Policy Brief

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Next SCOTUS Justice Could Impact Health Care

President Trump nominated Judge Brett Kavanaugh to fill Supreme Court Justice Anthony Kennedy's vacated seat. Kavanaugh, who has served on the U.S. Court of Appeals for the District of Columbia Circuit since 2006, will now have to be confirmed by the Senate. Kavanaugh's appointment is proving to be contentious for a few key reasons. Specific to health care, if confirmed, he could significantly influence future rulings on the Affordable Care Act (ACA), abortion, Medicaid work requirements, and employer coverage of contraceptives. Learn how his previous rulings could impact the future of health care below.

The ACA

Since its enactment, the ACA has been subject to many legal challenges. ACA supporters are concerned that the appointment of a conservative Justice will lead to reversal of the Act. However, Kavanaugh's previous rulings show a general affinity towards the ACA. In 2011, he wrote an opinion opposing a constitutional challenge to the ACA's individual mandate on technical grounds. In 2012, the Supreme Court used his interpretation of the individual mandate as a tax to defend the constitutionality of the ACA. Moreover, five of the six-Justice majority that ruled in favor of the ACA's constitutionality will remain on the bench. The Court is likely poised to continue to uphold the ACA.

Abortion

In the *Garza v. Hargan* case of 2017, Kavanaugh voted against his fellow judges when they supported an undocumented immigrant teen who sought an abortion while in HHS custody. He clarified that the court did not have to let her obtain an abortion, assuming she could find a "sponsor" (typically a family member or other guardian). He continued saying the delay to find a sponsor wouldn't "unduly burden the minor's right" to the procedure. From this opinion, it is unclear whether Kavanaugh will decide to fully uphold legal precedent of *Roe v. Wade*. His nomination remains a great concern for women's health advocates.

Medicaid Work Requirements

One of the biggest questions about Kavanaugh is how much deference he would give to the Trump Administration's decision to let states impose Medicaid work requirements. We don't know much about how he will approach this issue. However, if the State of Kentucky appeals the June 29th ruling by a federal district judge in Washington, D.C. the case could come before him.

Contraceptives

In the 2015 *Priests for Life v. HHS* case, Kavanaugh wrote that the ACA's employer coverage mandate for birth control undermined the rights of religious organizations. His conclusion in this case suggests that mandated contraceptive coverage could be in jeopardy.

Judge Blocks Kentucky Medicaid Waiver

Days before Medicaid work requirements were to launch in Kentucky, a federal judge invalidated the waiver that would have made them possible. Judge James Boasberg ruled that HHS Secretary Alex Azar erred in approving Kentucky's work requirements proposal. Boasberg argued that the Secretary failed to address the risk of lost coverage and cautioned that any waivers need to clearly articulate how they align with Medicaid's central purpose—providing health care coverage. The ruling has already had dramatic and unexpected consequences, with the Kentucky governor cutting Medicaid benefits in response. Boasberg's ruling could serve as a warning to other states who are considering similar demonstrations.

In response to the ruling, Governor Matt Bevin (R-KY) cancelled Medicaid vision and dental benefits for nearly 500,000 Kentuckians without advance notice. Bevin's administration is calling the cancellation an "unfortunate consequence," claiming that the benefits were dependent on the waiver's approval. According to local dentists, many of the cuts are being mistakenly applied to children and other groups that would have been exempt from work requirements even if the waiver had been approved.

While Boasberg's decision only applies to Kentucky, his sentiments on the purpose of Medicaid could have implications for other states. Those wanting to implement work requirements as a condition of Medicaid expansion may reconsider the structure of their waivers as a result. Seven states are currently awaiting a decision from CMS on submitted waivers; their approval process is likely to be slowed in the upcoming months while CMS seeks a resolution to this latest development.

