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ACA opponents scramble for a Plan B

By BRETT NORMAN and JASON MILLMAN | 11/8/12

What's the plan for Obamacare's opponents now? Judging from Republicans' mixed messages Thursday, the plan is: disarray.

On a day when House Speaker John Boehner declared that "Obamacare is the law of the land" — and then quickly scrambled to insist he hadn't given up on repeal after all — the law's critics often seemed to be scrambling to find a game plan.

That doesn't mean they'd given up the fight, though. Two states with Republican governors — Virginia and Kansas — announced they won't build health care exchanges in their states to implement the law. Instead, they'll let the feds set up an exchange in their states — at least when they go live in 2014.

And even the hint that Republican governors might cooperate in some ways from the law proved how sensitive the subject still is.

On Thursday afternoon, the Republican Governors Association canceled a call in which state officials were supposed to assess where they stood on exchange plans and how they'll approach the Nov. 16 deadline to submit a blueprint application. The call was scheduled, but then canceled after POLITICO reported it was happening.

All of this is unfolding as conservatives have to rethink their strategy. They had hoped to repeal Obamacare. But without gaining the White House or the Senate, they are opting for multi-front guerrilla warfare instead.

Slow it down in the states — as Brownback is doing. Challenge it in the courts. Try to get Congress to repeal its most vulnerable elements, and attempt to chop its funding at every opportunity.

But as Boehner's comments suggested, it's hard to get all of the law's opponents to accept that full repeal has slipped away.

"We had a five-point plan: Stop the exchanges, stop Medicaid expansion, take back the Senate, keep the House, take back the White House," said Adam Brandon, executive vice president at FreedomWorks. "Then it would get repealed."

Well, today point three and point five of my plan are dead, and that changes the game.”

The best hopes of resistance, for now, are coming from the states — where some governors are saying they may just not move ahead to set up the health exchanges. But even then, all that happens is that the feds would set up the exchanges for them.

Although Virginia showed interest in a state-based exchange as recently as this summer, Gov. Bob McDonnell and Attorney General Ken Cuccinelli said Wednesday they didn’t have enough federal guidance to make a decision ahead of the Nov. 16 exchange deadline.

“We’re going to pass through that [blueprint] deadline,” Cuccinelli said on Fox Business on Wednesday, but he left the door open for the state legislature to reopen the exchange issue next year.

And Kansas Gov. Sam Brownback, who last year sent back a \$31.5 million exchange grant, on Thursday afternoon objected to the cost of setting up a state-based exchange.

“My administration will not partner with the federal government to create a state-federal partnership insurance exchange because we will not benefit from it and implementing it could cost Kansas taxpayers millions of dollars,” Brownback said in a statement, adding that he welcomed legislative debate on his decision next year.

It’s not just Republicans who are opting out of the exchanges. In Missouri, Democratic Gov. Jay Nixon — fresh off reelection — said a state-based exchange wasn’t realistic for 2014, the Kansas City Star reported. Voters in his state just approved a ballot measure blocking him from using an executive order to launch an exchange.

Nationally, though, Obamacare opponents are being forced to scale back their ambitions.

The tea party-affiliated FreedomWorks had opposed narrowly targeted repeal efforts in the past, arguing that would make the law look fixable and dilute the drive for getting rid of the whole thing. Not anymore.

“The tactics now turn more toward a guerilla-style of picking and knocking things off,” Brandon said. “Now it’s getting into this tax, that subsidy. Let’s get in under the hood on some of these things.”

Congressional Republicans have been working at that for some time, of course. Among the most likely first targets post-election: the 2.3 percent medical device

tax that kicks in at the beginning of next year and the loathed Independent Payment Advisory Board.

On Wednesday, Majority Leader Eric Cantor sent a letter to Republican colleagues pledging a bill in the new Congress to repeal IPAB, the 15-member board intended to propose ways to control Medicare spending if it exceeds a certain rate and Congress fails to act.

And Senate Republican aides said they would try to at least delay the medical device tax in any year-end deal on the fiscal cliff. The tax was intended to be the industry's contribution to the health care law's insurance expansions that are expected to deliver new business. Some Democrats, including the delegations of med-tech heavy Minnesota and Massachusetts, have said they support repealing the tax, although a repeal bill that passed the House would pay for it by raiding exchange subsidies.

"I think it's going to be a rifle shot approach at particular aspects of the law that are unpopular," said Grace-Marie Turner, president of the Galen Institute, of potential repeal efforts.

Indeed, any budget negotiations risk raiding the funding of the Affordable Care Act. Republican aides said that members were eyeing exchange subsidies, particularly for those with higher incomes. Right now the subsidies go on a sliding scale up to 400 percent of the federal poverty level.

Funding for the Center for Medicare and Medicaid Innovation, which is testing a variety of payment reform pilots, is a likely target, in addition to the Prevention and Public Health Fund, which some Republicans have called a slush fund.

"They could get creative with how they pay for the SGR fix," Turner said, referring to the scheduled 27 percent cut to physician payments at the end of the year.

In the House, Rep. Scott DesJarlais (R-Tenn.) has drawn up a resolution of disapproval against an IRS rule that would allow the government to provide subsidies through the federal exchanges that are set up in states that don't so themselves.

Robert Jameson, DesJarlais's spokesman, said Thursday that DesJarlais needed to talk with the House leadership before deciding how to proceed with it.

Any resolution on that rule would almost certainly perish in the Senate, but it touches on a part of the law that some believe to be a serious vulnerability. The state of Oklahoma filed a lawsuit to block the subsidies, arguing that the IRS rule ignores the fact that the law only explicitly allows for subsidies to be provided through state-based exchanges.

“It’s the most vulnerable part of the law,” said Michael Cannon, a fellow at the libertarian Cato Institute, a prominent proponent of the argument alongside Jonathan Adler, a law professor at Case Western Reserve University. The government’s response to a brief filed in the Oklahoma case is due Nov. 19.

Most experts see the lawsuit as a long shot, but Cannon said that it could be joined by other states and drag out in the courts, prompting more states to adopt “wait and see” approach on implementation that many did ahead of the Supreme Court decision last summer, and then the elections.

Liberty University has filed a legal challenge against the requirement that would make most businesses with more than 50 workers provide health coverage or pay a fine, the so-called employer mandate, which many Republicans would also like to repeal. Liberty says that requirement is unconstitutional and has vowed to fight all the way to the Supreme Court.

And Republicans will certainly continue investigations into politically unpleasant parts of the law. Rep. Darrell Issa (R-Calif.) continues to push HHS for answers on an \$8.3 billion Medicare Advantage demonstration project that has protected that popular program so far from cuts contained in the Affordable Care Act.