

# **Termites at the Foundation? The Future of the Affordable Care Act**

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“I have to tell you, it’s an unbelievably complex subject. Nobody knew that health care could be so complicated.” (President Donald Trump, February 27, 2017)

“Obamacare unfortunately will explode. It’s going to have a very bad year.”  
(President Donald Trump, March 24, 2017)

# The Affordable Care Act (ACA) When President Trump Took Office: A Snapshot

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- 31 states plus DC had expanded Medicaid with about 10 million gaining coverage
- Insurance exchanges (mostly federally run) are fragile but help over 10 million obtain coverage
- Health insurance meets higher quality standards though non-ACA compliant coverage lingers
- The US population without health insurance had fallen to 8.8%, almost half the uninsured rate at the time of the ACA's passage in 2010

# The Republican Initiative to Repeal and Replace: The Dog That Almost Barked

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- The House of Representatives passes the American Health Care Act; more than repeal and replace – major Medicaid retrenchment
- Various Senate proposals barely fail to attract needed Republican votes
- CBO estimates that virtually all Republican proposals would substantially increase the number of uninsured
- Case defies conventional political wisdom
- Tax reduction bill passes in December 2017 – repeals penalty associated with the individual mandate, adds trillions to the national debt, penalizes states with higher taxes (e.g., New Jersey)
- Our focus, executive branch actions to undercut the ACA – termites at the foundation

# Medicaid Waivers to Erode Enrollment: “A New Day” – Work Requirements and More

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- Medicaid letter to the states in March 2017 opens the door to proposals Obama had rejected
- Seema Verma’s speech to the National Association of Medicaid Directors in November 2017 promises a “new day”
- Theme 1: The ACA’s Medicaid expansion has caused the program to stray from its core obligations to the elderly, people with disabilities, children and pregnant women and diverted resources to a less-deserving group of able-bodied adults
- This has “stretched the safety net from some of our most fragile populations, many of whom are on waiting lists for critical home-care services, while states enroll millions of newly eligible, able-bodied adults” at a higher Medicaid match rate

## Verma Speech – “A New Day”

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- Theme 2: States should have the flexibility to impose work requirements via waivers
- These waivers would “break the chains of poverty” and surmount “the soft bigotry of low expectations consistently espoused by the prior administration”
- Change in Medicaid website in November to remove coverage expansion as a goal of 1115 demonstration waivers

# State Response to “A New Day” for Medicaid Waivers

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- 16 states submit waivers proposing work or community engagement requirements (Alabama, Arizona, Arkansas, Indiana, Kentucky, Maine, Michigan, Mississippi, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Virginia, Wisconsin)
- These waiver proposals contain other provisions likely to depress Medicaid enrollments
  - Reporting requirements that increase the administrative burden on enrollees
  - Longer lock-out periods
  - Greater cost sharing for enrollees
  - Other less common enrollment barriers proposed – drug testing, time limits, income-based reductions in the eligibility for Medicaid from 138% of poverty to 100%

# CMS Moves Cautiously on the Waiver Requests

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- Public opinion supports Medicaid work requirements (70% approval) but CMS anticipates court challenges
- CMS turns down Arkansas request to limit the expansion to those at 100% of poverty and rejects Kansas proposal on time limits
- In May 2018, Verma cautions states to avoid the catch 22 of the “subsidy cliff”
  - Issue arises because 7 of 16 waiver requests come from non-expansion states
  - Example: Mississippi where eligibility among able-bodied adults is 27% of poverty
- CMS approves 8 work requirement waivers with the rest pending; only Arkansas well along with implementation

# The Court Battle to Limit Executive Discretion over Medicaid Waivers

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- Advocacy groups file suit in federal district court in DC to block implementation of Kentucky work requirements
- Core plaintiff arguments with special attention to the waiver provision that 195,000 Medicaid enrollees would lose coverage over five years
- Judge Boasberg issues injunction preventing Kentucky from implementing work requirements
- CMS takes steps to respond to federal concerns to obtain approval of waiver
- Early declines in Medicaid enrollment in Arkansas due to work requirements in that state lead advocacy groups to sue



# Reducing Medicaid Enrollments on Public Charge Grounds

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- Department of Homeland Security publishes proposed rule in October 2018 to require all “aliens” seeking an extension of stay or change of status to demonstrate they have not received and are unlikely to receive non-cash public benefits (e.g., Medicaid)
- Provider advocates worry it will have a chilling effect on Medicaid enrollments and access to services
- Kaiser estimates that close to 5 million might drop out of Medicaid and SCHIP

# Did the Trump Administration Succeed or Fail in Shrinking Medicaid?

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- Verdict is still out but the results so far are not very impressive from the perspective of the Trump administration – term limits contained so far
- Even if the court approves, the proportion of able-bodied Medicaid enrollees exposed to work and related requirements will be relatively small, but public charge rule a serious threat
- Recent election yield more Democratic governors supportive of expansion and opposed to work requirements
- Voters approve Medicaid expansion in three deep red states – Idaho, Nebraska, and Utah
- Likely increase in Medicaid expansion states from 31 in 2017 to 36 in 2019 (plus DC)

# The Insurance Exchanges: Sabotage Mostly (But Not Completely)

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- Webster's: Sabotage involves efforts to foster the “intentional destruction” of some target by opponents – to impart permanent, severe, disabling injury. It goes beyond common presidential initiatives to deemphasize and undercut certain agencies and programs.
- Steps to shrink the window for exchange enrollments and to undercut outreach (e.g., advertising and the navigator programs)
- The withdrawal of subsidies to insurance companies, especially cost sharing reduction payments
- The creation of uncertainty about whether it would enforce the tax penalty associated with the individual mandate in 2017 and 2018

