



# Bad Medicine

## UNINTENDED CONSEQUENCES OF OHIO'S ISSUE 3

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## Introduction

In November, Ohioans will vote on a ballot initiative – Issue 3, better known as the “Ohio Healthcare Freedom Amendment” – that would amend the state Constitution to prohibit the imposition of a requirement that all individuals in the state purchase health insurance. The ballot issue is aimed at eliminating the so-called “individual mandate” to purchase health insurance contained in the recently-enacted federal Affordable Care Act (ACA), often referred to by its opponents as “Obamacare.”

Since Article VI of the U.S. Constitution stipulates that federal law takes precedence over state law, and since the constitutionality of the ACA’s individual mandate will be decided by the federal courts, most legal scholars believe that passage of Issue 3 in Ohio will have no legal effect on the implementation of the ACA in Ohio. For that reason, Issue 3 seems mostly symbolic; a gesture by ACA opponents presumably meant to demonstrate that the mandate is unpopular. This, its supporters hope, will influence both the Congress and the courts.

But Issue 3 supporters also cite another reason for bringing their initiative to the ballot; namely, the impact it would have on any future health care legislation passed by the state of Ohio. Supporters point to Massachusetts’ passage of health care legislation and assert that if Issue 3 passes, “Ohio will never become Massachusetts.”

Unfortunately, however, the language of the constitutional amendment they’ve drafted is so sloppy, carelessly worded, and ambiguous that its passage would threaten a wide range of already-existing Ohio health programs, practices and policies enacted and supported by Republican and Democratic legislators and Governors alike. In other words, passage of Issue 3 would not just ensure that Ohio never becomes Massachusetts. Its unintended consequences would cast grave doubt on whether Ohio could continue being Ohio.

Few Ohioans seem to have actually read the full text of Issue 3. But because adding an amendment to the constitution of our state is so important, Innovation Ohio and Professors Maxwell Mehlman and Jessie Hill of the Case Western Reserve University Law School have carefully analyzed the language, with an eye toward assessing its potential impact on existing law, policy and practice. This report is the result of that analysis. The full text of Issue 3 can be found in **Appendix A** of this report.

## Compulsory Participation in a Health Care System

The first provision of Issue 3, which aims to prohibit compulsory participation in a healthcare system, is worded as follows:

*No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.*

*“Health care system” means any public or private entity or program whose function or purpose includes the management of, processing of, enrollment of individuals for, or*

*payment for, in full or in part, health care services, health care data, or health care information for its participants.*

Because the proposed amendment's definition of "health care system" is so broadly worded, it goes far beyond a prohibition on the so-called "individual mandate" of the ACA; it would also ban any attempt to require individuals to purchase health care, as well as laws or rules in which employers are required to purchase health insurance for their employees. Indeed, the language is so expansive that it would additionally ban programs involving the required submission of health information, including some that are critical to the protection of vulnerable populations and the preservation of public health.

The following are some specific examples of programs created by state or local law or rule that could run afoul of Issue 3's prohibition on the compulsory purchase of health insurance or payment for health care by individuals or employers. In each case, while the constitutional amendment includes a clause permitting such laws if they were on the books prior to 2010, any future changes to these laws or rules would have an effective date later than 2010, and, therefore, likely would be impermissible.

- **Workers compensation** - State law (ORC 4123.35) requires employers to purchase insurance to cover care needed as a result of injuries sustained in the workplace. While the current system was in place prior to 2010, any changes to the state's workers compensation laws would likely be impermissible as a result of Issue 3. This could include things near and dear to the hearts of conservatives and the current Governor, such as future efforts to privatize the workers compensation system.
- **COBRA** - State law (ORC 3923.38) requires that certain employers continue to offer insurance coverage for a period of time after an employee leaves the job. In 2009, Ohio's law was changed to extend benefits from 6 to 12 months and to make more employees eligible.
- **Child support enforcement orders** - State law (ORC 3119.30) grants courts and child support enforcement agencies the power to issue orders requiring that parents purchase health insurance for children subject to a child support order.
- **School immunizations** - State law (ORC 3313.671) requires that school districts pay for the immunization of students who cannot otherwise afford it.
- **College coverage requirements** – State university rules mandate that students enrolled at least half-time must purchase health insurance as a condition of attendance.

