Center on Budget and Policy Priorities

820 First Street NE, Suite 510
Washington, DC 20002

Tel: 202-408-1080
Fax: 202-408-1056

center@cbpp.org
www.cbpp.org

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House Republican Lawsuit Doesn't Threaten ACA's Overall Structure as *King v. Burwell* Did

By Richard Kogan and Edwin Park

A federal district court ruled on September 9 that House Republicans may go forward with a suit challenging aspects of the "cost-sharing reductions" in the Affordable Care Act (ACA). Specifically, the House Republicans claim that health reform's subsidies that lower deductibles, co-payments, and other out-of-pocket charges for marketplace enrollees with incomes below 250 percent of the poverty line cannot be paid to the insurers that deliver these benefits because Congress has not appropriated the money for those payments. This case has received attention after the Supreme Court's decision in *King v. Burwell* that health reform's premium subsidies are available in all states.

In its recent decision, the district court did not rule on the merits of the House Republicans' case — only that they have "standing" to present it to the courts and a higher court may disagree even on that point. However, even if the case reaches the Supreme Court and the Court decides it on the merits, it will not affect marketplace enrollees' continued access to cost-sharing subsidies or seriously threaten the marketplaces or health reform's overall structure as the *King* case would have done, for several reasons.

First, the ACA makes clear that the cost-sharing reductions are an *entitlement,* meaning that eligible people enrolled though a marketplace have a legal right to them. *Irrespective of the outcome of the case, individuals eligible for cost-sharing reductions will continue to receive them.*

Second, the ACA also makes clear that insurers have the legal right to be reimbursed for providing these cost-sharing reductions. The ACA states that the federal government "shall make periodic and timely payments" to the insurers equal to the value of the cost-sharing reductions they provide to eligible individuals. The ACA does not make this requirement contingent on Congress appropriating funds (or sufficient funds) for that specific purpose.

Third, the courts may accept the Administration's argument that the ACA's guaranteed funding stream to pay *premium* subsidies for marketplace coverage can also be used to pay the *cost-sharing* subsidies, as together they provide financial assistance to make marketplace coverage more affordable. Even if the courts conclude that the funding stream for the premium subsidies *cannot* be used also to pay the cost-sharing subsidies, they may nonetheless reason that the ACA's unequivocal mandate that the federal government pay cost-sharing subsidies constitutes an appropriation of

funding by itself. Neither the Constitution nor the courts require that appropriations acts be formally designated as such.

Moreover, even if the courts decide that an appropriation to pay the cost-sharing subsidies does not exist within the ACA, the government would still have to make the cost-sharing subsidy payments to insurers. As noted, eligible beneficiaries would retain the right to the cost-sharing subsidies, and marketplace insurers would retain the right to payments compensating them for providing the subsidies.

And, in the event that the courts ruled that no ACA funding stream currently exists for these subsidies and Congress refused to appropriate funds to compensate insurers for providing the subsidies, *insurers could seek relief in the United States Court of Federal Claims and would almost certainly prevail,* given that the ACA clearly establishes an entitlement to cost-sharing subsidies. Congress long ago enacted an open-ended, permanent appropriation of whatever amounts are needed to pay valid claims against the government including judgments from the Court of Federal Claims. The Court of Federal Claims could order that insurers be paid, and insurers would then receive their cost-sharing subsidy payments without any need for further congressional action.

Finally, let's consider a worst-case, extremely unlikely scenario where the Court of Federal Claims fails to provide relief and insurers have to continue to provide the cost-sharing subsidies without being compensated. Many insurers would then seek to cover as much of these costs as they could by raising premiums. But the 85 percent of marketplace enrollees who receive premium subsidies would be protected, because the ACA limits their share of the premiums to a fixed percentage of their income. Federal payments to insurers for cost-sharing subsidies would end, but would essentially be replaced by larger federal premium subsidy payments to insurers.

To be sure, marketplace enrollees with incomes above 400 percent of the poverty line could be hit hard with substantial premium increases, as could people enrolled in individual-market coverage outside the marketplaces. Some likely would drop their coverage; the ranks of the uninsured would rise. In addition, the risk pool in the marketplaces likely would experience some adverse selection (with the risk pool becoming less healthy, on average), and some insurers could withdraw from the marketplaces. Yet even in this very unlikely scenario, the outcome would not be a wholesale collapse of the ACA's structure, as would likely have occurred if the plaintiffs in *King v. Burwell* had prevailed and premium subsidies were unavailable in the federal marketplaces.

Moreover, the odds of such an eventuality are quite low. As noted, the judiciary may find on appeal that House Republicans lack "standing" to bring the suit in the first place, even though the federal district court has ruled that they do. A case like this generally depends on a person suffering an injury, such as a monetary loss or imprisonment. It's hard to see how Treasury payments of cost-sharing subsidies to marketplace insurers injure members of the House. The Supreme Court has rejected suits by members of Congress against executive actions on that basis in the past. If the courts finally rule, nonetheless, that House members do have standing, they may rule for the Administration on the merits of the case. And if House members prevail on the merits, it's unlikely the Court of Federal Claims won't provide relief that preserves the cost-sharing payments.

All of this is not to say that the lawsuit isn't worrisome at all. But with the Supreme Court's ruling in *King v. Burwell*, the period of existential challenges to the ACA through the courts appears to have ended.