

HEALTH CARE

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ACA: The Supreme Court Decision

- The Case: *King v. Burwell*
- The Issue: Can Federal Govt. provide ACA Tax Subsidies to People on Federal Exchanges?
- The Four Words: “Established by the State”
- The Timing of a Decision: June/July 2015
- The Likely Result: The Government wins & ACA subsidies for federal exchanges upheld

An Update on ACA: The Supreme Court

- Why Does the Government Likely Win?
- Solid Votes for the Government: 4 votes – Justices Sotomayor/Breyer/Kagan/Ginsburg
- Solid Votes for the Plaintiff: 3 votes – Justices Scalia/Thomas/Alito
- Swing Votes: Justices Roberts & Kennedy
- Justice Kennedy as Swing Vote Likely to Back the Government which is 5/9 votes for ACA

The Congressional Response

- What Does Congress Do if Plaintiff Wins?
- Option # 1 – Nothing – “Let Them Eat Cake”
But leave 5-8 million people w/o coverage
- Option # 2 – Pass New Law to Kill ACA
But Lack Senate Democratic Votes & Veto
- Option # 3 – Pass New ACA Temporary Fix
- Likely Bi-partisan Support for Temporary Fix through 2015 & maybe 2016 elections

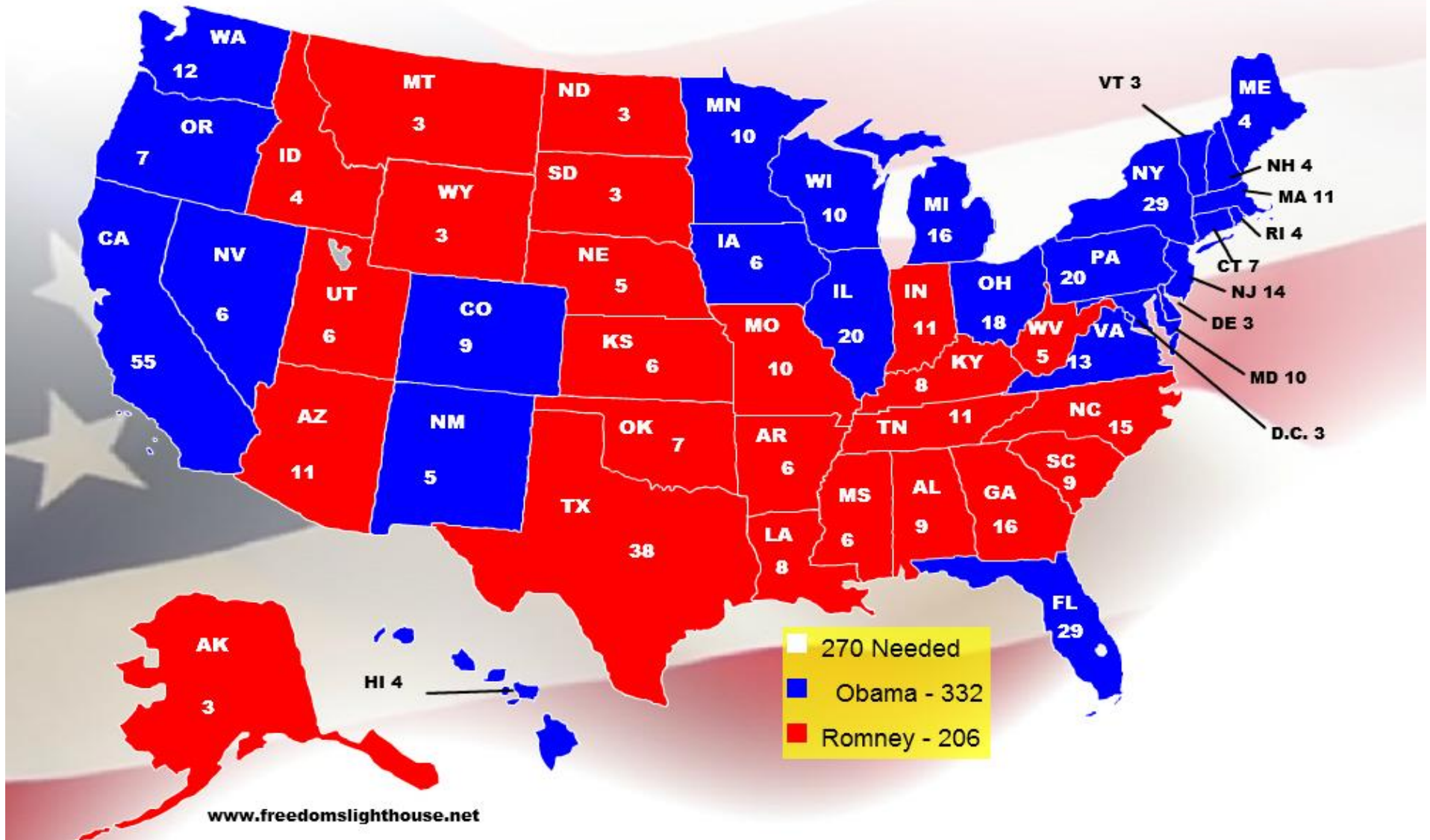
The Congressional Response: Why Does Republican Congress Do Temporary Fix?

