Of SCOTUS and Chicken

Larry Levitt, MPP

The game of chicken, which was popularized in the 1950s movie Rebel Without a Cause, has many variants, but the basic design goes like this: players involved in a conflict of some sort try not to yield in the hope that the other player will yield first. But the worst and potentially catastrophic outcome is when no one yields.

After hearing oral arguments on March 4, the US Supreme Court (aka SCOTUS) is deliberating in King v Burwell, a case that has the potential to unleash a massive game of chicken around the Affordable Care Act (ACA).

The case centers (http://bit.ly/1FERZu4) on circumstances related to premium subsidies under the ACA, which are now available to people with low and moderate incomes in all states. King v Burwell challenges the legality of subsidies in states where the federal government set up an exchange because the state declined to set up its own health insurance marketplace.

Swift, Severe Consequences

The consequences (http://bit.ly/IERCica) of a decision in favor of the challengers would be swift and severe:

- Subsidies would end—likely within a month of a decision, which is expected in late June—for about 7.5 million people who now qualify for them in the 34 states not running their own marketplaces (in the 17 state-based marketplaces, nothing would change and subsidies would continue).
- The premiums these 7.5 million people pay for insurance, would rise from an average of $105 (after taking the subsidies into account) to $374 per month, an increase of 256%.
- People who are sick and know they need insurance would likely work hard to find a way to keep it, but those who are healthy would likely drop it. The ACA’s individual mandate—which is the stick to get healthy people to enroll, working hand-in-hand with the carrot of the subsidies—would be largely ineffective. That’s because 83% of uninsured individuals who are currently eligible for subsidies would be exempt from the requirement to have coverage because it would be unaffordable without the subsidies.
- The result in affected states would be a classic “death spiral.” Premiums would rise, more healthy people would drop their coverage, and that in turn would cause premiums to rise even more. This would destabilize the whole individual market in these states because insurers are required to set premiums within a state based on their entire individual market business, not just people buying through the marketplace.

No one will want to yield in this scenario. But the consequences of no one yielding are indeed dire.

The important thing to understand about the King v Burwell case is that it does not (at least as it’s been argued before the Court) involve the constitutionality of the ACA. Rather, it’s a matter of statutory interpretation: did the Internal Revenue Service have the authority under the law to provide subsidies in all states?

That means with just a few strokes on the keyboard, Congress could clarify that subsidies should be provided to people in state-based and federal marketplaces alike. Such a swerve would avoid a catastrophe quickly and easily. But with many Republicans in Congress adamantly opposed to Obamacare, no one expects such a yield.

Enter the 34 governors and state legislatures that have not set up their own marketplaces under the ACA. If they were to yield and create state-based marketplaces, they would render moot a possible Supreme Court ruling against subsidies in states without their own exchange. To be sure, there would be strong pressure on states to take this route. Many of their residents would lose insurance if they...
don’t, and they would be turning their backs on about $2 billion in federal aid (http://bit.ly/1BzrP11) each month. And they would avert a destabilization of their individual insurance market.

Some states have indicated they are considering this route (http://wapo.st/1EOfGrr) However, others have said they will not participate (http://reut.rs/1vB3FSs) in the implementation of Obamacare, which remains a controversial law.

Logistical Challenges

There are also substantial logistical challenges involved in creating a marketplace quickly, even for those states that want to do so. The current state-based marketplaces took years to set up, and they benefited from federal start-up grants that no longer exist. The federal government would likely make it as easy as possible within legal constraints for states to qualify, including making healthcare.gov available as an enrollment and eligibility system, much as they have done for Oregon, Nevada, and New Mexico (http://bit.ly/1935uCu). But state-based marketplaces still couldn’t spring up in time, unless the Court issued a stay—which legal experts consider unlikely (http://bit.ly/19AKxzM)—or Congress temporarily extended the subsidies (http://on.wsj.com/1FC9Opo).

A temporary extension of the subsidies would also give Congress time to consider tweaks to the ACA that it might enact in exchange for continuing subsidies permanently, or more far-reaching replacement plans (as have been floated recently by Republican leaders in the Senate (http://wapo.st/1GEv7Fq) and House (http://on.wsj.com/1EIJIAp)).

If Congress musters the votes for one of these alternative strategies, it will be up to President Obama to decide whether to allow potentially significant changes to his signature domestic achievement or keep driving straight ahead in the hopes that Congress or the states yield.

The justices will be deliberating over the next several months, with a decision expected the end of June. In the meantime, outside the courthouse, all the interested parties undoubtedly will be working to frame what a court ruling would mean and who is to blame for the consequences, trying to get someone else to swerve away first. Given the unpredictability of how this might play out, we probably won’t know who (if anyone) is going to yield until they do it. ■

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**Author Affiliation:** Senior Vice President for Special Initiatives at the Kaiser Family Foundation and Senior Advisor to the President of the Foundation. Among other duties, he is Co-Executive Director of the Kaiser Initiative on Health Reform and Private Insurance.

**Corresponding Authors:** Larry Levitt, MPP (llevitt@kff.org).

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