



Health Policy Briefing

March 9, 2015

Supreme Court Hears *King v. Burwell* Oral Arguments

Few Hints of Outcome for ACA Subsidies

The Supreme Court heard oral arguments in the *King v. Burwell* case last week. The challengers contend that people residing in the 37 states using a federally facilitated exchange are illegally receiving subsidies under the Affordable Care Act (ACA). The Court’s decision, which could eliminate billions in federal health insurance subsidies for eight million people, hinges on the justices’ interpretation of four words in the law’s text: “established by the state.” Michael Carvin, the attorney arguing on behalf of the challengers, attempted to convince the Court that Congress intended to direct the premium subsidies to the state-run exchanges as a means to incentivize states to set up their own marketplaces instead of relying on the federal government to do so. Solicitor General Donald Verrilli, arguing for the Administration, countered that if Congress did intend to coerce states to set up their own exchanges through the withholding of subsidies, this objective would have been made clear and would have been central to the legislation. Critics of the law hope that the Court decides to interpret the key phrase “established by the state” literally, and that the justices not attempt to determine Congress’ intentions. Arguments appeared to be tailored to Chief Justice John Roberts, who cast the deciding vote in favor of the ACA in 2012, and Justice Anthony Kennedy, who has been the swing vote on many of the Court’s decisions in the past. Chief Justice Roberts’ views on the case remain unknown, as he stayed quiet during the oral arguments. Justice Kennedy surprised many with his comments directed at the plaintiffs. He suggested that there was a “serious constitutional problem” with their argument that “established by the state” means that subsidies are only available to people who enroll in health insurance through state-run marketplaces. Kennedy appeared to agree with Justice Sonia Sotomayor’s assessment of the challenger’s argument, that a literal reading of the legislative language would amount to a coercive ultimatum for the states. The remainder of the court appears divided among ideological lines. While the defense argued that federal agencies should have the discretion to interpret ambiguities in the law, and that ruling against the Administration would cause chaos in the insurance market, Justice Antonin Scalia expressed confidence that if the Court rules against the Administration Congress could successfully manage the consequences. Justice *continued on page 2*

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Samuel Alito went on to suggest that the Court could provide states with several months, potentially until the end of the tax season, to comply with the law before the subsidies were eliminated. Both Democrats and Republicans have expressed confidence that the Court will rule in their favor. The outcome of the case will be determined by late June. While the Administration insists that it does not have a contingency plan should the Supreme Court rule against them, lawmakers have begun to release details on subsidy replacement plans. Sen. Ben Sasse (R-Neb.) unveiled the Republican party's first bill addressing the *King v. Burwell* Supreme Court decision. The legislation would provide an 18-month transition period during which health care subsidies would be available to allow Americans to temporarily keep their health insurance if the Supreme Court Rules against the Administration this spring. Though the legislation does not specify how it would be funded, the Winding Down ObamaCare Act (S. 673) would cover 65 percent of insurance plan costs for six months, with some assistance continuing through 18 months. Sen. Orrin Hatch (R-Utah), Sen. Lamar Alexander (R-Tenn.) and Sen. John Barrasso (R-Wyo.) have also released a proposed strategy that would allow people who have been receiving subsidies to keep their coverage for a transitional period. Rep. John Kline (R-Minn.), Rep. Paul Ryan (R-Wis.) and Rep. Fred Upton (R-Mich.) have also proposed an ACA alternative in the case that the Supreme Court ends subsidies to states that don't have their own exchanges. The plan would use tax credits to help people purchase health insurance, ending the individual and employer mandates and the law's insurance coverage regulations. Additionally, the proposal contains policies often championed by House Republicans, including insurance purchasing across state lines, small business insurance pools, and medical malpractice reform. The plan would also retain some aspects of the law, including allowing young adults to stay on their parent's plan until age 26 and protection of people with pre-existing conditions. Sen. Ted Cruz (R-Texas) has also offered an ACA replacement policy proposal. The Health Care Choices Act (S. 647) would allow Americans to buy health insurance across state lines while repealing the law's insurance mandates, marketplaces, and subsidies.