Change is Coming to the 340B Program

This week, the 340B program was back in the spotlight with a four-hour hearing in the House Energy and Commerce Committee. With fifteen bills introduced, the Committee explored possible reforms to the program and heard testimony from the Government Accountability Office, an oncology physician and several 340B hospitals. While there is strong bipartisan support for the 340B program, legislators called for greater oversight and clarification on the patient definition and the program's intent. Below are the proposals discussed at the 340B hearing.

The Intent of the Program. Several representatives, such as Rep. Doris Matsui (D-CA) supported the original intent of the program—helping hospitals stretch federal scarce resources. Others argued the 340B program is outdated and needs reform. "Times have changed… the original intent of the program is important, but it's not 1992," said Rep. Larry Bucshon (R-Ind.).

Patient Definition. Rep. Chris Collins (R-N.Y.) proposed clarifying which patients are eligible for the program. There were also discussions on how to best ensure that 340B hospitals are dispensing drugs to eligible patients but no consensus was reached.

Increasing Reporting Requirements of the Program. There was bipartisan support around increasing the program's transparency. Proposals to achieve this included requiring covered entities to report their estimated savings, third-party revenue, payor mix and uncompensated care costs.

Increasing Oversight. Legislators agreed that there should be greater oversight of the program. This could be done by granting HRSA more regulatory authority and resources to perform audits.

Limit Contract Pharmacies. Contract pharmacies were heavily under fire in the hearing. They were accused of raising drug costs, profiting off the program and creating more risk of non-compliance, such as duplicative billing for manufacturers.

Raising the DSH Percentage for 340B Eligibility. Rep. Joe Barton (R-TX) proposed raising the minimum Medicaid DSH percentage from 11.75% to 18% that would allow hospitals to qualify for the program.

Implementing Delayed HRSA Regulations. Rep. Gene Green (D-TX) stated reforms to the 340B program should start with implementing the proposed rule to impose civil monetary penalties on manufacturers that overcharge 340B hospitals. In a speech at the 340B Coalition, HHS Secretary Alex Azar mentioned that the rule's delay was due to the Agency wanting to first implement comprehensive reforms to lower drug prices.

CMS Proposes New Model for Medicare Advantage

CMS announced a new model, the Medicare Advantage Qualifying Payment Arrangement Incentive (MAQI), that, if approved and adopted, would count as an Advanced Alternative Payment Model (APM) under MACRA. This means that physicians participating in at-risk Medicare Advantage plans would now be eligible for the 5% bonus under MACRA's APM track. The proposed demonstration indicates the current Administration's desire to grow Medicare Advantage and move physicians towards value-based models. Additional details about the proposed model are forthcoming.

Hearing Recap: The Cost of Care in America

The Senate Committee on Health, Education, Labor and Pensions (HELP) met on June 27th to discuss rising health care costs with clinicians, economists and the former Chief Data Officer at CMS. Click here for a detailed recap or here to watch the full hearing.

A Look at The Federal Register

Home Health Prospective Payment System Proposed Rule. CMS proposes to increase home health payments by 2.1% in 2019. To comply with the Bipartisan Budget Act of 2018, the Agency is changing the unit of payment from 60-day episodes of care to 30-day episodes. The rule also proposes to eliminate the current therapy thresholds and adopt a temporary transitional payment for home infusion therapy services that would begin in January 1, 2019. Other proposals include reimbursing for remote patient monitoring services and eliminating the requirement that the certifying physician estimate how much longer skilled services are required when recertifying the need for continued home health care.

Proposed Rule to Cut State Authority to Divert Medicaid Payments. CMS proposes to suspend a policy by the Obama Administration that allows states to divert Medicaid payments from providers to other third parties, such as in-home personal care workers. CMS seeks comments about new processes or procedures that can improve payment allocation across the Medicaid program.

Proposed Rule to Modernize and Drive Innovation in DME and ESRD Programs. CMS proposes changes to the bidding and pricing methodologies under the Durable Medical Equipment (DME) competitive bidding program. It also proposes new payment classes for oxygen and oxygen equipment. If finalized, the payment rate for renal dialysis services furnished to individuals with Acute Kidney Injury will be $235.82.

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