November 2, 2020

STRATEGIC PERSPECTIVES: How the 2020 presidential election could affect the future of health care

By Sheila Lynch-Afryl, J.D., M.A.

The makeup of Congress and the Supreme Court's decision in *California v. Texas* will be important influences on what either candidate can ultimately accomplish.

President Donald Trump and former Vice President Joe Biden, candidates for the 2020 presidential election, differ on virtually every issue, from the economy to climate change. Health care policy is no different, and it has become a defining issue in the 2020 election, in part due to the COVID-19 pandemic, which has permeated every aspect of life. On the eve of the 2020 presidential election, members of the Wolters Kluwer Health Law Advisory Board analyze how health care policy could look starting in 2021 if Trump or Biden prevails. But, they say, the winner's hands will likely be tied by the Supreme Court's decision on the validity of the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) and the constitution of Congress after the election.

Supreme Court's Decision on the ACA

On November 10, 2020, only a week after the election, the U.S. Supreme Court will hear arguments in *California v. Texas*, which involves a challenge by the Trump Administration to the individual mandate and implicates the survival of the entire ACA (see *What happens if the entire ACA is found unconstitutional?* September 28, 2020; *Health law takes center stage at U.S. Supreme Court*, October 5, 2020). Kathy Poppitt, partner at King & Spalding LLP, and Andrew Ruskin, partner at K&L Gates, agree that the upcoming Supreme Court decision will be pivotal in how either candidate addresses health care. The issue of the Supreme Court, and how it might rule on the ACA, became more complicated on October 26th when the Senate confirmed Amy Coney Barrett to the seat left vacant by Ruth Bader Ginsburg's death—the third nomination for Trump.

Ruskin said that an adverse decision on the ACA "is at least as important a catalyst of change as an election victory for the candidates." According to Ruskin, "A decision striking down the ACA would be catastrophic, as it would be impossible to unwind the law 10 years in. Both sides would need to act quickly to put in some sort of stopgap measure that reinstates it (even if they need to reinstate the mandate, so as to make it constitutional again), while negotiations would continue for a replacement."

Poppitt added that if the Court strikes down the ACA in its entirety, "tens of millions of people will lose their health insurance, a variety of protections for people with pre-existing conditions will be eliminated, and an extensive set of policies affecting Medicare, Medicaid, prescriptions drugs, and

other parts of the health care system will be reversed." A decade after it passed, the ACA "is deeply woven into the fabric of our healthcare system," but, she said, neither candidate has really addressed how they plan to move forward if the ACA is overturned.

The Role of Congress

Ruskin said that "the real question" is whether there will be a split between the legislative and executive branches after the election. "If the Senate is still Republican and Biden wins, then Biden will not be able to accomplish much in terms of reinforcing the ACA. And if Trump wins, but still has a Democratic house, then he won't be able to pass any substitute to the ACA." If "neither side gets a clear victory on both branches, I don't think there will be much difference in policy."

Ruskin noted that one area where bipartisan support may be possible will be telehealth. Legislation could pass early next year that would allow for wider Medicare coverage, and, he said, the election won't likely affect that momentum.

Health Care Policy if Biden Wins

Biden's health care plan includes protecting and expanding upon the ACA by providing a public health insurance option similar to Medicare and increasing premium subsidies. Poppitt opined, "Biden has not set forth his plan for accomplishing these goals if the ACA is overturned but he does seem committed to addressing healthcare in the event that this happens." However, she said, since Biden was vice president when the ACA was passed, he "appears to have an understanding of the intricacies of the healthcare system and seems more prepared to address the key policy decisions than does Trump. In my opinion, a Biden win is likely to create a much needed sense of stability to the healthcare system after years of uncertainty around the ACA."

Medicare. According to Robert L. Roth, partner at Hooper, Lundy & Bookman, P.C., under a Biden administration, "we expect that Medicare policies would be significantly different, most importantly with regard to the proposed expansion of eligibility and benefits." Biden proposed lowering the age of Medicare eligibility from 65 to 60, with, said Roth, the expansion financed outside of the current Medicare Trust Funds. "This would be the biggest expansion of Medicare eligibility since the program started in 1965."