# Off-Ramp to Lower Quality Insurance: Short-Term Health Plans

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- The ACA has upgraded the quality of health insurance – 10 essential health benefits (including mental health), financial protection against bankruptcy, guaranteed coverage for those with preexisting conditions without excessive premiums (community rating)
- Under the banner of promoting access to less expensive policies, the Trump administration promotes insurance that does not meet these quality standards
- Sabotage implications – risk that lower quality, cheaper insurance will attract healthier applicants leaving the exchanges with a more expensive risk pool that will drive up premiums
- Short-term health plans had been available as a stop-gap for people until they could purchase coverage on the exchanges; Obama administration limited to 3 months

## Short-Term Plans Become Long-Term

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- Final administrative rule issued in August 2018 after reviewing 12,000 comments; takes effect in 60 days
- Short-term defined as anything less than one year with possibility for renewal up to 36 months with same policy
- States have authority to specify shorter time parameters for this insurance and impose other coverage requirements
- Acknowledgement that rule may cause premiums on the exchanges to increase; but the need for more coverage options and consumer choice justifies the rule and curtails “overinsurance”; projected to increase premiums on the exchanges by 5%
- 7 associations (e.g., Mental Health America, AIDS United) file suit in federal district court to block implementation of the rule in September 2018

# Off-Ramp to Lower Quality Insurance: Association Health Plans

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- Administrative rule issued in June 2018 to expand the ability of individuals and small employers to form association health plans; phased in from September 2018 to April 2019; received 900 comments
- Authorized under Title 1 of ERISA passed in 1974 that allows employers to form together in a group or association which can offer health insurance (e.g., Chamber of Commerce)
- Regulation specifies that AHP must have at least one purpose other than offering health insurance

# Association Health Plan Rule: Key Provisions

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- Relaxes the requirement that employers have a common interest if they operate within the geographic confines of one state
- Reaffirms that employers who operate in the same trade or line of business can form AHPs that cross state lines
- Expanded those who could form AHPs to self-employed individuals (“working owners”) such as realtors, who would previously have obtained individual coverage through the exchanges
- Will be subject to state benefits mandates and other forms of regulation
- Rule projected to increase the numbers enrolled in AHPs by 4 million

## Court Challenge to AHP Rule

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- 11 Democratic attorneys general (including New Jersey) and DC file suit to block the rule in the federal district court in DC in July 2018
- Suit claims that AHPs will “destabilize insurance markets, increase fraud and abuse, decrease comprehensive health coverage, and substantially increase costs to the States”
- Claims ERISA does not apply to “working owners” with no other employees
- Rule increases regulatory burden on states to “prevent fraud, abuse, incompetence and mismanagement, and avoid unpaid health claims” by AHPs



# State Innovation Waivers: From Helping Hand to Sabotage

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- Authorized under Section 1332 of the ACA, these waivers are designed to allow states to pursue budget-neutral innovative alternatives to achieve the law's coverage goals
- Starting in mid-2017 and continuing to the present, several states (mostly 'blue') have obtained waivers to stabilize and lower premiums on the exchanges via reinsurance
- States with these kind of waivers include Alaska, Maine, Maryland, Minnesota, New Jersey, Oregon, and Wisconsin
- In October 2018, The Trump administration issues new permissive guidelines concerning Section 1332 waiver proposals
- Opens the door to state proposals where the federal government subsidizes enrollment in non-ACA-compliant products such as short-term and association health plans

# Abetting a Knock-Out Punch by Republican State Attorneys General

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- Following repeal of the tax penalty tied to the individual mandate, 18 state attorneys general and two governors (all Republicans) filed suit in a federal district court in Fort Worth, Texas
  - Thesis 1: without the tax, the ACA's mandate is unconstitutional per the logic in the Supreme Court's narrow 2012 decision upholding the law
  - Thesis 2: the mandate cannot be severed from the ACA so the entire law must now be declared unconstitutional
- 14 Democratic state attorneys general plus one additional state and DC file a brief in opposition to the plaintiffs in June 2018

# The Trump Administration Meets the Republican Plaintiffs Half Way

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- The individual mandate is unconstitutional which means that the guaranteed issue and community rating provisions of the ACA must be declared invalid
- Severability: “The remainder of the ACA can, however, stand despite the invalidation of these provisions”
- December, 2018 - Federal Judge Reed O’Connor in Fort Worth sides with the Republican officials rather than the Trump administration and declares the entire ACA unconstitutional
- The decision is stayed pending appeal to higher courts

# Success or Failure in Sabotaging the Exchanges?

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- Definitive assessment difficult absent the tracking of such indicators as the number of insurance companies participating on the exchanges, the premiums charged, and the proportion of Americans with substandard coverage
- Exchange enrollments show steady though not huge declines – 4% decline in sign-ups in 2017 and 2018 respectively; 2019 too soon to assess
- 11 fully state-run exchanges plus DC witnessed slight sign-up increases
- Actions of state insurance commissioners to bolster the exchanges: the case of silver loading (combined with substantial cost protection for those between 100% and 400% of poverty)
- The percentage without health insurance appears to be increasing

# The Major Issues Going Forward for the Future of the ACA

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- The court cases
  - Exchanges: the Fort Worth decision and cases involving short-term and association health plans, respectively
  - Medicaid: the outcome of suits challenging work requirements in Arkansas and Kentucky
- Whether Congress will legislatively patch the ACA to protect it from the court challenge to the individual mandate
- What states do to reinforce or defuse Trump administration initiatives (e.g., regulation of short-term and association health plans, more silver loading, state individual mandates)
- Trump administration response to rebuke in 2018 election