- Answer – the 2016 Elections
- (1) Rs Want to Hold the Senate – many of 24 Senate Rs up for election in impacted fed exchange states
- (2) Senate Finance Committee – 7/24 of Rs Senators on this key Committee that created ACA in those states
- (3) States Won't Fix Problem – Most impacted federal exchange states have Republican state legislatures
- (4) Can't Ignore Millions Losing Insurance – People who lose ACA insurance are angry voters in key R states
- (5) Presidential Election – Rs Want to Win Red States

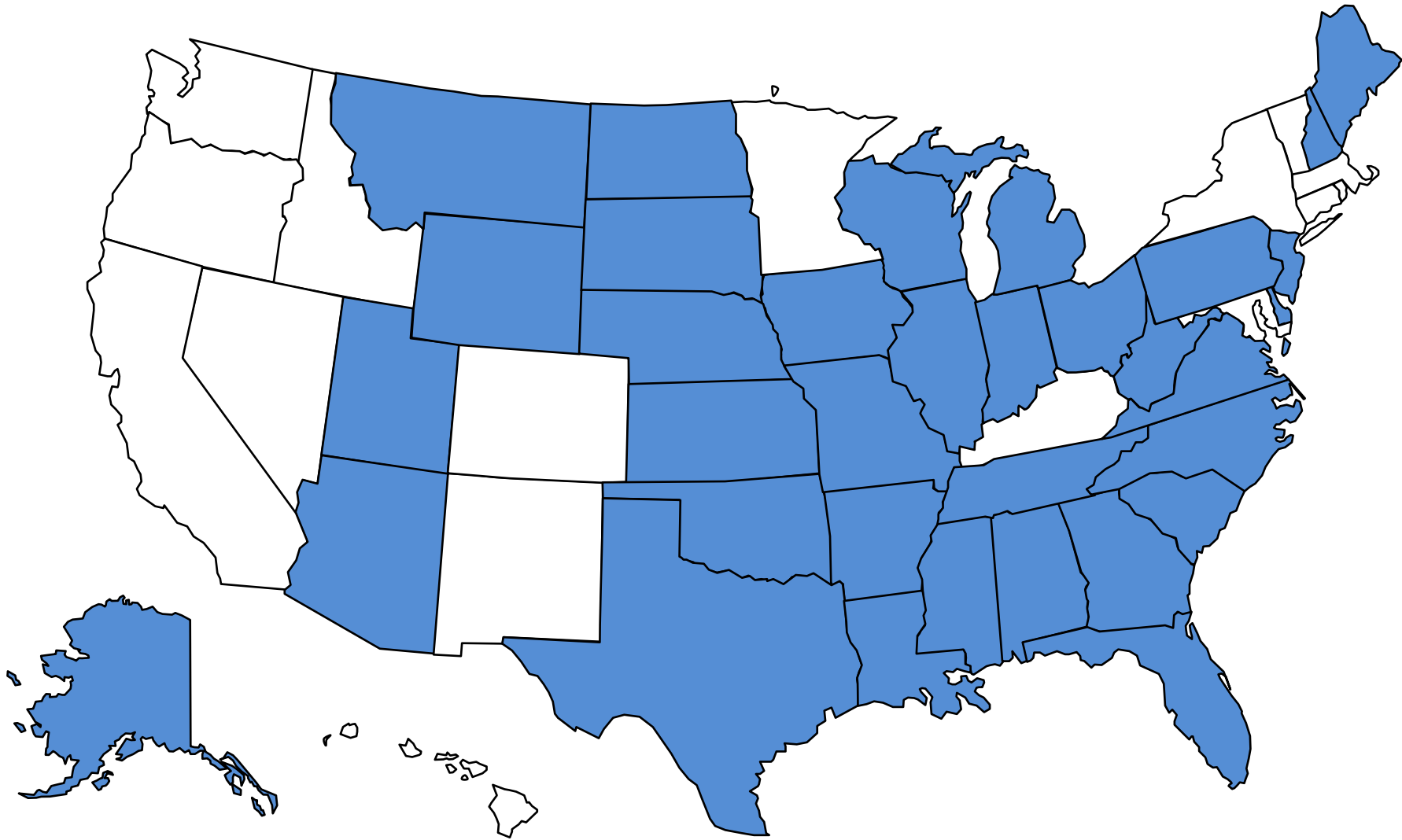
What Will Congress Do: A Peak at Senate Finance Committee & 2016 Election