In addition, the Biden plan includes expanding Medicare fee-for-service benefit coverage by finding what Roth dubbed a "financially responsible way" to add vision, hearing, and dental benefits. The Biden plan would also allow the HHS Secretary to negotiate drug prices for Medicare, which Roth said "would put downward pressure on drug prices while other Biden proposals would limit beneficiary out-of-pocket costs for prescription drugs, in effect expanding coverage and reducing cost." He also anticipates that both Biden and Trump would continue to push for more value-based care, as well as "site neutral" payment policies.

Ruskin noted that a Biden administration might be slightly more in favor of buttressing the accountable care organization (ACO) program, which "has not been a priority under Trump." Furthermore,

a Biden administration "will be slightly more inclined to lean on drug manufacturers to support the 340B contract pharmacy distribution chain, but there will be only shades of difference between the two potential administrations."

Surprise medical billing. Biden's plan would end surprise medical billing. Poppitt noted that Biden "is not far off from Trump's position" on this issue, but before COVID-19, Trump was not able to address the issue through the legislature—only in limited ways through Executive Orders.

Health Care Policy if Trump Wins

While Trump has not revealed an official plan for health care, in September he released an Executive Order on an American-First Healthcare Plan, which outlined his Administration's accomplishments throughout his term, including the repeal of the individual mandate, expansion of health savings accounts, and expansion of telehealth during the pandemic. It also ordered various agencies to "build upon existing actions to expand access to and options for affordable healthcare." Trump opposes the public option proposed by Biden, calling it "socialized medicine."

ACA replacement. The Trump Administration advocates for a repeal of the ACA but has not proposed a replacement. In the final presidential debate Trump said he would "terminate" the ACA and "come up with a brand new, beautiful health care" plan that protects people with preexisting conditions.

Poppitt noted that while Trump promised to protect those with preexisting conditions, he "hasn't offered specifics on how this might happen and doing so is much harder than it sounds." She explained that the buy-in by insurance companies to cover people with preexisting conditions at prevailing premiums was possible due to a variety of factors, including the requirement that adults of all ages and health conditions be required to have insurance, the same individual mandate that Trump has eliminated.

Medicare. Because "the Trump Administration has not made major changes to the Medicare program," under a second term, Roth "would expect Medicare policies to continue on the trajectory established over the past four years," including the following:

- No major changes to fee-for-service Medicare eligibility or benefit coverage, but incentives to move more beneficiaries into Medicare Advantage, for example, through expanded supplemental benefits.
- Policy focus on pricing transparency of health care services and, "despite little to show for it thus far," continued efforts to try to reduce costs of prescription drugs, perhaps with bolder regulatory measures under Part D.
- In response to the pandemic, additional funds were made available to providers and coverage of telehealth was expanded. It is unclear how far the Trump Administration would go in a second term to support permanent expansion of telehealth after the pandemic ends.
- The Administration's support of repeal of the ACA, by default, includes repeal of the following provisions that are very helpful to Medicare beneficiaries: provisions to close the Part D prescription drug "donut hole," free coverage for preventive services, creation of the CMS Innovations Center, and numerous provider payment policies.

Surprise medical billing. According to Poppitt, "Trump has pushed hard on Congress to deal with surprise billing, and lawmakers got close in December but ultimately failed to agree on legislation." The president has used his executive authority to try to bring down drug prices, and "another Trump term might mean some of these efforts will go into effect."

Looking Ahead

The winner of the 2020 presidential election will have his work cut out for him as the COVID-19 pandemic rages throughout the country. Despite their respective platforms, fixing many of the problems with health care policy and costs will need to be accomplished through legislation. Poppitt concluded, "Either occupant of the White House will need to learn the fine art of getting legislation through Congress."

Attorneys: Kathy Poppitt (King & Spalding LLP). Andrew Ruskin (K&L Gates). Robert L. Roth (Hooper, Lundy & Bookman, P.C.).

Follow Us
Law & Health Blog | Twitter

Get Our Apps
iPad & iPhone | Android

Related Products & Services
Cheetah™ Research Platform

Wolters Kluwer