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Commentary: Texas Suit Is One Among Many Attempts to Undo Pre-Existing Condition Protections

By Sarah Lueck

Two events are bringing renewed attention to the future of the Affordable Care Act's (ACA) insurance protections for people with pre-existing medical conditions: a hearing in a legal case that would invalidate those protections and Senate hearings on the Supreme Court nomination of Brett Kavanaugh, who if confirmed could preside over challenges to the law. Top Trump Administration officials and Republicans in Congress have said they support protecting people with pre-existing conditions. Yet such statements ignore efforts they and others are engaging in that would weaken or end these protections.

In late August, Seema Verma, who heads the Centers for Medicare and Medicaid Services (CMS), said that she supports “appropriate protections” for people with pre-existing conditions, and that if current law changes, the Trump Administration “would work with Congress to address that issue to make sure that they had the appropriate protections in place.”¹

The Administration decided, however, not to defend the ACA in the suit from the state attorneys general that seeks to invalidate the law.² Instead, the Administration has urged the court to invalidate the law's core protections for people with pre-existing conditions. It also recently finalized federal rules that will expand short-term insurance plans that are exempt from ACA pre-existing condition protections, which will raise premiums for people seeking comprehensive coverage in the individual insurance market — especially middle-income people with pre-existing conditions.³

In addition, congressional Republican leaders have repeatedly sought to pass legislation that would eliminate or greatly diminish the ACA's protections. And even a new Senate proposal, billed as a

¹ Peter Sullivan, “McCaskill presses Trump official on lawsuit against pre-existing condition protections,” *The Hill*, August 21, 2018, <https://www.msn.com/en-us/news/politics/mccaskill-presses-trump-official-on-lawsuit-against-pre-existing-condition-protections/ar-BBMewjC>.

² Office of the Attorney General, Letter to Speaker Ryan, June 7, 2018, <https://www.justice.gov/file/1069806/download>.

³ Sarah Lueck, “With Federal Rules Weakened, States Should Act to Protect Against Short-Term Health Plans,” Center on Budget and Policy Priorities, August 1, 2018, <https://www.cbpp.org/blog/with-federal-rules-weakened-states-should-act-to-protect-against-short-term-health-plans>.

move to protect people with pre-existing conditions from the potential harms of the Texas case, fails to accomplish that.

New Senate Bill Would Permit a Return to Harmful Insurer Practices

In the Senate, a dozen Republicans are backing the “Ensuring Coverage for Patients with Pre-Existing Conditions Act” (S. 3388),⁴ which they say would “guarantee Americans have equal health care coverage, regardless of their health status or pre-existing conditions,” in the event that the plaintiffs in the Texas case are successful. In reality, the proposed bill falls far short of that goal. While it would bar insurers from denying coverage or charging people higher premiums due to health status — two protections that are at risk in the Texas case — the bill would fail to maintain other safeguards in the individual insurance market that are critical for people with pre-existing conditions.

The new Senate bill would allow insurers to once again:

- charge higher premiums based on non-health factors that can strongly correlate to health risk, such as gender and occupation;
- charge older people far more, compared to younger people, than is currently permitted (most older people have pre-existing health conditions);
- exclude coverage altogether for people’s pre-existing medical conditions; and
- revive “post-claims underwriting,” in which insurers investigate the health histories of people enrolled in their plans, in order to classify health care services as related to a pre-existing condition and therefore not covered by the plan. If insurers can once again exclude coverage of pre-existing conditions, as S. 3388 would permit, they will have an incentive to comb through enrollee medical records and deny claims they can link (even tenuously) to a person’s prior health conditions, tests, or symptoms — particularly after enrollees receive very costly care.⁵

In most states, the bill likely would mean a return to pre-ACA insurer practices, such as women being charged more than men for the same health plan, people with pre-existing conditions being denied coverage of health care services that would be covered if they were healthier, and wide variance in protections depending on state law. Under S. 3388, a person with heart disease technically could purchase a plan (because insurers cannot deny them based on their illness), but then may find that, if they have a heart attack, the costs aren’t covered because the medical event is related to a pre-existing health condition. Even people who do not know they have a pre-existing condition could face challenges to their claims from health insurers. In most states, prior to the ACA, a medical condition could be considered “pre-existing” and excluded from coverage even if it was not previously diagnosed or treated but merely produced symptoms that would cause an

⁴ Sen. Thom Tillis, “Senators Introduce Legislation To Protect Americans with Pre-Existing Conditions,” August 24, 2018, <https://www.tillis.senate.gov/public/index.cfm/press-releases?ID=051BEDEA-D4ED-485E-9098-F3FDFDF645E0>.

