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Repeal and Replace a Year Later: Attempted Murder on a Disoriented Express

This is the ninth 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.

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Kenneth Branagh's remake of Agatha Christie's classic, Murder on the Orient Express, brings to mind this year's efforts of the President and Congress to kill the "disaster of Obamacare." (Since the mystery set on a train from Istanbul to Paris has been filmed so often, a spoiler alert seems unnecessary, but anyone unfamiliar with the story may wish to read no further.) This year's MOE finds Branagh's Hercule Poirot discovering that the victim, Edward Ratchett, died of knife wounds inflicted by all twelve suspects, avenging a heinous kidnapping and murder committed many years earlier for which Ratchett had escaped justice by subterfuge and corruption.

Although it is not dead yet, the Affordable Care Act, or Obamacare, likewise has been the victim of a strategy of killing slowly with multiple cuts from many would-be killers, each armed with the perceived certainty that they are righting the wrong inflicted on Americans by the 2010 law. In this column I both summarize these attacks and speculate concerning what they tell us about whether the ACA will ultimately go the way of the ill-fated Ratchett.

Preface

When I began writing this column almost a year ago, I was not alone among health-care lawyers in expecting quick action by the Republican Congress to pass a bill that could be described as repeal and replace of the ACA. It seemed a good bet. Joined by Congressional Republicans, newly-elected President Donald Trump had made repeal and replace a rallying cry during the 2016 campaign. Congress had passed just a year earlier a repeal of all those components that could be repealed with 51 Senate votes via budget reconciliation, and Paul Ryan had published his "Better Way" proposal that would have relied on expanded health savings accounts and tax credits based on age to replace the Obamacare tax credits based on income.

In addition, though upheld by the Supreme Court, the individual mandate to purchase health insurance was (and remains) widely unpopular, and in some (mostly rural) markets, the ACA exchanges were experiencing departures by major insurers and substantially increasing premiums. Both of these were due in part to the smaller and sicker risk pools that resulted from fewer young people obeying the mandate than anticipated, and the increased cost of requiring all policies to cover pre-existing conditions and a minimum package of essential health benefits, some of which (like maternity care, behavioral health, and prescription drug coverage) had not been routinely part of policies in the individual and small group markets before the ACA's

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enactment. Although most health-care economists and policy analysts thought that these Obamacare concerns could be fixed with a tweak rather than an execution, it did appear that the fix was in for the latter.

Recognizing that there would be no Democratic votes in support of the effort to undo one of President Obama's signature domestic legacies, Republicans in Congress tried to execute a repeal using the budget reconciliation process that had passed on a show vote just a year before when it was clear that President Obama would veto the measure. This year's effort failed because a large number of Republicans had concerns with what would happen to the 23 million Americans who had coverage either through the ACA's expansion of Medicaid, or its individual market exchanges.

Republicans disappointed in the Congressional failure to punish Obamacare may see an analogy to the criminal Ratchett escaping justice for his crimes. The Trump administration has taken that view to heart, and even without the judgment of a Congressional majority, set out to inflict on the ACA a sufficient number of stab wounds to kill it.

Wound #1: Creating Uncertainty About CSRs. The ACA has two kinds of consumer subsidies for Obamacare plans: premium subsidies to reduce the cost of buying insurance, and cost-sharing reductions (CSRs) to reduce patient out-of-pocket costs for deductibles, copayments and coinsurance. The House of Representatives sued the Obama administration to stop payment on the CSRs, arguing that they had not been properly appropriated. The House won in federal district court, but the Obama administration obtained a stay of the order pending appeal. Since the election, the parties have consistently pushed back the date of the appeal, and the Trump administration continued to make payments until September, when it announced it would no longer make them.

Even before this announcement, however, the administration refused to say from month to month whether it would continue the payments, leading many insurers to conclude that they would have to exit the Obamacare marketplaces or raise premiums in anticipation of the loss of those funds. Restoration of the CSRs is now the subject of a different lawsuit brought by state attorneys general, and of a bill proposed by Sens. Lamar Alexander (R-Tenn.) and Patty Murray (D-Wash.), but their future remains uncertain and, accordingly, so does the continued participation of a sufficient number of competing insurers to keep all of the exchanges viable.

