

Issue 3: Sloppy, costly and wildly off-target

By Janetta King, President of Innovation Ohio

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On November 8 Ohioans will vote on three ballot initiatives. While Issue 2 has soaked up media attention (and television ad dollars), Issue 3 would, if passed, have a profound—and profoundly negative—impact on Ohio consumers, public health, and even the state’s ability to govern itself.

Also known as the “Ohio Healthcare Freedom Amendment”, Issue 3 is a Tea Party-inspired amendment to the Ohio Constitution ostensibly aimed at preventing the implementation of the so-called “individual mandate” in the Affordable Care Act, or what opponents derisively call “Obamacare.”

Since the fate of the ACA’s individual mandate will be decided in the federal courts—and since Article VI of the U.S. Constitution stipulates that federal law takes precedence over state law—it is tempting to conclude that whatever happens with Issue 3 will be meaningless.

Nothing could be further from the truth.

Because while the authors of Issue 3 may have been aiming at ‘Obamacare’, their amendment is so ambiguous, broadly worded, and sloppily written that it could ban, freeze in place and prohibit any future changes to dozens of other *already existing* Ohio laws, rules and reporting requirements on which Ohioans depend to keep us safe and healthy. Indeed, passing Issue 3 could well destroy Ohio’s ability to protect consumers, ensure public health, and give doctors, hospitals, and other health care providers a predictable regulatory environment in which to operate.

Moreover, the ambiguous language of Issue 3 would virtually ensure an avalanche of litigation. While this doubtlessly would be welcome news to legions of lawyers, the rest of us would be saddled with millions of dollars in unnecessary legal expenses.

Nor are these dire predictions ones that my organization (Innovation Ohio) and I have reached on our own. Two distinguished law professors, Maxwell Mehlman and Jessie Hill of the Case Western Reserve University School of Law, recently joined IO in a rigorous analysis of Issue 3 and its likely impact on Ohio law, regulation, and practice. That study, entitled “Bad Medicine: Unintended Consequences of Ohio’s Issue 3”, can be accessed at www.innovationohio.org.

Incredibly, the author of Issue 3 said he and his organization did not disagree with our analysis, responding that we were “not far off” in our assessment and insisting that he *intended* Issue 3 to go beyond the individual mandate of the Affordable Care Act and have a far-reaching impact on state and local laws as well (“Issue 3’s Reach is Too Wide, Foes Say” 9/2/211, *Columbus Dispatch*).

So what Ohio laws, policies and regulations would be affected?

Issue 3 consists of three provisions. The first prohibits compulsory participation in a “health care system.” But the definition of “health care system” is so broad that it would not only ban any law (or changes to any law) requiring individuals or companies to buy health insurance, but would also ban programs requiring submission of health information, including those critical to preserving public health. Among the existing programs created by state or local law that would be in jeopardy are disease tracking and reporting, mandatory college and university student health care coverage, Hospital, Mental Health and Developmental Disabilities Tax Levies, the monitoring of “Pill Mills”, and any future changes to programs like Workers’ Compensation, child support enforcement orders which mandate the purchase of health insurance, and COBRA laws.

Issue 3’s second and third provisions would stop Ohio or any local government from “prohibit(ing) the purchase or sale of health care or health insurance”—and also stop them from “impos(ing) a penalty or fine for the sale or purchase of health insurance.” These provisions would jeopardize all post-2010 laws or rules—or any changes to laws or rules in existence *prior* to 2010—pertaining to the regulation of health insurance and the licensing of medical providers and insurance agents. Such regulations—and the imposition of fines for violating them—could easily be construed as “prohibiting the sale of health care and health insurance.” Indeed, prohibition is precisely the *point* of many of these laws, especially those which restrain unlicensed providers or ban the sale of deficient or substandard insurance policies.

In sum, Issue 3 is so overly broad and carelessly written that it would lead to a host of consequences (whether intended or unintended) which together would decimate Ohio’s ability to protect the vulnerable, ensure public health, or provide oversight of the medical and insurance professions. Supporters say Issue 3 would ensure that “Ohio never becomes Massachusetts.” In truth, passage of Issue 3 would cast grave doubt on whether Ohio could continue being Ohio. We urge stakeholders, newspaper editorial pages and voters to read the actual language of Issue 3 and then ask themselves whether it should be part of the Ohio Constitution. In our view, it is bad law, bad policy, and bad medicine.

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