

*Election 2016***Obamacare Cases in Limbo Following Republican Wins in White House, Congress**

The legal landscape for Obamacare-related litigation is uncertain following Republicans' election-day sweep, health-policy attorneys told Bloomberg BNA.

The cases range from challenges to rules implementing the Affordable Care Act's essential coverage provisions to insurers' demands for payments allegedly due them under the ACA's premium stabilization programs, known as the three Rs.

"The election will have direct implications for many cases," Timothy S. Jost, emeritus professor at Washington & Lee University School of Law, Lexington, Va., told Bloomberg BNA. Jost is a health-policy scholar and Obamacare supporter.

The stakes are high. Health care is a \$3 trillion, heavily regulated industry. Government policies and court decisions affecting how providers get paid and how Americans access care are crucial to its future.

Repeal, Replace or Something in Between? President-elect Donald Trump said he will ask Congress to repeal Obamacare. Even with Republican majorities in the House and Senate, Jost doesn't think there will be a full repeal. The proposal would prompt a filibuster in the Senate, where Democrats retained enough votes to block it, he said.

Congress, however, will do its best to chip away at the ACA during the budget reconciliation process, Jost said. Obamacare provisions dealing "strictly with spending, revenue or the debt ceiling can be repealed with a simple majority" at that time, Thomas Bulleit, of Ropes & Gray LLP, Washington, said. Bulleit is head of the health-care practice in the firm's Washington office.

"The federal subsidies for individual health-care coverage bought through the exchanges," will be a likely casualty, Bulleit said. Bulleit counsels clients in all segments of the health-care industry.

The individual mandate, premium tax credits and Medicaid expansion "are all on the table," Jost said. Essential coverage provisions may survive, but the Trump administration could gut rules, like the contraceptive mandate, implementing them.

Some popular provisions, like those prohibiting insurers from denying coverage based on pre-existing conditions and requiring continued coverage for young adults up to age 26, are expected to survive.

Some Changes Expected to Continue. "Going backwards" isn't an option, Gary Herschman, of Epstein, Becker & Green, Newark, N.J., told Bloomberg BNA. Herschman counsels providers.

ACA programs transforming health-care delivery and payment models were "crucial to stop the upward spiraling trend of health-care costs," Herschman said. Providers embraced them, and the transformation "spurred significant investment and consolidation in the industry."

Herschman sees "no logical reason to reverse this positive industry trend." Republicans may change the look of these programs, but they recognize the changes were needed to fix an ailing health-care system, he said.

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JOSH BLACKMAN,
SOUTH TEXAS COLLEGE OF LAW, HOUSTON

The Trump administration or Congress could address other ACA elements that aren't working as planned, he said. Proposals such as eliminating laws that prevent insurers from crossing state lines "likely will be pursued to enhance competition among health plans across the country, and may lead to more affordable coverage," Herschman said.

He acknowledged that changes in the law, including the federal McCarran-Ferguson Act, may be needed to accomplish that goal. The McCarran-Ferguson Act mostly exempts the insurance business from federal regulation, leaving it primarily within the states' province.

Trump Effect on Cases. The Trump administration takeover, however, could sound the death knell for cases the Department of Justice is defending on behalf of the Health and Human Services Department. Many could be rendered moot by policy changes, Herschman said.

U.S. House of Representatives v. Burwell is a key example. House Republicans accused the HHS of violating the Constitution's appropriations clause by reimbursing insurers that rolled back customer cost-sharing provisions.

The DOJ Oct. 24 urged the U.S. Court of Appeals for the District of Columbia Circuit to overturn a trial court

decision that held the administration illegally paid insurers (25 HLR 1560, 10/27/16).

The Trump DOJ could abandon the appeal, sources said.

“*House v. Burwell* goes away because the Trump administration will likely conclude that the payments are illegal,” Josh Blackman, an associate professor at South Texas College of Law in Houston and an adjunct scholar at the libertarian Cato Institute in Washington, told Bloomberg BNA.

Insurers or cost-sharing rule beneficiaries might try to intervene and take up the case for continuing payments, Jost said, though he wasn’t certain court rules would allow that.