- (1) Senator Charles Grassley (R-IA): YES 2016
- (2) Senator John Thune (R-SD): YES 2016
- (3) Senator Richard Burr (R-NC): YES 2016
- (4) Senator Johnny Isakson (R-GA): YES 2016
- (5) Senator Rob Portman (R-OH): YES 2016
- (6) *Senator Pat Toomey (R-PA): YES 2016*
- (7) Senator Dan Coats (R-IN): YES 2016
- (8) Senator Tim Scott (R-SC): YES 2016

2012 Presidential Election Electoral Vote Results



States Using Federal Exchange



What Will Congress Do: Current Senate & House Starter Proposals to “Fix” ACA

- Senate Bill – Senate Finance Committee Chairman Hatch (R-UT) along with Senators Burr (R-NC) & Representative Upton (R-MI) “The Patient CARE Act”
- House Bill – Three Chairmen – Ways & Means, Energy & Commerce & Education & Workforce - Ryan-Kline-Upton Bill

What will Congress do if ACA Loses?

Senate Bill: The Main Features Are:

- (1) Repeal of ACA
- (2) Means tested tax credits
- (3) Caps Employer Health Plan Tax Exclusion
- (4) Replace Medicaid Expansion - Tax Credits
- (5) Converts Medicaid to “Per-Capita Cap” Program
- (6) Med-Mal Reform: Caps Non-Economic Damages and Limits Attorneys Fees
- (8) More Hospital Pricing Transparency
- (9) Allows Interstate Insurance Purchasing

What Will Congress Do if ACA Loses?: The House Bill: The Main Features Are:

- (1) Eliminate individual & employer mandate
- (2) Allow Interstate Sale of Insurance
- (3) Med-Mal Liability Reform
- (4) Let small businesses pool & buy together
- (5) Allow Kids on Parents' Plans Until Age 26
- (6) Prohibit Lifetime Limits on Benefits
- (7) Guaranteed renewability if enrolled
- (8) Adjustable, advanceable tax credit
- (9) Expand Access to HSAs

Electronic Health Records

- Tangible growth since 2009 passage of the HITECH Act
- Providers face new “Meaningful Use” Rules
- EHR companies face new IT certification requirements & push for interoperability

Electronic Health Records: Background

- The HITECH Act of 2009:
- (1) Fostered adoption & “meaningful use” of EHR technology across the U.S.
- (2) Gave the HHS Office of National Coordinator for Health Information Technology authority to certify EHR & set standards for EHR technologies
- (3) Created financial incentives to Medicare/Medicaid health providers who demonstrated “meaningful use” of HER & penalties for failure to do so

Electronic Health Records

- The “Meaningful Use” Program was implemented by HHS in 3 Stages Stage 1 & 2 implemented
- March 2015 – HHS put out Draft Stage 3 Rules or “meaningful use” criteria for Medicare & Medicaid professionals to get EHR incentive payments & avoid downward adjustments
- March 2015 – ONC put out 2015 Edition Health IT Certification Criteria to match up with Nationwide Interoperability Roadmap

Electronic Health Records: The Problems Being Addressed Right Now

- Interoperability
- Antitrust Concerns
- Privacy & Security
- Cost
- Quality of Data
- Congress/HHS very focused on EHR now

Conclusion

- The Affordable Care Act is Here to Stay
- ACA Solidified if Government Wins SC Case
- ACA Subsidies Stay Through 2015/16 if Govt Loses Because Congress Will Do Temporary Fix
- Electronic Health Record Growth Continues
- Critical Time for EHR Technology Companies & Providers Required to Make “Meaningful Use”
- Companies Should Engage Congress & Federal Agencies on Both Issues Right Now

Big Data and Healthcare

- Accelerating data migration to cloud
 - Cloud-based vertical solutions allows greater innovation
 - Patient-centered and data-driven
 - Greater sharing and accessibility of health data
 - Increased statutory and regulatory enforcement

Big Data and Healthcare

- HIPAA now provides for more aggressive enforcement
 - Heightened demand for more control over health data
 - Adoption of electronic medical record (“EMR”) systems a top priority within industry
- Omnibus HIPAA Rule provisions most significant for cloud computing are those pertaining to liability

Big Data and Healthcare

- Healthcare providers, health plans, and other healthcare entities covered by HIPAA (“covered entities” or CEs) impacted
- Liability can extend down the chain beyond CEs to certain subcontractors
- A cloud service provider that creates, receives, maintains, or transmits PHI on behalf of a covered entity may fall within HIPAA's definition of business associate (“BA”)

