

Philo Hall Quoted in “5 Key Areas to Watch as 'Bidencare' Takes Shape”

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Philo D. Hall, Senior Counsel in the firm’s Health Care & Life Sciences practice, in the firm’s Washington, DC, office, was quoted in *Law360*, in “5 Key Areas to Watch as 'Bidencare' Takes Shape,” by Jeff Overley. (*Read the full version – subscription required.*)

Following is an excerpt:

President-elect Joe Biden's first term will feature white-knuckle drama on health care policy as U.S. Supreme Court conservatives consider ending the Affordable Care Act and Democrats struggle to salvage progressive promises on drug prices and health insurance, all against the backdrop of a ruinous pandemic.

Biden became the winner of the U.S. presidential election Saturday with his apparent victories in Pennsylvania and Nevada, but President Donald Trump says he will continue to challenge the results in court.

The former vice president and senator is set to oversee a health care landscape that's been scorched by the coronavirus crisis, which Biden has vowed to manage more effectively than his rival.

The incoming president will also have to traverse a perilous political path. To his right will be Republicans opposed to a bigger government role in health care, to his left will be fellow Democrats widely supportive of the opposite, and overseeing everything he does will be a conservative-dominated U.S. Supreme Court.

People



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Here are five key health care issues to watch under the new president. ...

Trump's Health Policies Face Rapid Reversals

Another out-of-the-gate priority for Biden will be setting in motion the reversal of Trump's health care policies. Likely targets include regulations on transgender rights in health care and ACA health insurance marketplaces.

"On day one, they'll have some interim final rules and executive orders to roll back enforcement of some controversial Trump rules," Epstein Becker Green senior counsel Philo Hall told Law360. "And then they'll spend a year or more developing more comprehensive regulatory proposals to really [undo] what Trump has done for four years."

Biden may also quickly pursue a pandemic relief bill, likely with more money for health care providers, if the upcoming lame-duck session doesn't produce legislation along those lines. From there, things get a little murky: House Democrats have signaled that top priorities include voting rights, government ethics, health care, infrastructure and climate change, with the latter two issues likely being combined. ...

Public Option to Fuel Lobbying Blitz

The centerpiece of Bidencare is a government-run health insurance program, or "public option," that would be broadly available to Americans who are too young for Medicare.

As envisioned, the public option would pay relatively low rates to health care providers and pass along the savings to consumers in the form of lower premiums. Democrats in 2009 dropped plans to include a public option in the Affordable Care Act because of opposition from centrists led by then-Sen. Joe Lieberman, I-Conn., and similar resistance will still be an issue even if Democrats claim a bare majority in the Senate. ...

In any event, getting enough senators on board would also require getting corporate America on board. The ACA's passage — famously called "a big f---ing deal" by then-Vice President Biden — was generally supported by major health care lobbies that had derailed earlier attempts at comprehensive health insurance reform, and those same lobbies will have lots of questions about Bidencare. ...

The same probably goes for health care providers, given that the public option's affordability would depend on paying lower rates for medical care.

"If hospitals and physicians are seeing the prospect of a big chunk of their patient population shifting to a lower-reimbursement payor, I think they will get very animated and be active lobbyists with Congress," Hall said.

It's possible that providers and payors could be placated by increasing rates in Medicare or Medicaid to offset lost revenue associated with the public option. They also might be mollified if Biden offers to alter or eliminate the Trump administration's requirements that hospitals and insurers greatly expand their price transparency, which lobbying groups have bitterly fought.

"There may be some horse-trading," Hall said. "They might try to sell to [providers and insurers] that they might be losers on some issues, but winners on others."

'Aggressive' Drug Pricing Agenda Looms

Biden has adopted a pugilistic stance toward Big Pharma, informed by his leadership during the Obama administration of the so-called Cancer Moonshot, a public-private partnership aimed at rapidly accelerating development of new therapeutics.

In his 2016 report on the Cancer Moonshot, Biden acknowledged that "lifesaving drugs are expensive to develop and create great value," but he also cited several types of problematic pricing. They included "price increases without any market justification," excessive payments to pharmacy benefit managers, and high copays for drugs that are relatively expensive but nonetheless cost-effective because they cure more people.

Biden has vowed as president to pursue value-based limits on drug prices, a ban on price hikes that outpace inflation, and the elimination of a statutory prohibition on Medicare's negotiation of drug prices. ...

One reason negotiations have been on the agenda for so long is because drugmakers hate the idea. The Obama administration in 2009 controversially cut a deal with lobbying powerhouse Pharmaceutical Research and Manufacturers of America to not include negotiating powers in the ACA, with PhRMA's members pledging in exchange to deliver tens of billions of dollars that helped to fund the law.

History could repeat itself if the new administration pursues legislation that increases the ACA's financial assistance for health insurance. That would likely carry a hefty price tag and need sources of funding, known as "pay-fors" in Capitol Hill parlance. ...

Republicans have historically called the negotiating powers a nonstarter, contending that they would leave drugmakers starved for funding and harm the development of important medications. But that position could be softening ever so slightly. Most notably, while Trump

didn't follow through on repeated pledges to allow negotiations, the fact that he claimed to support the idea was a break with GOP orthodoxy — and a potential sign that Bidentcare could find bipartisan agreement on some issues.

"I think the Republican Party ... is not as firmly opposed to Medicare negotiation on prescription drugs as they have been in the past," Hall said.