Wound #2: Weakening the Individual Mandate. On his first day in office, President Trump issued an Executive Order instructing federal agencies to “take all actions consistent with law to minimize the unwarranted economic and regulatory burdens of the act.” The order was widely interpreted as an invitation not to enforce the law's mandate that everyone have health insurance, and initially the IRS indicated that it would accept tax returns that did not contain information on health insurance. Although the IRS announced in October that it would not accept tax returns without this information, speculation remains that the agency might not vigorously enforce the tax penalty associated with non-compliance, perhaps by an expended interpretation of the “hardship waivers” allowed under the ACA. In addition, the Senate's tax reform bill as passed last week would repeal the individual mandate. The Congressional Budget Office estimates that a repeal of the mandate would result in some 13 million Americans becoming uninsured. In that most of those likely would be the young and healthy, this could inflict serious harm on the risk pool in the Obamacare exchanges and lead to higher premiums.

Wound #3: Diluting the Risk Pool by Expanding Access to Skinnier Health Plans. Another Executive Order issued Oct. 12 instructed the Departments of Labor, HHS, and Treasury to revisit their existing regulations around health insurance products, with the goal of making more widely available insurance policies that are cheaper, because they largely avoid the ACA's consumer protections. This would be accomplished by allowing a greater duration (one year) for so-called short-term plans, and by re-interpreting the Employee Retirement Income Security Act (ERISA) to allow association health plans to be offered by loose associations of employers. Although these rules have not yet been published, the expectation is that because these plans would not have to incorporate all of the Obamacare requirements, the plans would cover less and would be cheaper, thus drawing young and healthy people to choose them as opposed to more expensive ACA plans. The result would be that the ACA plans would have fewer young and healthy in the risk pool, and correspondingly premiums would rise for those plans.

Wound #4: Discouraging Enrollment in ACA Exchanges. In August, the administration announced that it was cutting by 90% the budget for advertising the ACA, and supporting organizations that assist patients with finding plans by about 40 percent. The administration also shortened the open enrollment period from three months to 45 days, and shut down the federal exchange for 12 hours each Sunday. Helpful information has been removed from the CMS website, and administration officials have consistently bad-mouthed the ACA. Although the pace of enrollment has exceeded past years, the

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shorter enrollment period may in the end result in fewer insured through the ACA for 2018. Assuming that the earlier wounds are having some effect, those enrolling will be older and sicker, another blow to the risk pools and another impetus for rising premiums.

Epilogue

So far, the stab wounds inflicted aboard this Disoriented Express have not been lethal. As noted, despite the obstacles, the pace of enrollment this year has exceeded every year (except the first). While it is not possible to rule out a form of full repeal and replace that becomes law next year, the odds seem against it until and unless the 2018 election increases the complement of conservative Republicans in Congress determined to repeal. Absent a repeal by Congress, the ACA's premium subsidies will ensure that the most economically vulnerable populations will still have access to affordable health insurance, and it seems likely that some bipartisan continuation of the CSRs will sustain those markets for another year.

What does seem clear, however, is that if the administration's efforts are successful, the individual health insurance marketplace will break into two. Amid lax enforcement (or repeal) of the individual mandate and a proliferation of skinnier plans, the young and healthy who do not qualify for subsidies either will not purchase insurance, or will purchase off-exchange plans that cost, and cover, less. That will leave the Obamacare exchanges crammed with the sick and elderly, leading to continued premium increases. The taxpayers will soften the blow of increased cost via the premium subsidies and CSRs, but for those Americans who are not poor enough to qualify for assistance, comprehensive health plans will become increasingly unaffordable.

Whether these efforts ultimately will succeed in killing Obamacare remains uncertain. Numerous lawsuits currently are pending to impede many of these efforts, and it seems highly likely that any changes to regulations that would fracture the ACA risk pool—especially the described changes for short term and association health plans—will be challenged in court. Challenges might be brought by states fearing harm to consumers from the loss of regulatory authority over association plans, or by insurers fearing loss of business. Legal theories might include assertions that these actions are arbitrary and capricious and not in accordance with law because they undermine the ACA, or because they are inconsistent with ERISA.

Whatever the final result, the many-stab-wounds approach to repeal and replace will continue to be if not chaotic, at least disoriented. In MOE, Poirot is existentially troubled. He solves the mystery, but lets the killers go free because he concludes that in this case, vigilante justice is justified for the evil and unrepentant Ratchett. Americans watching the stabbings aboard this Disoriented Express need no Poirot to discover what has taken place, since that is plain to see. But like the great detective, the voters ultimately must decide for themselves whether the administration should be free to continue with these "cuts," because those actions represent justice for the criminal endeavor that is Obamacare, or whether it should be punished for undermining the ACA without congressional authorization.

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