

5 Key Questions As ACA Repeal Hangs By Thread

By **Jeff Overley**

Law360, New York (July 18, 2017, 10:11 PM EDT) -- Questions swirled on Tuesday about whether Affordable Care Act repeal efforts are truly doomed and, if so, how the White House and congressional Republicans will react. Here's where Capitol Hill lobbyists think things are headed.

Is Repeal Really Dead?

There was a palpable sense of disbelief on Tuesday that ACA repeal is actually dead. That was true despite a statement late Monday in which Senate Majority Leader Mitch McConnell, R-Ky., said that repeal-and-replace efforts "will not be successful" because votes are lacking.

For one thing, observers said that McConnell may keep the door open to state-specific deals with senators who could be wooed by funding for personal priorities on health policy.

"I would not write McConnell off," said Peggy Tighe of Powers Pyles Sutter & Verville PC. "He has incredible power to bring things to senators."

W. Scott Douglas, a Crowell & Moring LLP lobbyist who previously served as McConnell's finance director, added that the mere prospect of failure could prompt second thoughts among Republican holdouts.

"I think when you say, 'Okay, we're going to move on,' that's gut-check time," Douglas told Law360.

The wariness stemmed largely from events earlier this year in the U.S. House of Representatives. In March, ACA repeal seemingly collapsed, with House Speaker Paul Ryan, R-Wis., declaring that "Obamacare is the law of the land."

But six weeks later, after behind-the-scenes negotiations, repeal advanced and Republicans were celebrating at a White House ceremony with President Donald Trump. It's possible that a similar resurrection of ACA repeal legislation could play out once again, even if it feels unlikely right now, experts say.

"There's always a chance that you could ... try this eleventh-hour effort," said Miranda Franco of Holland & Knight LLP. "[But] the momentum has died, and momentum is really important on these things."

Progressives, who often refer to ACA repeal legislation as "Zombie Trumpcare," were not taking any chances. As one example, a prominent group called Indivisible wrote a blog post on Tuesday that declared "the Trumpcare fight isn't over."

"It could be a duplicitous strategy out of Paul Ryan's playbook: declare defeat while working in the shadows to bring forward another attempt," the blog post said.

Will 'Repeal and Delay' Pass?

In the meantime, McConnell has scheduled a vote next week on "repeal and delay," which would defund the ACA, but only after giving Republicans two more years to figure out a replacement.

The vote appears likely to fail. Republicans can afford to lose only two votes, and three GOP senators — Susan Collins of Maine, Lisa Murkowski of Alaska, Shelley Moore Capito of West Virginia — opposed the plan on Tuesday, saying that a replacement should be devised first. Sen. Rob Portman, R-Ohio, also signaled resistance.

"I really do not see any viable path forward with just straight repeal," Franco said.

Most observers see the move as a political gesture — something that Republicans must attempt, no matter how futile, after more than seven years of railing against the ACA.

"I think Leader McConnell recognizes that they owe the public a vote on it," Douglas said.

Will Trump Make Good on Threats?

With repeal on life support, attention started turning to whether bipartisan compromise is possible. Trump was in no mood for olive branches on Tuesday, saying, "We'll let Obamacare fail, and then the Democrats are going to come to us."

Experts called that rhetoric strategically questionable, potentially leaving the White House exposed to criticism that it's sabotaging the ACA.

"He's saying the thing that nobody should say out loud, but God knows nobody can keep a clamp on him and what he says," Tighe said.

Some indications of whether Trump follows through on his threats will come from the U.S. Department of Health and Human Services, which issued a business-friendly regulation earlier this year to stabilize ACA marketplaces.

HHS Secretary Tom Price, an ardent ACA critic, vowed on Tuesday to "work tirelessly to get Washington out of the way" when it comes to health policy. Experts said that Price's role will be especially pivotal if the repeal bid crumbles.

"So much of Obamacare is regulatory. ... He has the real power right now to make significant changes to the Affordable Care Act," said John F. Williams of Hall Render Killian Heath & Lyman PC.

Can Short-Term Fixes Happen?

In the absence of repeal, all eyes will be on whether Republicans authorize the ACA's cost-sharing reductions, which are the subject of litigation. CSRs are set to reduce copayments and deductibles by \$10 billion next year, making them crucial to ACA stability and giving Republicans a potential bargaining chip.

"Continuing the cost-sharing subsidies is probably a nice shiny object that they would use to negotiate with Democrats," Dentons counsel Jenifer Healy said.

It's not clear what Republicans would want in return, but they were already showing willingness on Tuesday to come to the table. Sen. Lamar Alexander, R-Tenn., chairman of the Senate's health committee, said his group "has a responsibility during the next few weeks to hold hearings to continue exploring how to stabilize the individual market."

Sen. Joe Manchin, D-W.Va., said that he was looking to convene a bipartisan group of ex-governors on ACA talks. The idea drew praise from Sen. Mike Rounds, R-S.D., himself a former governor, who tweeted to Manchin, "Like your idea of getting the former governors together!"

Cate McCanless, a policy director at Brownstein Hyatt Farber Schreck LLP, predicted Tuesday that GOP lawmakers will ultimately buck Trump and agree on short-term ACA fixes if repeal fails.

"The majority of Republicans I talk to don't feel like playing politics with people's health care. That's just not where they want to be," McCanless said. "Senate Republicans were telling their members, at least early on in this effort, that, 'Hey guys, we have to do something about the markets as they currently are.'"

Is a Grand Bargain Possible?

Observers are less sanguine about the prospects for a bolder ACA overhaul that includes big-ticket ideas, such as reduced taxes that Republicans favor and heftier premium assistance that Democrats desire. That's largely because of political concerns facing the GOP, which fully controls the federal government and will have to answer to its base if repeal falls apart.

There will "need to be time and space" for dust to settle, and "any sort of grand statutory [deal] would have to be after the midterms" in 2018, Healy said.

Both parties will confront internal issues that present obstacles to compromise. Republican voters may well have continued hostility toward the ACA, and if recent campaigns are any indication, Democratic voters may increasingly press for a single-payer system of health insurance.

"Finding a bipartisan solution is going to be tough in any year," Douglas said. "It's going to take leadership in each party to get it done — to kind of keep those forces somewhat moderated."

--Editing by Katherine Rautenberg and Jill Coffey.