Health Law Daily Wrap Up, TOP STORY—LEGISLATION: BCRA may be gone, but AHCA, ACA repeal efforts continue, (Jul. 18, 2017)

Health Law Daily Wrap Up

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After four Republican Senators announced their opposition to the Better Care Reconciliation Act of 2017 (BCRA), the Senate’s draft bill that would end some of the Patient Protection and Affordable Care Act’s (ACA) (P.L. 111-148) requirements and taxes while reforming Medicaid, Senate Majority Leader Mitch McConnell (R-Ky) announced that BCRA would not proceed. Rather, McConnell said, the Senate will take up the House of Representative’s bill, titled the American Health Care Act (H.R. 1628), and amend it to mirror a reconciliation bill that passed both Houses in 2015 but was vetoed by President Barack Obama (H.R.3762).

BCRA. After the House passed the AHCA, the Senate began work on its own version of the bill (see Senate Republicans release discussion draft of ‘Better Care’ health bill, June 22, 2017). Although the two bills have much in common—particularly ending the employer mandate, repealing taxes that finance the ACA, terminating cost-sharing reductions in the individual health insurance market, phasing out Medicaid expansion, and allowing states flexibility in many requirements—they differ in effective dates and other details.

GOP opposition. Sens. Susan Collins (R-Me) and Rand Paul (R-Ky) had previously announced their opposition to BCRA, though for different reasons. Collins was concerned about the Congressional Budget Office (CBO) report showing that 22 million Americans would lose health insurance (see BCRAwould curb Medicaid spending growth, increase uninsured numbers, June 30, 2017), while Paul opposed the bill because it did not entirely repeal the ACA.

In an attempt to shore up needed votes—all 48 Democratic and independent senators opposed the bill, in addition to Collins and Paul; therefore, all 50 remaining Republican votes were needed to pass the bill with a tie-breaking vote from Vice President Mike Pence—BCRA was revised last week. The revision included an amendment from Sen. Ted Cruz (R-Texas) that would allow insurers to sell products that comply ACA rules alongside plans that do not (see Cheaper plans, fewer benefits with revised Senate’s ACA replacement bill, July 14, 2017). However, that amendment received opposition from a number of stakeholders, particularly health insurers (see Insurers dub Consumer Freedom Option unworkable, predict harm to consumers, July 17, 2017).

On July 17, following news that consideration of the bill would be delayed pending Sen. John McCain’s (R-Ariz) recovery from an emergency surgery (see McCain’s absence, delayed CBO analysis contribute to postponed Senate vote, July 17, 2017), Sens. Mike Lee (R-Utah) and Jerry Moran (R-Ks) announced that they too would oppose BCRA. There was speculation that other senators from states that expanded Medicaid under the ACA would also oppose BCRA due to its changes to the Medicaid program, including Alaska, Ohio, and Nevada, but none officially announced their position prior to McConnell’s decision to remove the bill from consideration.

McConnell’s new plan. McConnell laid out his plan for his continued efforts to repeal, alter, or undermine the ACA, saying, "the Senate will vote to take up the House bill," meaning that he plans to first bring the AHCA to the Senate floor for a vote. He then intends to remove the text of the AHCA and replace it with "what a majority of the Senate has already supported in 2015 and that was vetoed by then-President Obama." The bill McConnell referred to, H.R. 3762, was introduced in the 114th Congress as reconciliation legislation by then-Rep. Tom Price (R-Ga), the current HHS Secretary.

It would have repealed the ACA’s coverage subsidies, tax credits, Medicaid expansion provisions, individual and employer mandate penalties, and the medical device and health insurance taxes. After passing Congress, H.R.3762 made it to Obama’s desk before being vetoed (see Bill to repeal portions of the ACA heads to the
President’s desk, Obama veto imminent, January 13, 2016; Message in a veto: President says ACA stays put, January 13, 2016). The CBO estimated in 2015 that 22 million people would lose health insurance if H.R. 3762 became law; that number would be higher today (see Senate’s ACA repeal would reduce deficits by $474B, December 16, 2015). In a different report, the CBO found that repealing the ACA would initially increase the federal deficit, but later begin to reduce the deficit while leaving individuals with higher premium costs (see Can health care spending be reduced while improving effectiveness?, September 28, 2016).

Possible roadblocks. McConnell faces two major hurdles in his plan. First, a simple majority of senators must vote on a "motion to proceed," which is subject to debate and filibuster (Congressional Research Service, How Measures Are Brought to the Senate Floor: A Brief Introduction, April 6, 2017). Senators who opposed a motion to proceed on BCRA (including Collins and Paul) may similarly oppose such a motion on the AHCA. Three Republicans, Sens. Collins, Shelley Capito (R-WV), and Lisa Murkowski (R-Alaska), have all indicated that they would vote against the motion to proceed. Without those three votes, the motion to proceed would fail.

The second issue would arise after the AHCA was opened for debate and amendments, and if the amendment replacing the AHCA with the text of H.R. 3762 was approved: it would still require 50 votes in favor of the bill to pass with Pence’s tie-breaking vote. The original bill passed the Senate in December 2015 by a vote of 52 to 47; two Republicans—Sens. Collins and Mark Kirk (R-Ill) voted against it. Kirk lost his seat in the 2016 election to Sen. Tammy Duckworth (D-III), while Sen. Kelly Ayotte (R-NH), who voted for the bill, lost her seat to Sen. Maggie Hassan (D-NH). Sen. David Vitter (R-La) did not run for reelection in 2016; Sen. John Kennedy (R-La) won Vitter’s seat. Sen. Bernie Sanders (I-Vt) did not vote on the 2015 bill. Based on the CBO’s previous reports analyzing the effects of H.R. 3762, it may also face an uphill battle as senators from Medicaid expansion states grapple with the potential that millions of their constituents would lose health coverage. For example, Louisiana’s Medicaid expansion was implemented after the Senate voted on H.R. 3762, and Alaska’s had only recently begun. Eighteen months later, constituents are realizing the benefits of expansion and are lobbying against repeal.

If the bill passed the Senate, however, it would likely pass the House and be signed into law by the president.

A note of caution. Six weeks before it passed in the House of Representatives, the AHCA was pulled from consideration in the House on March 24, 2017 due to insufficient support (see Short-lived AHCA yanked by GOP without a vote, March 24, 2017). It was later resurrected with three minor amendments and no CBO score, passing by a tight vote (see The AHCA strikes back, May 4, 2017). Although such a revival is less likely in the Senate, neither BCRA nor AHCA should be entirely counted out.