Health Care Reform: It Ain't Over 'Til It's Over

House Democrats Sunday passed President Barack Obama's health care reform proposal. This 2,700 plus page legislative effort that mirrored the Senate health reform bill, and a separate "tweaking" bill altering the Senate's version to reflect negotiations with the House, provides for significant changes in health care delivery for the country – assuming it can survive additional political posturing and legal challenges.

First, a look at some of the provisions: (The key periods in the bill are generally "within six months" after passage and by Jan. 1, 2014.)

Within six months, Medicare beneficiaries will be eligible for up to $250 in prescription drug rebates to close the "doughnut hole." The doughnut hole is the term for the gap in federal prescription drug coverage between the $2,700 – $6,154 in beneficiary out of pocket costs. Below $2,700, the feds pick up 25 percent; above $6,154, 95 percent of the costs are covered.

Importantly, several insurer reforms will go into place during this six-month period. Lifetime caps on insurance coverage will be removed; insurers will not be able to deny coverage if an applicant or insured gets ill, or cancel coverage already issued except in the case of fraud; and insurers will be prohibited from denying coverage or rate adjustments for children who have pre-existing conditions. Also during this six-month period, high risk pools will be created for adults with pre-existing conditions to buy insurance until 2014, when they will also not be denied or have rates adjusted for pre-existing conditions.

Further, tax credits for small businesses when purchasing coverage will be instituted. In addition, dependents will be able to stay under parents' plan until they are 26 years old, and all insurers must post their balance sheets on the Internet and fully disclose administrative costs, executive compensation packages, and benefit payments.

By Jan. 1, 2014, a second set of requirements will go into effect. A key touted provision is that citizens cannot be denied coverage or have their rates adjusted by insurers if they have a pre-existing condition. Further, tax credits will be extended to families under $88,000 in annual income to help offset the cost of health care premiums.

Importantly, the interface of insurance access and employment is altered. Employers, with greater than 200 persons, must automatically enroll their employees into their health insurance plans. But individuals who obtain health insurance through their employer can instead purchase a cheaper option of health insurance in statewide insurance "exchanges" if their current premiums are more than 9.5 percent of their income or if their current plan does not cover 60 percent of the cost of their benefits. Certain middle-income families who pay more than 8 percent but less than 9.5 percent will be eligible for vouchers from their employers to purchase insurance. Medium and large companies will be subject to a fine if they do not provide coverage for their employees, or do not achieve a minimum standard of coverage.

These provisions are important because all citizens will be required to carry health insurance or face a fine unless they earn under a certain amount (less than $19,000 for a couple) or fall within other economic hardship or religious exemptions.

Although a tremendous amount of celebration has taken place because of this recent health reform effort, it may be too early to cut the cake. Political and legal obstacles are still on the short and, more importantly, on the election horizon, which must be addressed for these provisions to go into effect.

First, the House "tweaking" bill must survive Senate "budget reconciliation" – a process that allows clear budget matters to be subject to only a 51 vote count for passage, eliminating the potential for filibuster. Senate Democrats have expressed confidence that they will prevail in this process; however, Senate Republicans have indicated clearly that they will use any and all legislative tactics in order to slow and even stop the House reconciliation bill from passing.

A key challenge will be the individual mandate to purchase health insurance – 37 states have indicated that if and when final health care reform bills are enacted, they will file suit to enjoin its implementation.

There are tremendous risks associated with the budget reconciliation strategy. Despite needing only a 51 vote majority for passage, by Senate rules, members are allowed to offer unlimited amendments and challenges to the reconciled bill. Although in theory, reconciliation rules indicate that there are only 20 hours of debate, that number is not set in stone because Senate Republicans are going to introduce a seemingly (to Democrats and reform advocates) unlimited number of amendments. The Senate parliamentarian must then rule on the permissibility of these amendments as add-ons to the "tweaking" bill.

