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Legislative Jenga: Building a Bipartisan Bill to Repair Obamacare

This is the fifth 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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Senate Majority Leader Mitch McConnell's (R-KY) push to repeal and replace the Affordable Care Act (ACA) likely suffered a fatal blow this week as a growing number of Republicans came out against the latest Senate bill. The Senate will not vote on its draft Better Care Reconciliation Act (BCRA) this week, and absent new developments, it appears the Senate will not vote on repeal-and-replace legislation at all.

Instead, McConnell has said that he plans a vote on a "clean" repeal of as much of the ACA as Senate reconciliation rules will permit, no doubt using the Restoring Americans' Healthcare Freedom Reconciliation Act, which both houses of Congress passed in 2015 when it was sure of a veto by President Obama, as a model. The bill likely would delay repeal from going into effect for two years to give Congress time to work on a replacement and perhaps drive Democrats to the table if the uncertainty created by the legislation destabilizes the insurance markets, as President Trump, among others, have predicted. However, given the political risks, market uncertainty, and losses of insurance coverage that would result from repealing the ACA without a replacement, it is difficult to foresee fifty Republican senators supporting such a strategy. As a result, it is more likely that the Republicans soon will need to move on from their repeal ambitions and decide whether they should work with Democrats on bipartisan reforms to shore up insurance markets in the near term. McConnell in the past has suggested such an approach, and Minority Leader Chuck Schumer (D-NY) recently wrote to McConnell urging him to work with Democrats on such a bill.

In the event that both sides come to the table, what would a bipartisan "repair" bill look like? In crafting it, McConnell and Schumer's task will resemble a legislative version of Jenga, the classic game where one misplaced brick could cause the whole endeavor to collapse. McConnell and Schumer must find the right "bricks" of the ACA to tinker with and still maintain a bipartisan coalition. It will be a delicate game. Democrats will resist any efforts to roll back core components of the ACA, and will insist on messaging that this is not a "repeal." Republicans will only play if their actions are billed as a temporary measure and not an endorsement of Obamacare, or if the bill contains other non-repeal elements that support their health care agenda.

This column attempts to predict five "bricks" in the ACA structure that both sides might put into play. Which bricks are selected ultimately will depend on the ambition of the two sides. Even a narrow bill focused solely on market stabilization likely would include some version of the first three bricks. In the perhaps unlikely event that this effort leads to a genuine appetite for bipartisanship, the fourth brick seems an easy non-repeal concession for

Democrats that would allow Republicans to claim a small victory. The fifth brick will be more of a reach for many Democrats, so its inclusion would signal a degree of bipartisanship that could suggest further health care compromises.

Brick #1: Preserve Cost-Sharing Reductions (CSRs)

Any bipartisan Senate bill likely would address the uncertainty surrounding the ACA's cost-sharing reductions (CSRs). In addition to premium tax credits, the ACA also authorized CSR payments to insurers to reduce out-of-pocket costs, such as deductibles and copayments, for low-income Americans in the individual market. The legality of CSRs is currently in doubt, as the House of Representatives v. Price litigation regarding whether CSRs funding was properly appropriated remains pending. The Trump administration has continued to make the payments thus far, but has not committed to continuing to do so.

This uncertainty has had a destabilizing effect on the individual markets and has been cited by multiple insurers as a key factor in their decisions to raise premiums or withdraw from certain markets altogether. Removing such uncertainty by expressly funding the CSRs for at least the next two years would go a long way in strengthening markets and stabilizing premiums.

Such a proposal should have broad support among Republicans, as well as Democrats who have long pushed for long-term funding of CSRs. Numerous Republican senators have backed continuing CSRs at least in the short-term, including moderates like Susan Collins (R-ME) and Rob Portman (R-OH), conservatives like Ron Johnson (R-WI), and committee leaders like Lamar Alexander (R-TN). In fact, the Senate repeal-and-replace bill included two years of funding for CSRs (before repealing the program in 2020). CSRs would be a reasonable starting point for building a bipartisan bill.

Brick #2: Invest in a Reinsurance Program for Insurers

The ACA initially created three programs to help stabilize the individual markets and encourage participation by insurers: risk adjustment, reinsurance, and risk corridors (or "the three Rs"). The reinsurance and risk corridor programs expired after 2016. While permanent, the risk adjustment program does not inject new funding into the insurance market; rather, it merely shifts funds from plans with low-risk enrollees to those with high-risk enrollees.

A new reinsurance program should help strengthen insurance markets and lower premiums by helping defray the costs for insurers of covering expensive enrollees whose yearly medical expenses exceed a certain threshold. Such a program could resemble the ACA's temporary program, similar initiatives in states like Alaska and Maine, or the programs proposed in the Republican House and Senate repeal-and-replace bills. Both bills allocated substantial sums for state stability funds, which would be used for, among other things, reinsurance and risk-sharing arrangements with insurers.

These bills suggest many Republicans would be open to at least a short-term reinsurance program. Senate Democrats have already introduced their own bill to create a permanent version of such a program. A plausible path likely exists then for McConnell and Schumer to fashion some form of reinsurance arrangement for at least the next couple of years to help stabilize markets.