In addition to the above programs in which Ohio law or practice appears to run afoul of Issue 3 by requiring the purchase of health insurance or health care, countless other laws and agency rules require the submission of health data or information to state and local entities, in effect compelling them to participate in a "health care system" as defined by the amendment:

- **Disease tracking** - State law (ORC 3701.23) and agency rulemaking (OAC 3701-3-03) compel health care providers to collect and submit information about cases and outbreaks of infectious disease, such as smallpox, influenza and HIV.
- **School immunizations** - State law (ORC 3313.67) requires certain employers (in this case, school districts) to submit information about student vaccinations. Another provision of state law (ORC 1713.55) requires employers (in this case, nonprofit colleges and universities) to submit information on vaccinations for students residing in on-campus housing.
- **Monitoring “Pill Mills”** – a recently-enacted state law (HB93) requires prescribers of certain controlled substances to submit information about patients and prescribed medication to a state database (ORC 4729.75). Because the bill has an effective date in 2011, the reporting component, a key enforcement provision of the law, almost certainly would be unconstitutional if Issue 3 were to pass.
- **Abortion notifications** – Another newly-enacted state law (HB 78) was recently passed to ban the practice of “late term” abortions. The law (as set forth in ORC 2919.171) specifically requires reporting of any qualifying abortions to the Ohio Department of Health. The bill’s 2011 effective date means it too would be unconstitutional if Issue 3 were to pass. (In fact, the ban on late-term abortions itself could become unconstitutional, depending on how the courts interpret Issue 3’s exemptions for laws punishing “wrongdoing” in the health care industry, discussed below.)
- **Children’s medical records** – State agency rules (Ohio Administrative Code 5101:2-12-37) requires certain employers (in this case, child care centers) to collect and submit records of enrolled students’ medical examinations.
- **Court ordered rehabilitation** – State law (ORC 2929.27) allows judges to sentence defendants in certain criminal proceedings to receive drug treatment services on an inpatient or outpatient basis. Because the law permitting such sentences was recently amended with an effective date of September 23, 2011, it would be unconstitutional if Issue 3 were to pass.
- **Involuntary mental health commitment** – State law (ORC 5122.05) allows for a number of procedures, both medical and legal, under which a person may be involuntarily committed to a hospital for mental illness.
- **Hospital, Ambulance, Mental Health and Developmental Disabilities Tax Levies** – State law (ORC 513.01, 749.01, 5705.222) authorizes taxing residents of districts of the state for the purposes of providing a variety of health care services including, but not limited to: community hospitals, mental health services, ambulance and emergency medical services, and community mental retardation and developmental disabilities services. The compulsory payment of taxes into a system that pays for health care services could well constitute “participation in a health care system” as defined by Issue 3.

## Prohibition on purchase or sale of health care or health insurance

The second and third provisions of Issue 3 read as follows:

*No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.*

*No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.*

These provisions appear to nullify all post-2010 laws or rules, and all post-2010 changes in laws and rules, pertaining to the regulation of health insurance and the licensing of medical providers in Ohio, since they have the effect of preventing the sale of health care and health insurance. The same is true of legislative or administrative efforts to impose penalties and or fines for the sale of health care by unlicensed providers.

- **Medical Licensing** – State law (ORC 4731.22) regulates the licensing of medical providers in Ohio and sets forth provisions for the suspension or revocation of a medical license, applying penalties for the unlicensed sale of health care services, in apparent violation of the language of Issue 3. Pharmacists, nurses, dentists, optometrists, respiratory therapists, physician assistants, anesthesiology assistants, radiology assistants, dental hygienists, advance practice nurses are similarly licensed under other sections of the Revised Code. Although hospitals don't have to be licensed, they do have to be accredited, which could place restrictions on their ability to sell health care services.
- **Insurance Agent Licensing** - State law empowers the state superintendent of Insurance to revoke or suspend the license of an insurance agent in the state for failing to comply with Ohio's insurance laws. Notably, in February of 2010, the Ohio General Assembly adopted HB 300 which included changes to Ohio's insurance agent licensure laws. As a result of HB300, Ohio's insurance agent licensure administrative rules (OAC Chapter 3905) were substantially rewritten to include restrictions that prevent insurance agents from selling health insurance if they do not comply with new regulatory requirements. Some of the new provisions in HB300 and all of the changes to OAC Chapter 3901-5 became effective after March 19, 2010 and therefore may be unconstitutional under Issue 3.