Senate Democrats may be able to overrule any adverse Senate parliamentarian decision, but this is also highly unlikely. To overrule the parliamentarian's decision, Senate Democrats need a three-quarters majority. This bipartisan level of cooperation is even more than invoking cloture on filibuster, and would be impossible in the current state of political affairs. Senate Democrats can also call upon the Senate's Presiding Officer, Vice President Joe Biden, to deem Republican amendments "dilatory" (i.e., not serious attempts to amend the bill but designed without substance to obstruct) and rule them out of order. But this too, is politically dangerous since a large segment of the public has been vocally dismayed at the substance and procedure so far used in health reform efforts.

Note, however, that there is a counterbalance that can be used by both parties. The Byrd Rule, named for Sen. Robert Byrd (D-WV), provides a point of order against anything that is more weighted toward creating policy than having a budgetary effect. In other words, the budget effect must be substantive – it cannot be "merely incidental" to the policy. Further, a Byrd Rule challenge is allowed when a provision, such as the "Cadillac tax," contains recommendations relative to Social Security, which cannot be altered using the budget reconciliation process. As well, a Byrd Rule point of order lies against any bill provision that does not produce a change in revenue or outlays.

If any aspect of the House "tweaking" bill is changed, it must go back to the House for a review and agreement as to the new provisions. Of course, if anything is changed there, it must go back to the Senate and/or go to a conference committee to iron out differences.

Beyond these political maneuvers will be the legal ones. A key challenge will be the individual mandate to purchase health insurance. At present, 37 states have indicated that if and when final health care reform bills are enacted, they will file suit to enjoin its implementation. The challenge will likely be on the basis of the well known, argued and arguable, Commerce Clause.

On the one hand, the Supreme Court has allowed Congress to regulate economic activities. However, the term "economic" has been broad – as long as the activities substantially affect interstate commerce. Such a definition would likely include health insurance (although traditionally, insurance contracts are deemed trade and carriage of merchandise and regulated by the states).

A greater challenge is the purchase of insurance itself, or more accurately, the refusal to purchase. Can Congress through its use of Commerce Clause powers require that an individual person *engage* in commerce with a private entity, i.e., purchase a good or service such as insurance? This area will certainly be fodder for many plausible arguments both ways, and could table health care reform implementation significantly.

Other aspects of the bill are available for legal and political fodder. The extensive special deals and their clever appellations (e.g., the Cornhusker Kickback, the Louisiana Purchase, Gator Aid) can also be the subject of legal challenge. Of course, Congress may use its Article I, "tax and spend" power even if it benefits a particular geographic locale. But these benefits must also extend to the U.S. generally (e.g., a military base). Special *political* deals that only impact/benefit one state are arguably unconstitutional. This can be another basis for challenge of health care reform.

In addition, although unusual and not convened since the repeal of prohibition, Article V of the Constitution allows two-thirds of the state legislatures to mandate that Congress assemble a constitutional convention. With 37 states already publicly indicating they will attempt to stop health care reform individual mandates, this is beyond the needed number to push this alternative into play – if organizationally, it can be done. This would be a unique and equally historic challenge to the passage of health care reform.

Certainly there are the other unknowns as well. Will taxes that are funding health care reform ever be implemented? Will a system that has no caps on insurance premiums substantively give access to the uninsured? Will low employer ($2,000 – $3,000) and individual ($695) dollar fines be enough to have insurance coverage offered and taken when family insurance plans cost $10,000 – $12,000 annually? Will promised cuts to providers not affect access to quality care to beneficiaries?

It ain't over 'til it's over. And with health care reform, we don't have a game clock.

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New Spouse's Income in Factoring Child Support

One of the most common questions asked by family law clients is, "Does my new spouse's income increase my obligation to pay support for my child from a previous marriage?" The answer is that courts are reluctant to include a new spouse's income for purposes of calculating child support. Prior to 1994, the court had the authority and discretion to consider a new spouse's income when setting a child support award. Thereafter, the Legislature enacted Family Code Section 4057.5. The statute prohibits family law courts from considering a new spouse or non-marital partner's income for purposes of determining or modifying child support, except in extraordinary cases where excluding the new spouse's income would lead to extreme and severe hardship to the minor child. For the exception to apply, the court looks to the needs of the child, not the needs or conduct of the parents.