⁵ Gary Claxton *et al.*, “Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA,” Kaiser Family Foundation, December 12, 2016, <https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/>.

“ordinarily prudent” person to seek medical advice. And in several states, even conditions that didn’t produce symptoms were considered pre-existing.⁶

Not only would a return of post-claims underwriting leave some people with overwhelming medical expenses, it would also inject new uncertainty for all enrollees in the individual market, as neither they nor their health care providers could be completely confident that their insurer would pay for medical services they need rather than deny their claims as related to a pre-existing condition.

Other Bills Seek to End or Weaken Pre-Existing Condition Protections

Meanwhile, the Administration continues to advocate for legislation proposed in the Senate last September that, among other things, would have ended the ACA’s nationwide ban on charging sicker people higher premiums. Under that legislation, introduced by Senators Bill Cassidy, Lindsey Graham, Dean Heller, and Ron Johnson, states could freely lift this ban. (Senators Cassidy, Graham, and Heller are also among the sponsors of S. 3388.) Under the bill, states could also waive other ACA consumer protections, such as the requirement that plans cover essential health benefits, which include services such as mental health treatment and prescription drugs that are often crucial for people with pre-existing conditions.⁷

The Cassidy-Graham bill⁸ would have let states waive these protections for any insurance plan subsidized by the bill’s block grant to states (which would replace the ACA’s Medicaid expansion and marketplace subsidies, both of which would be repealed). A state that used even a small portion of its block grant funds to provide tiny subsidies to all individual market plans could then waive the ACA rules *for its entire individual market*. And, while insurers in these states would still be barred from denying coverage to people with pre-existing conditions, they could offer them plans with premiums of thousands or tens of thousands of dollars per month⁹ — a distinction without much of a difference for consumers.

Indeed, under the bill “most states” would ultimately modify their insurance-market rules, and “coverage for people with preexisting conditions would be much more expensive in some of those states than under current law,” the Congressional Budget Office (CBO) concluded.¹⁰ Similarly, America’s Health Insurance Plans, the Blue Cross Blue Shield Association, the American Medical Association, the American Academy of Family Physicians, the American Hospital Association, and

⁶ Claxton, *op cit*.

⁷ Aviva Aron-Dine, “Cassidy-Graham’s Waiver Authority Would Gut Protections for People with Pre-Existing Conditions,” Center on Budget and Policy Priorities, September 15, 2017, <https://www.cbpp.org/blog/cassidy-grahams-waiver-authority-would-gut-protections-for-people-with-pre-existing-conditions>.

⁸ H.R. 1628, <https://www.cassidy.senate.gov/imo/media/doc/LYN17752.pdf>.

⁹ Sam Berger and Emily Gee, “Graham-Cassidy ACA Repeal Bill Would Cause Huge Premium Increases for People with Pre-Existing Conditions,” Center for American Progress, September 18, 2017, <https://www.americanprogress.org/issues/healthcare/news/2017/09/18/439091/graham-cassidy-aca-repeal-bill-cause-huge-premium-increases-people-pre-existing-conditions/>.

¹⁰ Congressional Budget Office, “Preliminary Analysis of Legislation That Would Replace Subsidies for Health Care With Block Grants,” September 2017, <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/53126-health.pdf>.

the Federation of American Hospitals said in a joint statement, “the bill will... undermine safeguards for those with pre-existing conditions. Without these guaranteed protections, people with significant medical conditions can be charged much higher premiums and some may not be able to buy coverage at all.”¹¹

Support for Cassidy-Graham was strong enough that Senate Majority Leader Mitch McConnell initially indicated last summer that he would bring it to a vote,¹² changing course after at least three Republican senators announced their opposition. Not only did the Trump Administration support the proposal last year, but the President’s fiscal year 2019 budget proposal urged “enactment of legislation modeled closely after the Graham-Cassidy-Heller-Johnson (GCHJ) bill as soon as possible.”

