

Gail R. Wilensky



## uncertainty dominates the near-term environment

**Now that the dust is settling on the recent Supreme Court decision regarding the constitutionality of the Affordable Care Act (ACA), it is important that hospitals and physicians recognize how much uncertainty still remains in their future and plan accordingly.**

The Supreme Court has resolved the constitutionality of the mandate (by declaring the penalty a tax, which the federal government clearly has the right to levy) and removed the threat to states of losing all their Medicaid funding if they choose not to expand Medicaid to all individuals under 138 percent of the poverty line. Although these are key issues that needed clarification, many states are still undecided about some of the most fundamental provisions of the ACA.

### Participation in the Medicaid Expansion

Twenty-six states had challenged the coercive nature of the original language of the Medicaid expansion, and it is now unclear what they will do. Six, including some large states such as Texas and Florida, have said they will not participate in the expansions, and five others have said they are leaning that way. The others remain undecided.

Historically, states have tended to participate most fully when the federal government pays a large share of the expense. Because the federal government will pay 100 percent of the expanded Medicaid costs for the first three years and 90 percent after the next four years—a far higher match than for the current Medicaid program—it's likely most states will decide to participate.

Nonetheless, 10 percent of a large expansion still means a lot of state expenditures for states currently feeling extreme financial pressures.

These decisions of whether to participate will affect not only the populations that are potentially eligible for expanded Medicaid coverage, but also the physicians and hospitals that provide services to these populations. These providers should be monitoring their states' contemplated actions in this area and reaching out to influence decision makers appropriately.

### Creation of Health Insurance Exchanges

Each state also must decide whether to set up its own health insurance exchange to offer subsidized insurance or to rely on the federal government to set up an exchange, at least initially. So far, only 13 states plus the District of Columbia have established exchanges. States that wish to establish their own exchanges from the start are required to have some level of operational readiness by January 2013 and be fully operational by October 2013. Otherwise, a state must partner with the federal government to establish an exchange until it is ready to take over running the exchange.

Like the Medicaid expansion, the insurance exchanges, with their offerings of subsidized insurance to currently uninsured individuals below four times the poverty line, will affect not only the formerly uninsured, but also the physicians and hospitals that provide services to the newly insured. Therefore, this area also warrants attention by provider groups. The amount of work required to establish these exchanges is truly daunting, and it is not clear whether the federal government will be capable of stepping in as often as may be necessary.

### The 2012 Election

The November election will potentially affect the future of the ACA as well as other outstanding healthcare issues. Governor Romney, the presumptive Republican candidate, has pledged to “overturn” the ACA on day one. Of course, he can only literally overturn the act if he has a Congress that is willing to pass legislation supporting this goal.

If Republicans control both the House and the Senate, they could pass legislation that is focused on budgetary issues related to the ACA with only a simple majority in the Senate rather than the 60 votes that would be required to pass non-budget-related legislation. Ironically, this potentiality means that a repeal of the provisions of the ACA relating to the budget (i.e., that cost money, which are also the most controversial items) appears to be much more feasible than passage of a replacement bill, given that the latter would require a 60-vote majority. There are also administrative actions that the executive branch can impose that could slow down implementation of the act without overturning it.

All the attention focused on whether the U.S. Supreme Court would rule the entire act or major portions of it unconstitutional has eclipsed other important issues that will require congressional and presidential action immediately before or after the election. The most important of these for the provider community are sequestration and the expiration of the latest sustainable growth rate patch.

It seems like longer ago than just last fall that so much attention was being focused on whether the Super Committee would be able to come up with \$1.5 trillion in savings or whether sequestration—the automatic spending cuts that the Congress had

agreed would otherwise occur—would go into effect. To no one’s surprise, the committee was unable to reach the needed seven-vote majority required to avoid sequestration, which means the prearranged automatic spending reductions start going into effect in January 2013—50 percent from the defense budget and 50 percent from nondefense spending, with Medicaid and Social Security exempt and provider reductions in Medicare limited to 2 percent. The outcome of the election could determine whether another attempt will be made to more specifically define the needed \$1.5 trillion in savings to avoid sequestration. For healthcare providers, it is hard to believe that any alternative will not lead to even greater reductions in payment than are currently legislated to occur. From a narrow, selfish viewpoint, stalemate is not always the worst outcome.

January 2013 also will bring the next showdown on physician fees. Once again, physician fees are scheduled to be reduced by about 27 percent—an outcome no one assumes will actually occur, but patience with these never-ending short-term “fixes” is running thin both for the physician community and for members of Congress. Unfortunately, a viable alternative seems to be as elusive as ever.

In addition to these provisions primarily focused on health care, the Congress needs to resolve at least two other major challenges before the end of the year: the expiration of the Bush tax cuts and the increase in the debt ceiling. How Congress chooses to resolve these issues will affect all of us—healthcare providers and healthcare users alike. ●

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