinued Coverage Protections. Another issue is what would happen if an insurer responded to the Court's ruling by discontinuing participation in the exchange. New language in the 2015 contracts has fueled speculation about such a scenario. In its contracts with insurers offering coverage for 2015 on the federally run exchange, HHS included a clause acknowledging that insurer participation was premised on the assumption that subsidies would be available to enrollees and that "[i]n the event that this assumption ceases to be valid during the term of this Agreement, CMS acknowledges that Issuer could have cause to terminate this Agreement subject to applicable state and federal law."[6]

If an insurer terminated a plan offered through the exchange before the end of the plan year, then any affected enrollee would meet the criteria for being an individual who "loses minimum essential coverage."[7] The enrollee would then qualify for a special enrollment period and thus be given an opportunity to choose replacement coverage from among any of the other plans offered in the exchange in his state by other insurers.

However, it is not clear that insurers would actually discontinue coverage. That is because, as their contracts with HHS note, any coverage termination would also be "subject to applicable state and federal law." In fact, other provisions of federal law predating the ACA specify that if an insurer discontinues a plan, it must offer enrollees the choice of any other plan that it offers in the individual market.[8] This effectively means that an enrollee would be able to choose new coverage not only from among the other plans offered in the exchange in his state by other insurers, but also from among any plans that his current insurer offers outside of the exchange.

Furthermore, and again under federal law predating the ACA, if the insurer offers no other plan in the state's individual market, then the insurer is barred for five years from offering individual market coverage in that state.[9] Should an insurer actually exit the market entirely in this way, enrollees who lost coverage as a result would also meet the criteria for losing minimum essential coverage and thus qualify for a special enrollment period. However, in those circumstances, any other insurer offering individual market coverage in the state—regardless of whether the coverage was offered on or off the exchange—would be required to allow affected enrollees to choose replacement coverage from among the plans that they offer.[10]

Table 1 summarizes the coverage options available to enrollees under the three scenarios in Healthcare.gov federal exchanges who might be affected by the Court's ruling.

The expected timing of a Supreme Court decision in *King v. Burwell* also raises practical considerations that make it even more unlikely that insurers would actually terminate exchange plans in response to the Court's ruling. It is generally expected that the Court will issue its ruling at the end of its term in June. During oral arguments, Justice Samuel Alito raised the possibility that the Court could stay its decision until the end of the year, thus avoiding disrupting existing arrangements before the end of the 2015 plan year and tax year.[11]

1. 42 USC § 18031(c)(6).
2. 45 CFR § 155.420(d)(2) and (7).
3. 42 USC § 18031(c)(6)(C) as implemented in 45 CFR § 155.420(d)(6).
4. 45 CFR § 155.420(d).
5. U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, "Health Insurance Marketplaces 2015 Open Enrollment Period: March Enrollment Report," *ASPE Issue Brief*, March 10, 2015, http://aspe.hhs.gov/health/reports/2015/MarketPlaceEnrollment/Mar2015/ib_2015mar_enrollment.pdf (accessed March 27, 2015).
6. Lisa Schencker, "Speculation Swirls Around What Happens If Federal Subsidies Go Away," *Modern Healthcare*, October 27, 2014, http://www.modernhealthcare.com/article/20141027/NEWS/310249935 (accessed March 27, 2015).
7. 42 USC § 18031(c)(6)(C) as implemented in 45 CFR § 155.420(d)(1)(i).
8. 42 USC § 300gg-2(c)(1)(B), as implemented in 45 CFR §147.106(c)(2).
9. 42 USC § 300gg-2(c)(2)(B) and USC § 300gg-42(c)(2)(B).
10. 42 USC § 300gg-1(b)(3) as implemented in 45 CFR § 147.104(b)(2).
11. "JUSTICE ALITO: Would it not be possible if we were to adopt Petitioners' interpretation of the statute to stay the mandate until the end of this tax year as we have done in other cases where we have adopted an interpretation of the constitutional—or a statute that would have very disruptive consequences such as the Northern Pipeline case." U.S. Supreme Court, Transcript of Oral Argument in *King v. Burwell*, Case No. 14114, Wednesday, March 4, 2015, p. 53, http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-114_lkhn.pdf (accessed March 27, 2015).

TABLE 1

Replacement Coverage Options for Healthcare.gov Enrollees

Qualifying Event	Qualification for Special Enrollment Period	Enrollee Coverage Options
Loss of ACA coverage subsidies	The individual becomes "newly ineligible for advance payments of the premium tax credit or has a change in eligibility for cost-sharing reductions"	• Any plan (at any coverage level) offered by any insurer in Healthcare.gov for that state
Insurer terminates an exchange plan	The individual "loses minimum essential coverage"	• Any other plan (at any coverage level) offered by that or any other insurer in Healthcare.gov for that state, and; • Any other individual market plan offered in that state outside of the exchange by the insurer that terminated the plan
Insurer terminates all plans in a state's individual market	The individual "loses minimum essential coverage"	• Any other plan (at any coverage level) offered by any other insurer in Healthcare.gov for that state, and; • Any other individual market plan offered outside of the exchange by any other insurer in that state

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However, even if the Court did *not* stay its ruling—and it took effect immediately in June—there would be only six months left in the 2015 plan year. Yet federal law also stipulates that when an insurer terminates a plan, it must not only give enrollees the opportunity to choose replacement coverage, but also give them a minimum of 90 days (three months) notice that their plan is about to be terminated.[12] In the case of an insurer terminating all coverage and withdrawing from a state's market, federal law requires that the insurer give the affected enrollees at least 180 days (six months) prior notice.[13]

Consequently, these constraints in federal law mean that as a practical matter, insurers would gain little or nothing from terminating plans before the end of a plan year that had only six months remaining.

Coverage Protections Exist

In sum, should the Supreme Court's eventual ruling in *King v. Burwell* result in people losing insurance subsidies, the affected individuals will have options for maintaining their coverage or choosing replacement coverage. Congress can also reinforce that through oversight hearings, appropriations, or legislation.

Of course, some might still not be able to afford the unsubsidized premium even if they switched to a less expensive plan. As a first step to help them, Congress can contribute to bringing premiums back down by exempting individuals, employers, and plans from the costly benefit mandates and age-rating rules imposed by the ACA—especially in those states where the ACA subsidies are not available.[14] That would allow for a rational market to form and thus provide a clearer understanding of the need for assistance.

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12. 42 USC § 300gg–2(c)(1)(A), as implemented in 45 CFR §147.106(c)(1).
13. 42 USC § 300gg–2(c)(2)(A)(i), as implemented in 45 CFR §147.106(d)(1)(i).
14. Nina Owcharenko and Edmund F. Haislmaier, "*King v. Burwell*: An Opportunity for Congress and the States to Clear Away Obamacare's Failed Policies," Heritage Foundation *Issue Brief* No. 4360, February 27, 2015, http://www.heritage.org/research/reports/2015/02/king-v-burwell-an-opportunity-for-congress-and-the-states-to-clear-away-obamacares-failed-policies.