## Exceptions

Issue 3 does contain a number of exceptions that would limit the otherwise far-reaching impact of the amendment. Namely:

*This section does not affect laws or rules in effect as of March 19, 2010; affect which services a health care provider or hospital is required to perform or provide; affect terms and conditions of government employment; or affect any laws calculated to deter fraud or punish wrongdoing in the health care industry.*

The grandfathering of laws on the books prior to March 19, 2010 means that a number of the programs outlined above would not be affected immediately upon passage of Issue 3. However, the cutoff date in the amendment means that *future* legislatures would be unable to change any law that requires participation in a health care system or that prohibits the purchase or sale of health care or insurance.

Furthermore, Ohio law requires agencies to review and update rules every five years (ORC 119.032). But as a result of Issue 3, any changes to agency rules that impact the mandatory participation in a health care system – including reporting of health information or data – or which place a prohibition on the sale or purchase of health care, including fines or penalties for the unlicensed practice of health care in Ohio would be unconstitutional, since they would have effective dates after March 19, 2010.

In addition, the final portion of the exceptions provision is so poorly drafted that it is impossible to be certain which legal provisions would be “saved” from the prohibitions in Issue 3. For example, the provision states that Issue 3 would not affect “any laws calculated to ... punish wrongdoing in the health care industry.” As noted earlier, however, many state regulatory programs, such as those that license health care providers, are not calculated to punish wrongdoing but rather to set forth requirements, such as training and experience, intended to maintain and improve the quality of health care in the state. Thus, they would not seem to be spared from the reach of Issue 3’s prohibitions.

Furthermore, unlike the initial clause of the provision (which includes the term “rules”), the provision which states that Issue 3 would not affect “any laws calculated to deter fraud ... in the health care industry” refers only to “laws.” This could be interpreted to prohibit any state agency rulemaking that was inconsistent with the prohibitions in Issue 3 even though the rules were calculated to punish wrongdoing in the healthcare industry.

Finally, it is also worth noting that the term “wrongdoing”, although used in the text, is nowhere defined in the amendment. Not only is this another example of the sloppiness and ambiguity of the amendment’s language, but it is yet another reason that Issue 3 would likely lead to a litigation nightmare.

## **Conclusion**

Issue 3 is overly-broad and carelessly written, and would result in such a host of pernicious “unintended consequences,” that it should not be passed in November and become part of the Ohio Constitution. Laws and rules governing protections for the vulnerable, protecting the public’s health, and providing oversight of the medical and insurance professions would be frozen in time and could never be changed, except to deter “wrongdoing” (whatever the courts end up interpreting that to mean). We strongly urge the news media, newspaper editorial pages, and the public at large to take a close look at the language of Issue 3, and then consider carefully whether the risks and side effects of Issue 3’s passage outweigh any potential “benefit” of having it become part of the Ohio constitution. In our view, Issue 3 is bad law, bad policy, and bad medicine.

## **Appendix A: Full Text of Constitutional Amendment**

*Be it resolved by the people of the State of Ohio that Article I, Section 21 of the Ohio Constitution be adopted and read as follows:*

### **ARTICLE I**

#### ***Preservation of the freedom to choose health care and health care coverage***

**Section 21 (A)** *No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.*

**Section 21 (B)** *No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.*

**Section 21 (C)** *No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.*

**Section 21 (D)** *This section does not affect laws or rules in effect as of March 19, 2010; affect which services a health care provider or hospital is required to perform or provide; affect terms and conditions of government employment; or affect any laws calculated to deter fraud or punish wrongdoing in the health care industry.*

**Section 21 (E)** *As used in this Section,*

*(1) "Compel" includes the levying of penalties or fines.*

*(2) "Health care system" means any public or private entity or program whose function or purpose includes the management of, processing of, enrollment of individuals for, or payment for, in full or in part, health care services, health care data, or health care information for its participants.*

*(3) "Penalty or fine" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge or any named fee established by law or rule by a government established, created, or controlled agency that is used to punish or discourage the exercise of rights protected under this section.*

Full text is available online at <http://www.sos.state.oh.us/sos/upload/ballotboard/2010/2010-05-03initPetition.pdf>