Big Data and Healthcare

- CEs remain responsible for a host of Privacy Rule and Security Rule requirements aimed at safeguarding PHI
 - adopt written privacy policies and procedures
 - designate a privacy official to implement these policies and procedures
 - train workforce with respect to these policies
 - maintain reasonable and appropriate administrative, technical, and physical safeguards to prevent disclosure of PHI and limit its incidental use and disclosure pursuant to otherwise permitted or required use or disclosure

Big Data and Healthcare

- Breach
 - A CE is responsible for making the notifications to individuals, the media, and the Secretary
 - CE fails to comply with an administrative simplification provision, it is directly liable for civil, and in some cases criminal, penalties
- Rule eliminated the affirmative defense to avoid a penalty if it:
 - “did not know and with the exercise of reasonable diligence would not have known of the violation”

Big Data and Healthcare

- BAs are required to
 - Provide notification to the CE in the event of a breach of unsecured PHI
 - to comply with the minimum necessary rule; to cooperate with the Secretary during complaint investigations and compliance reviews
 - to provide an accounting of disclosures of PHI; and to make an electronic copy of PHI available to an individual or CE when an individual requests it

Latest Legislative Developments: MACRA

- Medicare Access and CHIP Reauthorization Act of 2015 (MACRA)
- Signed into law April 16, 2015
- In a nutshell:
 - Repeals SGR formula and changes Medicare payment system
 - New Program Integrity Provisions

MACRA's Fraud and Abuse Provisions

- **§ 501 – Removal of SSN from Medicare Cards**
- **§ 502: Preventing Improper Payments**
 - Recovery Audit Contractor Review of Improper Payments:
 - Incarcerated Beneficiaries
 - Not Lawfully Present
 - Deceased Beneficiaries
- **§ 503 – Study of Smart Card Technology for Medicare Beneficiaries**

MACRA's Fraud and Abuse Provisions

- **§ 505 – Medicare Administrative Contractor Improper Payment Outreach and Education Program**
 - Gives providers and suppliers information from Recovery Audit Contractor program data regarding:
 - Most frequent and expensive payment errors (quarterly);
 - Instructions on correcting and avoiding such errors;
 - Notice of new topics for RAC audits; and
 - Instructions on preventing issues related to such audits.
 - Imposes restrictions on the use of recovered funds (no capital investments or IT infrastructure)
- **§ 509 – Renewal of MAC Contracts**
 - Changes renewal cycle from 5 years to 10 years

CMS Developments

- Center for Medicare
 - Release of Medicare Payment Data
 - Focus on Quality and Data Reporting
- Center for Medicaid & CHIP Services
 - Shift to Managed Care
 - Focus on Alternative Payment Models

CMS Developments

- Center for Medicare and Medicaid Innovation
 - Accountable Care Organizations
 - Bundled Payment
 - Innovation Grants
- Center for Program Integrity
 - Transparency Programs
 - Data Analytics

Recovery Audit Contractors (RACs)

Who are they?

- Four private companies that run Medicare's Recovery Audit Program

What do they do?

- Identify improper payments from Medicare Part A and B claims.
- Analyze claims and review those most likely to contain improper payments, which may include:
 - (1) payment for items or services that do not meet Medicare's coverage and medical necessity criteria;
 - (2) payment for items that are incorrectly coded; and
 - (3) payment for services where the documentation submitted did not support the ordered service.

Controversy

What's the big deal?

- RACs are paid on a contingency-fee basis.
- CMS coding standards are complex and constantly changing.
- RACs can audit healthcare providers for up to three years.



Understanding the RACs Appeals Process

The five-levels of appeal include:

- Redetermination by the Fiscal Intermediary
- Reconsideration by a Qualified Independent Contractor;
- Administrative Law Judge Hearing;
- Medicare Appeals Council Review; and
- Judicial Review in U.S. District Court.

Problems with the process:

- Overloaded system, causing at least a two-year delay at the ALJ level
- High cost of RAC appeals

Potential Solutions

- **President's Budget Proposal for FY 2016 Includes Several Medicare Appeals Legislative Proposals**
 - Provide Office of Medicare Hearings and Appeals and Departmental Appeals Board Authority to Use Recovery Audit Contractor Collections
 - Establish a Refundable Filing Fee
 - Sample and Consolidate Similar Claims for Administrative Efficiency
 - Remand Appeals to the Redetermination Level with the Introduction of New Evidence
 - Increase Minimum Amount in Controversy for Administrative Law Judge Adjudication of Claims to Equal Amount Required for Judicial Review
 - Establish Magistrate Adjudication for Claims with Amount in Controversy Below New Administrative Law Judge Amount in Controversy Threshold
 - Expedite Procedures for Claims with No Material Fact in Dispute

Questions?

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