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This is the third article in a series in which Ropes & Gray health-care partner Tom Bulleit will compare and contrast various aspects of the latest Affordable Care Act “repeal and replace” proposals.

Reports of the AHCA's Revival: Will Giving the States Obamacare Waivers Thread the Needle?



BY TOM BULLEIT

A barrage of recent news indicates that House Republicans may be coalescing around a proposed Obamacare “repeal and replace” compromise that in essence would punt to the states the difficult decisions about the content and cost of the individual and small group health insurance plans regulated under Title I of the Affordable Care Act (ACA). In fairness, at least as many reports contend that there is nowhere near any such consensus. Even assuming the yet-to-be released legislative language of the so-called MacArthur Amendment, named for Rep. Tom MacArthur (R-N.J.), attracts sufficient moderate and conservative votes to push the American Health Care Act (AHCA) to the Senate, the nature of the compromise may not do enough to address the concerns of moderate Senate Republicans whose votes would be needed to send the bill to President Trump.

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The State of House Negotiations

Just a month ago, Speaker Paul Ryan (R-Wis.) cancelled a House vote on the AHCA and pronounced that “Obamacare is now the law of the land” and President Trump said that he would be “moving on” with his legislative agenda despite inaction on the ACA. I speculated at the time that this might have been a statement intended to prompt House Republicans who had not supported the prior bill but did support a repeal of the ACA to return to negotiations. Since then, the speaker and the president seem to have been working to breathe new life into the AHCA. It has been widely reported that Vice President Mike Pence has been holding meetings with members of the moderate Tuesday Group and the conservative Freedom Caucus in an effort to bring about a compromise. The president gave an interview in which he indicated that he intended to get Obamacare “repeal and replace” done before moving to tax reform.

According to numerous news outlets, there is an emerging consensus among House Republicans around a proposal purportedly authored by Rep. MacArthur. The president has suggested that a new vote may be called this week “or shortly thereafter,” though most other sources consider that timetable to be overly aggressive. As of this writing, legislative language has not been released, but the publication Politico published a summary that has been widely circulated on line.

The MacArthur Amendment

According to the Politico document and other news reports, the MacArthur Amendment to the AHCA is crafted to thread the needle between moderates who want to retain what might be regarded as the essential Obamacare Title I consumer protections, and conservatives who want the AHCA to lower premiums. For the moderates, the proposal would retain the ACA's 10 essential health benefits, its requirement for community

rating of premiums and the popular provisions guaranteeing coverage despite pre-existing conditions and for children on parent policies to age 26.

However, what the proposal giveth to satisfy moderates, it seems to taketh away to please conservatives, in the form of making available to the states waivers from most of those very protections. Specifically, the states could obtain from the secretary of health and human services a waiver of the essential health benefits and most of the community rating rules on premiums. Waivers could not be granted based on gender, on age (although states apparently would be able to reduce the 5:1/older:younger ratio in premiums), or on health status; however waivers for health status *would* be available if the state operated a high-risk pool. Stated differently, states would be free to allow insurers to offer policies that are priced more expensively for patients with pre-existing conditions as long as the state participates in a high-risk pool. By most accounts, the amount of high-risk pool funding offered under the AHCA would not be adequate to cover the full costs of caring for a high-risk population.

States would be required to attest that their purpose in seeking the waiver is to reduce premium costs, increase the number of insureds or advance another benefit to the public interest in the state. It appears that there would be no look-behind for these attestations, suggesting that waivers would be freely granted.

Anticipated Senate Reception

Even if this proposal were to get the AHCA over the hump in the House, it seems not to address the concerns expressed by many Senate Republicans. These concerns include the AHCA's proposed changes to Medicaid, which in 2020 would sunset the ACA's Medicaid expansion and convert federal financial participation in Medicaid from an entitlement based on the state's costs of care, to a per capita, or block grant, amount based on 2016 costs, trended forward. Other concerns relate to the reallocation of subsidies (renamed advanceable, refundable tax credits) from the

poor based on income to less needy persons and families based on age.

It is difficult to imagine that the necessary eight Senate Democrats could be convinced to vote for a bill containing these elements. To prompt them, President Trump has suggested that he might use the ACA's cost-sharing reductions (CSRs), subsidies to help consumers with their copayments and deductibles, as bargaining chips. Although HHS has finalized a regulation that gives the insurance industry some of what it wants to stabilize the exchange marketplaces, there is fairly wide agreement that if the administration stops paying CSRs, the marketplaces would collapse as insurers would withdraw for 2018 and might attempt to withdraw for the remainder of 2017. So far, Democrats seem convinced that the president and Republican Congress would be blamed, and thus have shown no willingness to negotiate on this point.

However, getting a bill to the Senate at least would create the prospect of a totally different Senate bill, perhaps along the lines of the Collins-Cassidy Patient Freedom Act, which would get House and Senate together in conference. Initial Democratic reactions to the Patient Freedom Act were not favorable, but it is not impossible to imagine some Democrats getting on board for a proposal that would retain the popular Obamacare consumer protections (e.g., pre-existing conditions, age 26), and allow states to retain the Obamacare subsidies and their Medicaid expansions, if the words "revive and repair" were substituted for "repeal and replace." Such a bill would never satisfy the House Freedom caucus, but it would not have to if House Democrats would join mainstream House Republicans in support.

. . . Or Maybe Not

Of course, this bill may never emerge, and by next week, there might be a different "repeal and replace" strategy in play. Despite the enormous differences in approach, Republicans seem to remain united on fulfilling their campaign promise to "repeal and replace" Obamacare. At least if both houses of Congress pass a bill, they will be able to tell their constituents that they did their best to keep that promise.