Brick #3: Address Counties Without Exchange Plans

In their quest to eradicate the ACA, conservatives often point to the number of counties with one or no insurance provider option(s) in their local marketplace. A bipartisan agreement that quells this conservative argument also would have to allow the existing marketplace structure created by the ACA to remain. Senators Lamar Alexander (R-TN) and Bob Corker (R-TN) offered a solution in their proposed Health Care Options Act (HCOA), providing that counties with no qualified health plan offerings would be exempt from the individual mandate. Qualifying individuals also would be eligible for premium tax credits to put towards the purchase of an off-exchange plan. Based largely on the unique case of Tennessee, the proposal lacks widespread support because some legislators fear that the act may not be an appropriate one-size-fits-all solution for bare counties nationwide.

Senator Cruz recently proposed a more conservative fix, arguing in favor of parallel healthcare offerings by a single insurer; that is, as long as a company offers one ACA-compliant plan in a state, the company would then be able to offer alternate noncompliant plans in that state. Cruz's proposal appeases his conservative peers' distaste for the ACA's mandated insurance protections. Yet Cruz's proposal likely would upset both moderate Republicans and Democrats by isolating the ACA exchanges, driving healthy individuals to non-compliant plans and turning ACA-compliant plans into high-premium high-risk pools.

In hopes of providing a Democratic fix to the issue, Senator Claire McCaskill (D-MO) recently proposed legislation that would allow individuals in counties with no insurance options to purchase coverage through the District of Columbia small group exchange, just as members of Congress and their staff do. Though the bill has potential for bipartisan support, it may fall short due to a lack of clarity in the details of its implementation. Amongst these outstanding questions is how insurers participating in the D.C.'s small business exchange would determine premiums and set premium tax credit amounts for individuals in counties across the country. An alternative would be to allow individuals in bare counties to participate in Federal Employees Health Benefits (FEHB) plans; however, similar administrative challenges would exist.

Brick #4: Tax-Advantaged Accounts

Health savings accounts (HSAs) are another topic where both parties may see eye to eye in a bipartisan effort to preserve and update the ACA. Both the Senate and House repeal-and-replace bills included various proposals to promote the use of HSAs, including raising the yearly contribution limit, permitting HSAs to be used once again for over-the-counter medications, and reducing the tax penalty for HSA funds used for non-qualified medical expenses. Republicans might use the opportunity of a bipartisan effort to further their HSA policies. HSA expansion provides a material benefit for lawmakers of both parties to show their constituents, allowing Republicans to expand consumer choice and lower taxes while leaving the core Democratic tenets of the ACA intact. Some moderate Democrats have supported expanding HSAs in the past. For example, last Congress, Senators Heidi Heitkamp (D-ND) and Pat Roberts (R-KS) introduced a bill to repeal the ACA provision preventing consumers from using HSAs to purchase over-the-counter medications. Promoting HSAs could be a policy victory for Republicans and some moderate Democrats, but would be unlikely to command much support among the rest of the Democratic caucus, which views HSAs as unlikely to help America's low-income population. Still, in the rough and tumble of the Jenga tournament, it should be relatively painless for Democrats to leave this brick in place in order to firm up the structure.

Brick #5: Expanding Plan Offerings

Led by Senator Mark Warner (D-VA), a handful of moderate Democrats have previously proposed adding a "copper plan" to the existing range of insurance tiers available under the ACA. Under the existing structure of the ACA, there are four insurance tiers (bronze, silver, gold, and platinum plans), providing incremental increases in both premium costs and overall coverage. For example, a bronze plan offers coverage equivalent to 60 percent actuarial value, while platinum plans offer 90 percent actuarial value. Republicans and moderate Democrats interested in expanding consumer options and offering plans with lower premiums could push for introducing copper plans, which would have a lower actuarial value of around 50 percent. The plan's premiums would be lower than current ACA offerings, but deductibles would have to be much higher.

The addition of a copper brick in a bipartisan revision of the ACA could offer something for lawmakers on both sides of the aisle. Lower value plans would provide an incentive for additional consumers to join the insurance marketplace due to their little-to-no-cost premiums. Sen. Warner recently stated his support of actuarially cheaper plans as a way to shore up the individual market and incentivize young people to buy health insurance.

Conventional Democratic thinking would find the shine of copper plans to be lackluster due to the plan's inadequacies. The low premiums may provide buyers with the illusion of coverage, but in the event of a health crisis, many consumers would be unprepared and financially devastated due to the high deductibles. For just this reason, a serious consideration of copper plans could be a bellwether for a higher degree of bipartisanship in achieving health care reform.

Conclusion

Even with the deep partisanship clouding the health care debate, there are numerous areas where McConnell and Schumer could reach a bipartisan agreement—so long as they don't play the wrong bricks and risk bringing the whole thing down. Upcoming legislation to reauthorize the Children's Health Insurance Program (CHIP), which expires September 30, could provide the perfect vehicle for targeted ACA repairs. It would allow Republicans to claim the repair measures are simply components of a larger health care package and not an abandonment of their opposition to Obamacare, while Democrats would get what they need to make the ACA work better.

