Missouri Bill Would Punish Insurers Who Participate In Obamacare

By Ian Millhiser
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A bill introduced Monday by a Missouri lawmaker appears designed to terrorize insurers into no longer providing insurance coverage under the Affordable Care Act. Should it be enacted, it could potentially impose crippling financial sanctions on any insurer who does sell Obamacare plans in Missouri. The bill closely tracks a proposal by a staffer at a conservative think tank who is heavily involved in efforts to push state lawmakers and the courts to undermine or even rewrite segments of the Affordable Care Act.

Though the bill's key provisions are unlikely to have much effect at all under the Affordable Care Act as drafted, they could potentially impose enormous financial costs on insurers who sold plans in health marketplaces authorized by Obamacare if a Supreme Court case seeking to gut much of the Affordable Care Act succeeds. One of the leading advocates behind that lawsuit is the same think tank staffer who proposed state legislation mirroring this bill.

The Affordable Care Act gives each state a choice, it can either set up its own health exchange where consumers can purchase insurance and receive subsidies if they qualify, or the state can opt to have the federal government set up this exchange. In either event, the law provides that consumers will receive subsidies from the exchange in their state, regardless of whether it is set up by a state or by the federal government.

A lawsuit called *King v. Burwell* seeks to change this equation, however. The plaintiffs in this case fixate on six words of the law that, if read out of context, seem to suggest that only state-operated exchanges are permitted to provide subsidies to help people pay for insurance. The Supreme Court, however, has held that "a reviewing court should not confine itself to examining a particular statutory provision in isolation" as the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." Thus, if the justices, who have agreed to hear the *King* case, read the Affordable Care Act the same way that they read every other federal law, they will reject the plaintiffs' claims. Although a handful of judges — all Republicans — sided with the plaintiffs in *King*, most judges sided against this attempt to deny subsidies under the law.

Which brings us back to the Missouri bill. The bill closely resembles a 2013 proposal by Michael Cannon, a health policy staffer at the Cato Institute who is also one of the architects of the *King* litigation. Cannon's proposal calls for states to enact legislation providing that "if any insurance carrier licensed by the state accepts" subsidized premium payments under the Affordable Care Act, then "the state will partially suspend the insurer's license immediately and until the insurer

returns that remuneration to its source and represents that it will decline any such remuneration in the future." In essence, Cannon seeks to cut off the subsidies by forcing insurers to return them to the federal government or else they lose their ability to do business in the state.

Under normal circumstances, this proposal would have little, if any, effect. Under the Constitution and longstanding Supreme Court precedents, federal law overrides state laws that "stand . . . as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The whole purpose of Cannon's plan is to erect a massive obstacle in front of the Affordable Care Act, and therefore state law adopting his plan is void for as long as Obamacare remains law.

But what if Obamacare were not law? Or, more on point, what if the Supreme Court drastically altered the Affordable Care Act so that it no longer paid out many of the subsidies authorized by the law. If the justices effectively rewrite Obamacare in *King*, the rewritten federal law would no longer stand as an obstacle to the implementation of Cannon's policy. A law that was once "preempted," to use the proper legal term for when a federal law trumps a state law, would suddenly become entirely enforceable.

By the time the Supreme Court gets around to handing down its decision in *King*, however, many insurers will have received subsidized premium payments for a year and a half. This is what makes Cannon's proposal, and the Missouri bill, so dangerous for the health insurance market. Say that Missouri were to enact this bill on January 1. When the Supreme Court decides *King*, which is likely to come in late June, Missouri insurers would have collected half-a-year's worth of subsidies. If *King* adopts Cannon's reading of Obamacare, however, that would mean that each insurer would immediately have to pay back all of those subsidies or they would lose their license to do business in the state (although Cannon's proposal says that the insurer will "partially" have their license suspended, the Missouri bill says that the license "shall be suspended" in its entirety).

In practice, the mere possibility that this scenario could play out is likely to drive many insurers from the market in fear should the bill become law. Insurers who behaved in a manner that was entirely lawful, even encouraged, under federal law could suddenly be hit with a massive new cost as the price of continuing to do business in Missouri.

Of course, this does not change the fact that the plaintiffs' arguments in *King* are weak as a matter of law. At least one prominent attorney, however, has suggested that the merits of this case could not matter. In an interview with *Talking Points Memo*'s Sahil Kapur, Michael Carvin, the lead attorney representing the plaintiffs in *King*, indicated that he believes that politics will trump the law in this case. While the case was still awaiting a decision from a lower court, Carvin predicted that he was "not going to lose any Republican-appointed judges' votes" in that court, and that he expected the Republican members of the Supreme Court to follow their lead.