

Health Care Reform

Trump Administration Could End Need For ACA Appeal, House Republicans Say

Halt the administration's appeal of an Obamacare cost-sharing case for now, House Republicans told a federal appeals court Nov. 21 (*U.S. House of Representatives v. Burwell*, D.C. Cir., No. 16-5202, motion filed 11/21/16).

The delay would give the incoming Trump administration time to consider whether to continue appealing a district court decision holding that payments made to insurers under the Affordable Care Act were illegal, the lawmakers said. They filed a motion asking the U.S. Court of Appeals for the District of Columbia Circuit to put the case on hold until February.

A program in which insurers agreed to reduce plan members' costs, including copays and coinsurance, in exchange for government subsidies is at issue. It was considered essential to prop up insurers for losses expected to occur when they complied with the ACA's coverage requirements.

But House Republicans said they never approved payments for the program.

President-elect Donald Trump has indicated there will be a significant policy change after his inauguration, namely a repeal and replacement of Obamacare.

Even if full repeal isn't on the table anymore, changes "could either obviate the need for resolution of this appeal or affect the nature and scope of the issues presented for review," the lawmakers said in their motion.

Burwell opposed the motion Nov. 23, saying the lawsuit is an unprecedented attempt by Congress to meddle in the executive branch's internal affairs.

The House's Nov. 28 reply reiterated that adherence to the current briefing schedule could be a waste of time and resources. The "potential for settlement with the new Administration means that the appeal may never need to be heard," it said. Alternatively, if the House's motion isn't granted and the Obama administration files its brief Jan. 19, the new administration may feel compelled to file a supplemental brief, it said.

No Money for Payments. House Republicans sued the Department of Health and Human Services over payments it made to insurers. Because Congress never earmarked the money to pay the insurers, the payments the HHS made to them were illegal, the lawmakers said.

A federal district court judge agreed, saying the payments violated the Constitution's appropriations clause, which gives Congress the power to set the federal budget (25 HLR 717, 5/19/16).

Judge Rosemary Collyer, however, delayed the effect of her ruling. This allowed the government to continue paying insurers pending the HHS's appeal.

The HHS, represented by the Department of Justice, filed its opening brief Oct. 24, arguing the ruling should be overturned. The House's response brief is due Dec. 23.

Attorneys and health-policy experts watching the case told Bloomberg BNA immediately after the Nov. 8 election they expect the new administration's DOJ to either drop the appeal or settle the case.

Give Trump a Chance. The lawmakers in their motion asked the court to give Trump and his administration time to consider whether the appeal should continue or be "otherwise" resolved. They suggested that the court order the parties to file a joint status report Feb. 21 indicating whether they are considering a settlement or voluntary dismissal of the appeal.

They asked the court alternatively to reset the briefing schedule, making the House's brief due after Trump's inauguration.

Burwell said the extension wasn't needed because the recent election didn't change the separation-of-powers principles implicated by the suit.

"The House does not suggest that the incoming Administration would welcome heretofore unprecedented suits by subcomponents of Congress that seek to alter the way the Executive Branch is administering federal law," Burwell's response said.

The HHS said it wouldn't object if the House decided to dismiss the lawsuit.

Not Going Over Cliff. The House's motion is "consistent with the thought that the incoming administration would prefer a slope to a cliff when it comes to repeal and replace," the president-elect's promise for Obamacare, Thomas Bulleit, told Bloomberg BNA. Bulleit heads the health-care practice in Ropes & Gray LLP's Washington office and has been watching the case.

Bulleit previously predicted the Trump administration won't simply drop the appeal. The new DOJ will need time to determine how to deal with the suit without throwing approximately 20 million people off their health insurance on Feb. 1, 2017, he said.

Not much can be read into the House's motion, Bulleit cautioned. The lawmakers could be trying to save the administration work, because the government's reply to the House's response brief is due Jan. 19, 2017, one day before the inauguration. One of the first things the Trump DOJ could do is change the position taken in that brief.

Still, the motion could indicate the House doesn't want to "jump off the cliff" by ending all insurer payments without having an alternative in place.

An absolute repeal doesn't seem to be what Trump has in mind, Bulleit said. But it will take time to find the proper "path to a post-ACA world," he said. A repeal-and-delay, giving Congress two years to come up with an alternative, is one approach that has been discussed, he said.

The HHS will continue paying insurers under the cost-sharing program until that replacement strategy is set, Bulleit said.

Thomas G. Hungar, Todd B. Tatelman and Eleni Roumel, of the House of Representatives' General Coun-

sel's Office, Washington, are representing the House Republicans. Alisa B. Klein, Mark B. Stern and Carleen Mary Zubrzycki, of the U.S. Department of Justice, Washington, are represented the administration.

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The motion is at <http://src.bna.com/keZ>. Burwell's response in opposition is at <http://src.bna.com/kku>. The House's reply brief is at <http://src.bna.com/kkz>.

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