Senators Push to Reduce Antibiotic Use in Agriculture

A bipartisan bill has been introduced in the Senate that would require the Food and Drug Administration (FDA) to withdraw its approvals of certain antibiotics used in animal agriculture. The Preventing Antibiotic Resistance Act (S. 621), introduced by Sen. Dianne Feinstein (D-Calif.) and Sen. Susan Collins (R-Maine), would require that producers prove that their use of antibiotics doesn't pose a risk to human health. S. 621 would also require new labels which call for minimal usage of antibiotics used for therapeutic purposes. This bill would build on guidance released by the agency in 2013 that makes it illegal for producers to use antibiotics for the purpose of animal weight gain.

Affordable Care Act Update

Bipartisan Legislation to Repeal IPAB Introduced in the House

Rep. Phil Roe (R-Tenn.) and Rep. Linda T. Sánchez (D-Calif.) have introduced legislation that would repeal the Independent Payment Advisory Board (IPAB). IPAB was included as a part of the ACA to make cost-cutting recommendations to Medicare if program spending exceeds a target growth rate. Unless Congress makes cuts to meet the law's requirements, the Board's recommendations would be automatically implemented. IPAB repeal is supported by members on both sides of the aisle who oppose the ceding of congressional authority to an unelected and unaccountable decision making body. Showing strong support for the bill, H.R. 1190 was introduced with 206 bipartisan original cosponsors.

Part D Legislation Introduced to Require Six Protected Drug Categories

Last week, Sen. Chuck Grassley (R-Iowa) and Sen. Sherrod Brown (D-Ohio) introduced a bill that would require Medicare Part D plan formularies to include prescription drugs in six categories: anticonvulsants, antineoplastics, antiretrovirals, antipsychotics, antidepressants, and immunosuppressants. The Grassley/Brown bill is a response to an attempt by the Centers for Medicare and Medicaid Services (CMS) to limit protected categories to anticonvulsants, antiretrovirals, and antineoplastics through regulation last year. CMS did not finalize its proposed rule due to opposition from the public. S. 648 would prevent the Secretary of Health and Human Services from using the regulatory process to narrow protected drug classes, establish exceptions to exclude a drug in one of the protected classes, or limit access to protected drugs through utilization controls such as prior authorization. The bill would take effect starting in plan year 2015.

Ryan Dismisses Possibility of SGR Repeal Before Deadline

While speaking with the Federation of American Hospitals last week, House Ways and Means Committee Chairman Paul D. Ryan (R-Wis.) explained that the lack of consensus on how to pay for permanent repeal of the sustainable growth rate (SGR) will require the passage of another short-term fix before 21 percent cuts to Medicare physician reimbursement rates take effect on April 1. Repeal and replacement of the SGR would cost \$174.5 billion. Ryan noted that a larger budget agreement could offer the opportunity to move SGR repeal at a later date.

Upcoming Congressional Meetings and Hearings

POSTPONED: Senate Health, Education, Labor and Pensions Committee: hearing titled “America’s Health IT Transformation: Translating the Promise of Electronic Health Records Into Better Care;” a list of witnesses can be found [here](#)

POSTPONED: House Energy and Commerce Health Subcommittee: hearing titled “Examining the 340B Drug Pricing Program;” a list of witnesses can be found [here](#)

Senate Health, Education, Labor and Pensions Committee: hearing titled “America’s Leadership in Medical Innovation for Patients;” a list of witnesses can be found [here](#); 10:00 a.m., 430 Dirksen Bldg.; March 10

Senate Appropriations Agriculture, Rural Development, FDA, and Related Agencies Subcommittee: hearing on proposed fiscal 2016 appropriations for the Food and Drug Administration; 10:00 a.m., 138 Dirksen Bldg.; March 12

Senate Caucus on International Narcotics Control: hearing on the quota system used to manage controlled substances; time and place TBD; April 14

Health Legislation Recently Introduced

H.R. 1189 (WELLNESS PROGRAMS), to clarify rules relating to nondiscriminatory employer wellness programs as such programs relate to premium discounts, rebates, or modifications to otherwise applicable cost sharing under group health plans; KLINE; jointly, to the committees on Education and the Workforce, Energy and Commerce, and Ways and Means; March 2

H.R. 1190 (IPAB), to repeal the provisions of the Patient Protection and Affordable Care Act providing for the Independent Payment Advisory Board; ROE; jointly, to the committees on Ways and Means, Energy and Commerce, and Rules; March 2

H.R. 1191 (PPACA), to amend the Internal Revenue Code of 1986 to ensure that emergency services volunteers are not taken into account as employees under the shared responsibility requirements contained in the Patient Protection and Affordable Care Act; BARLETTA; to the Committee on Ways and Means; March 2