The insurance companies also could bring new cases against “the government to recover fees they believe they are due, like in the risk corridor cases,” Blackman said.

Bulleit disagreed with predictions the Trump DOJ would simply drop the appeal.

The trial court stayed its injunction against the government payments. Presumably, that order would go into effect if the government ended the appeal, meaning payments to insurers would cease immediately, Bulleit said.

More insurers likely would then pull out of the marketplaces, throwing millions of consumers out of insurance coverage. There wouldn’t be any transition period, leaving the potential for “chaos” in the insurance market, Bulleit said.

Vice President-Elect Mike Pence has said a transition period is needed. And, while Trump has said he wants to get rid of the exchanges, throwing about 20 million people out of the insurance market in one fell swoop would be a “very aggressive thing,” Bulleit said.

A better course would be to ask the appeals court to postpone or stay the appeal until an alternative can be put in place, Bulleit said.

The Trump HHS likely won’t make the payments regardless of how the case plays out, Jost said. This would “sink” the ACA health insurance marketplaces and “cause severe distress for insurers and problems for beneficiaries,” he added.

Fraud Claims Against Insurers? The news for insurers that accepted cost-sharing payments could be even worse, according to Blackman. The Trump administration might sue insurers under the False Claims Act for damages and to claw back the money they received, he told Bloomberg BNA.

Insurers are “prime targets” for FCA actions because they accepted illegal payments from the government, Blackman said. Insurance company shareholders “should be worried,” he added.

It is “an intriguing idea,” Bulleit said, “but quite unlikely.”

Under the “reverse” FCA, an entity that receives money from the government to which it isn’t entitled must pay it back, he said. The district court didn’t say the insurers weren’t entitled to this money, it said the

government “paid it out of the wrong pocket,” Bulleit said.

The argument the insurers would have to repay the money is a “difficult” one, he said.

Obama officials responsible for authorizing or making the payments, too, may be sued, Blackman said. The Anti-Deficiency Act prohibits government officials from making illegal payments. A spotlight will be shown on “the Obama administration’s illegal acts,” he added.

Again, Bulleit disagreed. While he said he isn’t very familiar with the Anti-Deficiency Act, he believes anyone bringing a lawsuit would have to show the officials acted outside the scope of their employment. Officials could argue they acted within their reasonable business judgment, believing the payments to be legal, he said.

3R Suits. The DOJ is defending nearly a dozen lawsuits filed by insurers seeking payments under the ACA’s risk corridor provision, about a half-dozen concerning the risk adjustment program and a handful challenging the reinsurance program.

These sections, known as the “3Rs,” were intended to spread among insurers the risk of offering plans to less-healthy people, so that no one insurer would suffer overwhelming losses.

But the government failed to pay nearly \$5 billion it allegedly owes insurers for risk corridor losses. And insurers challenged the formula for setting risk adjustment payments, saying it favored existing insurers over new firms.

The Obama DOJ “will try to settle these cases as quickly as possible,” Blackman told Bloomberg BNA. The cases, however, will proceed if the U.S. Court of Federal Claims doesn’t accept a settlement before Trump’s inauguration.

The Trump DOJ will defend the suits “vigorously” if that happens, he said. A Congressional Budget Office review said payments to insurers can’t be made from the Judgment Fund, “and that’s a defensible position,” Blackman told Bloomberg BNA. The Judgment Fund is a permanent appropriation established to pay judgments and settlements when the U.S. is sued.

Settlement has “become very complicated,” Blackman said.

The Court of Federal Claims complicated the picture further on Nov. 10, when it dismissed Land of Lincoln Mutual Health Insurance Co.’s risk corridor complaint. The court said Land of Lincoln didn’t have a cause of action because it wasn’t statutorily entitled to full payment at this time (*see related story*).

The HHS’s budget-neutral stance, under which it argued it would make payments as it received the money from profitable insurers, was reasonable and entitled to deference, the court said (*Land of Lincoln Mut. Health Ins. Co. v. United States*, 2016 BL 376197, Fed. Cl., No. 16-cv-744C, 11/10/16). The court also said there was no enforceable contract for payment between the parties, and the government’s refusal to pay the money wasn’t an unconstitutional taking.

