

Legal Lens

Students from the Saint Louis University School of Law Center for Health Law Studies contributed the following items to this column. Amy N. Sanders, associate director, supervised the contributions of Brandon Hall (J.D. anticipated 2019) and Valerie De Wandel (J.D./Ph.D. expected 2020).

LOBBYIST DOCUMENTS REVEAL HEALTH CARE INDUSTRY BATTLE PLAN AGAINST “MEDICARE FOR ALL”

Preceding the 2018 election, leading pharmaceutical, insurance, and hospital lobbyists formed the “Partnership for America’s Health Care Future,” to dissuade lawmakers of both political parties from supporting expansion of Medicare, in particular the Medicare for All effort. Despite growing attention and interest in the idea, private healthcare lobbyists feel “confident” that they can thwart any federal expansion of Medicare, given the political makeup and climate, and by focusing on research that indicates that any support for the Medicare for All option dissipates when beneficiaries find out that Medicare for All would likely require ending employer-based coverage, tax increases, and increased governmental control. Proponents of the Medicare for All concept, however, assert that “the smear of socialized medicine has been used a thousand times and has lost its bite,” pointing to California Governor Gavin Newsome’s recent proposal in California as evidence. Proponents counter-attack solution is seemingly simple: educate the public on the

realities. Proponents assert that once a single payer option is more widely understood “as a program that covers everyone, that doesn’t impose copays and deductibles, and that has more comprehensive benefits than existing plans,” support will only continue to grow. Lee Fang, Nick Surgey, *The Intercept*, November 20, 2018

<https://theintercept.com/2018/11/20/medicare-for-all-healthcare-industry/>

UNDER TRUMP, NUMBER OF UNINSURED KIDS ROSE FOR FIRST TIME THIS DECADE

According to a Georgetown University report, the number of children without health insurance rose by almost 300,000 in the United States. Although the statistics indicate that the percentage of uninsured children rose by merely .3 percent, normally the uninsured rate maintains stability through times of economic growth. One of the reasons for the rise in uninsured children is the fact that the Trump administration has stopped funding to those seeking coverage and to those helping people sign up for coverage. Further, many health care providers, such as OLE Health, that serve immigrants have seen patients disenroll from health care, due to fear of deportation. Some states, however, did make progress in lowering the uninsured rate of children, including South Dakota, Utah and Texas. Georgia, Massachusetts, Ohio, South Carolina, and Tennessee also increased their insured children. Phil Galewitz, *Kaiser Health News*, November 29, 2018

<https://khn.org/news/under-trump-number-of-uninsured-kids-rose-for-first-time-this-decade/>

TRUMP ADMINISTRATION DETAILS HEALTH-LAW WAIVERS FOR STATES

Recently, the Trump administration has identified different ways states can waive parts of the Affordable Care Act. According to Centers for Medicare and Medicaid Services, there are four different template indicating how states may implement waivers. In response, Health and Human Services Secretary Alex Azar released a statement that, “The specific examples laid out today show how state governments can work with HHS to create more choices and greater flexibility in their health insurance markets, helping to bring down costs and expand access to care.”

Democrats, and other supporters of the ACA, argue these templates will only allow for inadequate coverage, a result of the current administration working to undue the central tenets of the ACA. Supporters of the ACA argue that legal challenges could be brought against the waivers provided. Although these waivers may encourage states to use differing methods in implementing health care, some states may keep the current system while others may entirely defer from the system. Stephanie Armour, *Wall Street Journal*, November 29, 2018

<https://www.wsj.com/articles/trump-administration-details-health-law-waivers-for-states-1543512557>

HEALTH LAW COULD BE HARD TO KNOCK DOWN DESPITE JUDGE’S RULING

Appointed to the Federal District Court in Fort Worth, Judge Reed O’Connor ruled that the Affordable Care Act was unconstitutional, based on the law’s requirement that the majority of American citizens have health coverage or must pay a tax penalty. Although the tax penalty was taken away by Congress, the rest of the law was left in place per the legal doctrine of severability. Although Judge O’Connor cited such congressional intent, he ignored the 2017 congressional action. Ad thus failed to analyze the most recent congressional perspective. While this argument continues, efforts to protect the ACA also continue. The Supreme Court may decide to hear the case, if the case moves forward and is heard by the United States Court of Appeals for the Fifth Circuit this spring and the Fifth Circuit overturns Judge O’Connor’s ruling. Those five justices who upheld the ACA in the notable 2012 decision still serve on the U.S. Supreme Court. Jan Hoffman, Robert Pear, and Adam Liptak, *The New York Times*, December 15, 2018
<https://www.nytimes.com/2018/12/15/health/texas-aca-ruling-unconstitutional.html>