H.R. 1192 (PHSA), to amend the Public Health Service Act to foster more effective implementation and coordination of clinical care for people with pre-diabetes, diabetes, and the chronic diseases and conditions that result from diabetes; OLSON; to the Committee on Energy and Commerce; March 2

H.R. 1196 (HSA), to amend the Internal Revenue Code of 1986 to modify rules relating to health savings accounts; BURGESS; jointly, to the committees on Ways and Means, the Judiciary, and Energy and Commerce; March 2

H.R. 1197 (BREAST CANCER), to provide for the establishment of a Commission to Accelerate the End of Breast Cancer; CASTOR; to the Committee on Energy and Commerce; March 2

H.R. 1200 (HEALTH CARE), to provide for health care for every American and to control the cost and enhance the quality of the health care system; MCDERMOTT; jointly, to the committees on Energy and Commerce, Ways and Means, Oversight and Government Reform, Armed Services, and Education and the Workforce; March 2

H.R. 1202 (PHYSICIAN ASSISTANTS), to amend title XVIII of the Social Security Act to provide for the recognition of attending physician assistants as attending physicians to serve hospice patients, and for other purposes; JENKINS; jointly, to the committees on Ways and Means and Energy and Commerce; March 2

S. 620 (WELLNESS PROGRAMS), to clarify rules relating to nondiscriminatory employer wellness programs as such programs relate to premium discounts, rebates, or modifications to otherwise applicable cost sharing under group health plans; ALEXANDER; to the Committee on Health, Education, Labor, and Pensions; March 2

S. 621 (ANTIMICROBIALS), to amend the Federal Food, Drug, and Cosmetic Act to ensure the safety and effectiveness of medically important antimicrobials approved for use in the prevention and control of animal diseases, in order to minimize the development of antibiotic-resistant bacteria; FEINSTEIN; to the Committee on Health, Education, Labor, and Pensions; March 2

H.R. 1209 (PHSA), to amend the Public Health Service Act to provide for the designation of maternity care health professional shortage areas; BURGESS; to the Committee on Energy and Commerce; March 3

H.R. 1220 (COLORECTAL CANCER), to amend title XVIII of the Social Security Act to waive coinsurance under Medicare for colorectal cancer screening tests, regardless of whether therapeutic intervention is required during the screening; DENT; jointly, to the committees on Energy and Commerce and Ways and Means; March 3

H.R. 1221 (PODIATRIC PHYSICIANS), to amend title XIX of the Social Security Act to cover physician services delivered by podiatric physicians to ensure access by Medicaid beneficiaries to appropriate quality foot and ankle care, to amend title XVIII of such Act to modify the requirements for diabetic shoes to be included under Medicare, and for other purposes; ELLMERS; jointly, to the committees on Energy and Commerce and Ways and Means; March 3

Health Legislation Recently Introduced cont.

H.R. 1225 (EHR), to amend title XVIII of the Social Security Act to allow certain hospitals in Puerto Rico to qualify for incentives for adoption and meaningful use of certified EHR Technology under the Medicare program, and for other purposes; PIERLUISI; to the Committee on Ways and Means; March 3

H.Res. 141 (MULTIPLE SCLEROSIS), supporting the goals and ideals of Multiple Sclerosis Awareness Week; LEE; to the Committee on Energy and Commerce; March 3

S. 624 (COLORECTAL CANCER), to amend title XVIII of the Social Security Act to waive coinsurance under Medicare for colorectal cancer screening tests, regardless of whether therapeutic intervention is required during the screening; BROWN; to the Committee on Finance; March 3

S. 626 (PODIATRIC PHYSICIANS), to amend title XIX of the Social Security Act to cover physician services delivered by podiatric physicians to ensure access by Medicaid beneficiaries to appropriate quality foot and ankle care, to amend title XVIII of such Act to modify the requirements for diabetic shoes to be included under Medicare, and for other purposes; GRASSLEY; to the Committee on Finance; March 3

S. 628 (PHSA), to amend the Public Health Service Act to provide for the designation of maternity care health professional shortage areas; KIRK; to the Committee on Health, Education, Labor, and Pensions; March 3

S. 629 (NURSING PROGRAMS), to enable hospital-based nursing programs that are affiliated with a hospital to maintain payments under the Medicare program to hospitals for the costs of such programs; PORTMAN; to the Committee on Finance; March 3