What happens when the parent's income is passive income from investments? The case of *In re Marriage of Knowles* (2009) 178 Cal.App.4th 35 answers this question. Thomas and Elizabeth were married and had one son, Carter. In 1995, Thomas and Elizabeth were divorced. Thereafter, Thomas married Sara. At the time of his dissolution, Thomas was ordered to pay $506 per month to Elizabeth for child support. In 2005, Elizabeth sought a modification to increase child support. In determining child support, one of the factors that the court takes into consideration is the income of both parents. The definition of income includes wages, salary and passive income from investments.

Thomas had previously worked full-time in his family's ranch business. In December 2005, he stopped working for the family business because of his success in certain real estate investments. Based on Thomas' former employment in the family business, the trial court imputed income to him of $50,000 per year. As a result of his investments, Thomas earned $3.1 million in capital gains in 2004 and 2005. The investment income Thomas earned was after his marriage to Elizabeth. In fact, the capital gains increased when Thomas was remarried to Sara, so the capital gains belonged in their community property. Most of the capital gains were invested into a brokerage account and real estate development investment held in Sara's name alone. During the trial, Thomas and Sara testified that the brokerage account was held in Sara's name alone for "convenience."

In calculating child support, the trial court imputed employment income to Thomas of $50,000 per year or $4,166 per month. In addition, the trial court determined that a reasonable return on Thomas' investments was $18,450 per month. The $18,450 per month included $10,950 from the brokerage account and $7,500 from the real estate development. The trial court used the entire monthly investment amount of $18,450 per month for purposes of calculating Thomas' child support obligation. Based on Thomas' income, the trial court awarded Elizabeth increased child support of $1,557 per month. The trial court made its order retroactive to 2005 when Elizabeth filed her motion to increase child support.

There must be a finding that an extreme or severe hardship will occur if the investment income of the new spouse is not used in calculating child support.

Thomas appealed the trial court's decision and the Court of Appeal reversed and remanded. Thomas argued on appeal that the income from investments was community property belonging to him jointly with his new spouse, Sara. Thomas contended that the trial court incorrectly used the full amount of the community property income in determining his child support obligation. Thomas also argued that by doing so, the trial court violated Family Code Section 4057.5, which prohibits the court from using his new spouse's income when modifying child support. Thomas claimed that the trial court should have attributed one-half of the investment income in the sum of $9,225 to him, rather than $18,450.

The Court of Appeal agreed. It held that in determining child support, the trial court is limited to considering only one-half of the community income of a parent even if that income is passive, absent evidence that the minor child would suffer extreme or severe hardship if the new spouse's income were not considered. The Court of Appeal reasoned that Family Code Section 4057.5 prohibits using the community income attributable to the new spouse, whether the income is earned or is a return on investment, in calculating a child support obligation.

Further, the Court of Appeal held that the trial court made no finding that extreme or severe hardship would result if the new spouse's income was not included in the child support calculation. If the trial court had made such a finding of extreme or severe hardship in its statement of decision, the Court of Appeal may have upheld the trial court's decision to include the portion of the new spouse's investment income. However, there was no such finding in this case. Other cases have held that extreme and severe hardship is determined on a case-by-case basis after review of the income of both parents.

Elizabeth argued on public policy grounds. She claimed that public policy should interpret the term "income" broadly for the purpose of calculating a parent's child support obligation. The Court of Appeal stated that when a statute is on point, the public policy of the statute is contained in the statute itself, and that this applied to Family Code Section 4057.5. Thus, this interpretation of the child support statute limits judicial discretion in determining what portion of the new spouse's income is available for child support.

It is apparent from this recent case that courts are reluctant to use a new spouse's income, even in the form of passive investment income, in the equation when calculating a child support obligation. The logic is that payment of child support is the parent's obligation, and not the obligation of the new spouse or non-marital partner.

The decision by the Court of Appeal is important in cases where a parent wants to modify a previous child support order. The parent seeking a modification should be aware that courts disfavor using the new spouse's income, and will not even use passive investment income of the new spouse in calculating child support. There must be a finding that an extreme or severe hardship will occur if the investment income of the new spouse is not used in calculating child support. Otherwise, similar to the *Knowles* decision, the court will view the passive income from capital gains, interest and dividends as community property, and use only one-half of the income for purposes of calculating child support.

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