DRUGMAKERS MAY BE DELAYING PRICE HIKES TO AVOID SPOTLIGHT

According to health care services analyst Robert Jones, “The lower magnitude of brand price increases could present modest downside risk to wholesaler earnings.” This was a response to a delay in price increase of branded medicines, with the average list price increase being half of what it was in 2018.

Raymond James analyst Elliot Wilbur indicated that the majority of major drugmakers are using a “wait-and-see approach” due to more cautious approach by the major drugmakers to avoid the regulation spotlight. Cristin Flanagan, Riley Ray Griffin, *Bloomberg Law*, Jan. 2, 2019 https://www.bloomberglaw.com/product/bla w/document/XC7GEPBC000000?bc=W1siU2VhcmNoIFJlc3VsdHMiLCIvcHJvZHVjdC9ibGF3L3NIYXJjaC9yZXR1bHRzL2NiYzc3M2EzYWZlMTAxNjE5NGU5MWFhMTNiMDdmNzdkI1d- ee5fb2888c66317f7037995240d6bfcf623204cb &guid=ba6514ff-b4c0-4fc8-81a4-7bd596c5e683&search32=gpgugOSnIb0qJ_M1EbDhDw%3D%3DfNwewZYf67ItN9D-P5LJyiTaXt3-IURm9504KPGgI9H6t5bqurwGEvF6jYwsfA_ ib8IEz_XdADLZotBftBzME1EVMZvVdOU2M8FSmw8nJPXfrKo5rJa7_GAbTnYhPAnh

NEW MAINE GOVERNOR ORDERS MEDICAID EXPANSION

After over a year of non-compliance with the a 2017 ballot initiative that expanded Medicaid in Maine under former Governor Paul LePage, new Governor, Janet Mills signed an executive order in her first week that implements the expansion, thereby expanding access to care in Maine. This means that an estimated 70,000 low income adults in Maine are expected to be eligible for coverage. But while the executive order has gotten the proverbial ball rolling, full implementation still faces a few more necessary tasks. CMS still must approve Maine’s state plan amendment to implement the expansion, and the state legislature still has to approve the requisite funding of the state’s 10 percent share of the cost. Both are expected to be completed

fairly quickly. Harris Meyer, *Modern Healthcare*, January 3, 2019 <https://www.modernhealthcare.com/article/20190103/NEWS/190109956>

DNA TESTING? YOU MIGHT WANT TO WAIT FOR MORE LEGAL PROTECTION

The genetic testing industry is expected to flourish, but altogether raises a major concern that existing laws may not be fully comparable with protecting the privacy of genetic information. Currently, according to Joel Winston of the Pittsburgh-based Winston Law Firm LLC, “There are a lot of gray areas and companies are taking advantage of it.” A major concern lies with de-identification. Although data can be de-identified, current technology has made it easier to re-identify the data, introducing a concern for the use in racial profiling, according to Alexandra Cavazos of Loeb & Loeb LLP. Although there are laws that do apply, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Genetic Information Nondiscrimination Act (GINA), they define genetic and personal information as two separate things. Thus, the overarching argument is that the “law always lags behind the technology”, according to Jessica B. Lee of Loeb & Loeb LLP. Another concern is the lack of blanket privacy protections, since genetic information, once leaving the individual source, is not under any sort of privacy protection. Thus, greater issues such as familial impact can arise from such technological advances of DNA testing. Dana A. Elfin, *Bloomberg Law*, Jan. 7, 2019 <https://www.bloomberglaw.com/product/bla w/document/X8KOPB3C000000?bc=W1siU2VhcmNoIFJlc3VsdHMiLCIvcHJvZHVjdC9ibGF3L3NIYXJjaC9yZXR1bHRzLzQ5ZTdhYT>