S. 636 (DRUG ABUSE), to reduce prescription drug misuse and abuse; UDALL; to the Committee on Health, Education, Labor, and Pensions; March 3

S. 647 (PPACA), to repeal title I of the Patient Protection and Affordable Care Act and to amend the Public Health Service Act to provide for cooperative governing of individual health insurance coverage offered in interstate commerce; CRUZ; to the Committee on Finance; March 3

H.R. 1234 (INSURANCE MARKETS), to restore to States the freedom and flexibility to regulate health insurance markets, and for other purposes; PRICE; jointly, to the committees on Energy and Commerce, Ways and Means, and Education and the Workforce; March 4

H.R. 1250 (LTCH), to amend title XVIII of the Social Security Act to provide that payment under the Medicare program to a long-term care hospital for inpatient services shall not be made at the applicable site neutral payment rate for certain discharges involving severe wounds, and for other purposes; HARPER; jointly, to the committees on Ways and Means and Energy and Commerce; March 4

H.R. 1271 (CONCUSSIONS), to provide for systemic research, treatment, prevention, awareness, and dissemination of information with respect to sports-related and other concussions; BEATTY; to the Committee on Energy and Commerce; March 4

H.R. 1272 (RURAL COMMUNITIES), to provide incentives to physicians to practice in rural and medically underserved communities, and for other purposes; BERA; to the Committee on the Judiciary; March 4

H.R. 1275 (CLIMATE CHANGE), to direct the Secretary of Health and Human Services to develop a national strategic action plan to assist health professionals in preparing for and responding to the public health effects of climate change, and for other purposes; CAPP; to the Committee on Energy and Commerce; March 4

H.R. 1300 (EMERGENCY RESPONSE), to direct the Secretary of Homeland Security to make anthrax vaccines and antimicrobials available to emergency response providers, and for other purposes; KING; jointly, to the committees on Homeland Security and Energy and Commerce; March 4

H.R. 1312 (PHSA), to amend the Public Health Service Act to provide for the participation of optometrists in the National Health Service Corps scholarship and loan repayment programs, and for other purposes; MCMORRIS RODGERS; to the Committee on Energy and Commerce; March 4

Health Legislation Recently Introduced cont.

H.R. 1319 (VA), to direct the Secretary of Veterans Affairs to conduct annual surveys of veterans on experiences obtaining hospital care and medical services from medical facilities of the Department of Veterans Affairs, and for other purposes; O'ROURKE; to the Committee on Veterans' Affairs; March 4

H.R. 1321 (COSMETICS), to prohibit the sale or distribution of cosmetics containing synthetic plastic microbeads; PALLONE; to the Committee on Energy and Commerce; March 4

H.R. 1331 (VA), to amend title 38, United States Code, to improve the treatment of medical evidence provided by non-Department of Veterans Affairs medical professionals in support of claims for disability compensation under the laws administered by the Secretary of Veterans Affairs, and for other purposes; WALZ; to the Committee on Veterans' Affairs; March 4

S. 648 (PART D), to amend title XVIII of the Social Security Act to improve formulary requirements for prescription drug plans and MA-PD plans with respect to certain categories or classes of drugs; GRASSLEY; to the Committee on Finance; March 4

S. 666 (VA), to amend title 38, United States Code, to improve the treatment of medical evidence provided by non-Department of Veterans Affairs medical professionals in support of claims for disability compensation under the laws administered by the Secretary of Veterans Affairs, and for other purposes; FRANKEN; to the Committee on Veterans' Affairs; March 4

S. 673 (ACA), to provide a transition plan for those individuals who may be affected by ObamaCare's unlawful implementation; SASSE; to the Committee on Finance; March 4

S. 674 (WOMEN'S HEALTH), to expand programs with respect to women's health; MURRAY; to the Committee on Health, Education, Labor, and Pensions; March 4

H.R. 1341 (HEALTH INSURANCE), to amend the Internal Revenue Code of 1986 to adjust the phaseout of the health insurance tax credit for geographic variations in the cost-of-living; THOMPSON; to the Committee on Ways and Means; March 6

H.R. 1342 (HOME HEALTH), to amend title XVIII of the Social Security Act to ensure more timely access to home health services for Medicare beneficiaries under the Medicare program, and for other purposes; WALDEN; jointly, to the committees on Ways and Means and Energy and Commerce; March 6