In addition, the ACA repeal bill that the House passed in May 2017 included the “MacArthur amendment,” which allowed state waivers similar to those under Cassidy-Graham.¹³ CBO found that under the House legislation, in some states, “less healthy individuals (including those with preexisting or newly acquired medical conditions) would be unable to purchase comprehensive coverage with premiums close to those under current law and *might not be able to purchase coverage at all*” (emphasis added).¹⁴

Furthermore, while ACA repeal legislation that the Senate considered last summer wouldn’t have let states waive the ACA’s ban on charging higher premiums to people with pre-existing conditions, it would have let states waive the essential health benefit standards.¹⁵ This would have led to large increases in out-of-pocket costs for those needing the essential services that insurers ceased to cover, including people with pre-existing conditions.¹⁶ Later versions of the Senate bill also incorporated the so-called “Cruz amendment,” which would have created a parallel individual market, operating alongside the ACA market, in which the ACA’s pre-existing conditions protections and other market reforms would no longer apply.¹⁷ The Administration’s rule changes to short-term insurance plans,

¹¹ The joint statement is available at <https://www.ahip.org/wp-content/uploads/2017/09/Joint-statement-AMA-AAFP-AHA-FAH-AHIP-BCBSA-9.23.17.pdf>

¹² Burgess Everett and Seung Min Kim, “Senate gears for final Obamacare repeal vote,” Politico, September 20, 2017, <https://www.politico.com/story/2017/09/20/obamacare-repeal-senate-vote-graham-cassidy-242937>.

¹³ Jacob Leibenluft, “MacArthur Amendment Would Mean Return to Pre-ACA Law for People with Pre-Existing Conditions,” Center on Budget and Policy Priorities, April 27, 2017, <https://www.cbpp.org/blog/macarthur-amendment-would-mean-return-to-pre-aca-law-for-people-with-pre-existing-conditions>.

¹⁴ Congressional Budget Office, “H.R. 1628: American Health Care Act of 2017,” May 24, 2017, <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr1628aspassed.pdf>.

¹⁵ Center on Budget and Policy Priorities, “Senate Health Bill No Better Than House Version,” June 29, 2017, <https://www.cbpp.org/research/health/senate-health-bill-no-better-than-house-version>.

¹⁶ CBO, “H.R. 1628: Better Care Reconciliation Act of 2017,” <https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/52849-hr1628senate.pdf>.

¹⁷ Sarah Lueck, “Cruz Amendment Would Worsen Already Harmful Senate Health Bill for People with Medical Conditions,” Center on Budget and Policy Priorities, June 12, 2017, <https://www.cbpp.org/research/health/cruz-amendment-would-worsen-already-harmful-senate-health-bill-for-people-with>.

as well as to association health plans,¹⁸ seek to achieve a similar result by expanding the availability of health coverage not subject to ACA rules.

Even as they worked to weaken pre-existing condition protections, various policymakers have sought to portray themselves as supporting those protections. In June, when the Administration said it would not defend the ACA's main pre-existing condition protections in the Texas lawsuit, Senator McConnell said, "Everybody I know in the Senate, everybody is in favor of maintaining coverage for pre-existing conditions."¹⁹ Similarly, the Administration attempted to distinguish its legal stance in the lawsuit from its policy views, with Health and Human Services Secretary Alex Azar [saying](#), "We share the view of working to ensure individuals with pre-existing conditions can have access to affordable health insurance."²⁰

But policymakers can't have it both ways: support for dismantling these protections in whole or in part is not compatible with support for "maintaining coverage for pre-existing conditions."

¹⁸ Sarah Lueck, "3 Factors That Will Determine the Damage From Association Health Plans," Center on Budget and Policy Priorities, July 27, 2018, <https://www.cbpp.org/blog/3-factors-that-will-determine-the-damage-from-association-health-plans>.

¹⁹ Jessie Hellmann, "McConnell: 'Everybody' in the Senate supports protections for preexisting conditions," *The Hill*, June 12, 2018, <http://thehill.com/policy/healthcare/391921-mcconnell-everybody-in-the-senate-supports-preexisting-conditions>.

²⁰ Tom Howell Jr., "HHS chief: Refusal to defend Obamacare is a 'legal' position," *Washington Times*, June 12, 2018, <https://www.washingtontimes.com/news/2018/jun/12/hhs-chief-refusal-defend-obamacare-legal-position/>.