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Contraceptive Mandate. The contraceptive mandate isn't in the ACA. The requirement that employers provide no-cost health plans covering birth control products and related services was part of a rule implementing the essential coverage section.

The Trump administration could do away with the rule, even if it retains the ACA's essential coverage provisions. That would take some time, though, according to Jost.

Meanwhile, the Supreme Court charged the DOJ with working out a compromise with religious nonprofit groups that oppose providing the coverage. The court asked the parties to discuss whether the groups' employees could get access to no-cost birth control coverage without involving employers that object to providing it.

The HHS in September received comments on how the government might accomplish that goal, Brigitte Amiri, senior staff attorney at the American Civil Liberties Union's Reproductive Freedom Project in New York, told Bloomberg BNA.

The cases are on hold pending the HHS's review of the comments. The HHS could complete its review and propose changes to the contraceptive mandate before Trump takes office in January, she said.

Blackman, however, predicted the cases will "fall off the docket." The Trump administration could "simply exempt the religious charities that object to the contraceptive mandate, rather than 'accommodate' them."

The exemption would be the same as one applied to houses of worship, which aren't required to provide the plans. "Religious charities, such as the Little Sisters of the Poor, will receive the same treatment," Blackman said.

"These cases have always had a very easy solution, because the government has numerous ways to get contraceptives to people without involving" religious groups, Kristina Arriaga, executive director of the Becket Fund for Religious Liberty, told Bloomberg BNA.

"If the ACA is repealed, then the mandates will be repealed with it," she said. "But whether or not the ACA is repealed, all of the existing options are still on the table and are easy to implement."

Arriaga said Becket Fund's clients in these cases, including the Little Sisters of the Poor, "remain optimistic that the parties will be able to find a good solution."

Anti-Discrimination Section. Amiri was involved heavily in the contraceptive mandate litigation, and now is litigating cases brought against health-care providers under the ACA's anti-discrimination provision, Section 1557.

There is much uncertainty over the future of Section 1557, and Amiri told Bloomberg BNA she doesn't know if it will be repealed.

The ACLU is moving forward under the existing law for now, she said. Section 1557 is one tool in the group's

toolbox, but there are other anti-discrimination provisions under which it can proceed.

There isn't any perfect federal analog to Section 1557, but there are state provisions that could provide relief to people who say health-care providers or insurers have discriminated against them, Amiri said. The U.S. has "a long tradition" of fighting discrimination.

Trump's election also could affect *Franciscan Alliance, Inc. v. Burwell*, a suit pending in the U.S. District Court for the Northern District of Texas. Christian provider groups and several states challenged what they called the "transgender mandate," a rule interpreting Section 1557 (25 HLR 1245, 8/25/16).

The plaintiffs said the rule requires doctors to perform, and insurers and states to pay for, gender reassignment procedures, even when it goes against their medical judgment or religious beliefs.

The rule's proponents say it only prohibits providers from refusing treatments that could be used to conform a patient's physical form to his or her gender, if the provider would provide the same treatment for other reasons.

The case is on a fast track, Amiri told Bloomberg BNA. The plaintiffs have moved to block the rule's implementation. The Northern District of Texas is a very conservative district, so the motion likely will be granted.

The plaintiffs then could file an emergency appeal in the U.S. Court of Appeals for the Fifth Circuit, another conservative court. If they don't get relief there, the plaintiffs could file a motion for emergency relief in the Supreme Court.

It would take "a quick cascade of events," but the case could get to the Supreme Court before a Trump nominee could be seated, Amiri said.

Abortion. New federal anti-abortion measures are a big concern for abortion rights groups, Amiri told Bloomberg BNA. Such measures traditionally get passed when conservatives are in control of both houses of Congress, she said.

NARAL Pro-Choice America President Ilyse Hogue said in a press release the organization will continue fighting to keep abortion legal in the U.S.

The fight for "our values" won't be "won or lost in a single election," she added, noting that NARAL was founded before the Supreme Court recognized the right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973).

But there will be at least four years of Trump judicial appointees, and "Trump judges will change the legal landscape," Jost said.

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