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Health Care Reform: A Time to Wait, or Expiate?

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A Time To Wait, or Expiate? (by Craig B. Garner)

If Dante Alighieri had written an epic poem describing the recent evolution of American health care, it might have much in common with his famous *Purgatorio*. As the nine U.S. Supreme Court Justices continue deliberation on the fate of the 2010 Affordable Care Act, it is unclear whether our nation`s health care system is heading toward *Inferno* or *Paradiso*. While experts on both sides of the aisle attempt to divine the secret codes shared between Justices over a record-breaking three days of oral argument, the rest of us have little choice but to wait until summer for clarity.

In the 25 months since President Obama signed the Affordable Care Act into law, the structure of our modern American health care system has changed dramatically, dividing the nation down political lines amid questions of constitutionality. With the bill currently under debate in our highest court, now is the time to consider the practical implications of an adverse ruling, and what the resultant ramifications may entail for the future of both the Affordable Care Act and the patients for whom the legislation was designed to protect.

Reform Without Mandate – the Facts

Ultimately, the bill’s survival or demise may rest on whether the Supreme Court decides that a single directive within the Constitution’s Commerce Clause (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”) trumps the Affordable Care Act’s Insurance Mandate, in effect arguing that the mandate imposes a penalty rather than a tax as a means of enforcement. However, this step alone would not automatically render the entire 2,700 pages of codified health care reform unconstitutional, thereby making the implications of such a ruling purposely political, definitively fiscal, yet generally inconsequential.

However, should the Supreme Court decide that the Insurance Mandate is not only unconstitutional but so firmly entrenched in the heart of health care reform that the Affordable Care Act should cease to exist without it, the newly defined structure of modern American health care would be shaken to its core, as well as having a dramatic influence on the November elections. While such a ruling may give scholars of the Constitution a summer’s worth of debate, what would be the practical effect on American health care today?

Arguably the number of insured young adults under the age of 26 will not give up their newfound entitlement to health care coverage without a struggle. Likewise, the 50,000 newly insured who had in the past failed to qualify for health insurance due to pre-existing conditions will not be pleased to move to the back of the health care coverage line, only to start the denial process anew.
The protections within the Patient Protection and Affordable Care Act will also not pass quietly into the night. This includes the mandated “community rating” established so that individual rates can only vary based on location or rating area, age of the insured, and tobacco use. Similarly, few patients will want to forfeit recent regulations requiring health insurance companies to disclose and justify any rate increase of 10 percent or more.

Originally six pages in Section 3022 of the Affordable Care Act, the Medicare Shared Savings Program (defining Accountable Care Organizations or ACOs) was expanded last November by 189 triple-columned pages of regulations (42 C.F.R. Part 425). In addition to the new regulations, in October the Office of the Inspector General clarified its position by establishing ACO waivers relating to the Physician Self-Referral Law and the Federal anti-kickback statute. Likewise, the Federal Trade Commission clarified its position of antitrust enforcement regarding ACOs, and the Internal Revenue Service provided information for tax-exempt organizations participating in the Medicare Shared Savings Program through ACOs.

From the provider’s point of view, all this coordinated governmental energy directed at clarifying the regulations for ACOs does not begin to scratch the surface when compared to the resources employed by those who wish to participate in the Medicare Shared Savings Program and have gone so far as to submit the 21 page application for consideration. Facilities brave enough to undertake this Herculean task are granted a firsthand view of the future of health care from the eyes of the Federal Government, as they respond to application questions such as:

1. “Please describe in a narrative how you plan to use shared savings payments, including whether you intend to share savings with ACO participants and ACO providers/suppliers, or to use the shared savings to re-invest in the ACO’s infrastructure, redesigning care processes, etc. . . . Additionally, describe how this plan will achieve the specific goals of the Shared Savings Program and how this plan will achieve the general aims of better care for individuals, better health for populations, and lower growth in expenditures."

2. “Submit a narrative describing how the ACO will define, establish, implement, evaluate, and periodically update its process to promote evidence-based medicine. This process should cover diagnoses with significant potential for the ACO to achieve quality improvements, taking into account the circumstances of individual beneficiaries.”
3. “Submit a narrative describing how the ACO will define, establish, implement, evaluate, and periodically update its process to promote patient engagement.”

4. “Submit a narrative describing how the ACO will define, establish, implement, evaluate, and periodically update its process and infrastructure to support internal reporting on quality and cost metrics to enable the ACO to monitor, provide feedback, and evaluate ACO participant and ACO provider/supplier performance and to use these results to continually improve care and service over time.”

5. “Submit a narrative describing how the ACO will define, establish, implement, evaluate, and periodically update its care coordination processes.”

While outright rejection of the Affordable Care Act may end the debate over who should pay for contraceptive care, the myriad other programs designed to improve overall health care would be sorely missed. This includes last summer’s regulations requiring all new private health plans to cover several evidence-based preventative services such as mammograms, colonoscopies, blood pressure checks, and childhood immunizations without charging a copayment, deductible or coinsurance.

Finally, it would be difficult to recover the monies already channeled toward those programs under the aegis of the Center for Medicare & Medicaid Innovation, many of which were designed to transform health care by finding new ways to deliver treatment, and pay for such delivery, that concurrently improve results and efficiency. With a total budget of $1 billion for grants, this may be one bell that the Supreme Court’s ruling cannot unring.

Medicaid Expansion

Already labeled the “sleeper issue” before the Supreme Court, the way in which the Justices handle the Affordable Care Act’s requirement that states expand their Medicaid programs to cover more qualifying Americans has implications well beyond the walls of 1 First Street, NE. Indeed, in anticipation of such an expansion, many states have been digging trenches and preparing whatever rations necessary so that their individual Medicaid programs can survive through December 31, 2013. Justified or not, elimination of this provision in the Affordable Care Act may be the force to topple the nation’s Medicaid programs like a house of cards..

While left to speculate until the Supreme Court renders its decision this summer, we might look again to Dante for guidance in how best to proceed when the ruling comes. Should we find ourselves in Purgatorio, we would do well to
consider the phrase libertà va cercando, ch’è sì cara, come sa chi per lei vita rifiuta (he goes seeking liberty, which is so dear, as he knows who for it renounces life). If we are nearing Paradiso, perhaps the words poca favilla gran fiamma seconda (a great flame follows a little spark) will resonate. But if our next stop is in fact the Inferno, there will be no shortage of Americans finding kinship if not solace in one of the poet’s most famous lines - lasciate ogne speranza, voi ch’entrate (all hope abandon, ye who enter in). In the days leading up to the final verdict, we can only hope that Justitia, better known as Lady Justice, sees fit to shepherd the fledgling legislation toward a positive outcome.