
REMAPPING DEBATE

Asking "Why" and "Why Not"

Coloradans to vote on “protection” from health coverage mandates

Story Repair | By Timothy Martinez | Denver Post, Health care

From the Editor:

In this feature, we select a story that appeared in a major news outlet and take it in for repairs. The stories we choose are not necessarily “fatally” flawed; on the contrary, in many cases, they’ll bring genuinely newsworthy information to light. But our goal is to show how, with a similar investment of time, a different set of interviews or line of questioning could have produced a different — and, we hope, more illuminating — article.

The source material this week: “[Amendment 63 looks to capitalize on health care controversy](#)” (The Denver Post, October 13, 2010). The Post has run several opinion pieces (including its own editorial) commenting on the issue, but we have not found another news article in the Post that delves into the meaning and potential implications of Amendment 63.

October 26, 2010 — In sweeping language, proposed Amendment 63 to Colorado’s state constitution would bar the state from ever adopting or enforcing, either “directly or indirectly,” any mandate that requires individuals to participate in a public or private health insurance, coverage, or benefit plan. The ballot proposition encompasses mandates initiated by the state and those “at the instance” of the federal government, and could affect state-level implementation of both current and future health-related legislation. Colorado voters will decide the fate of Amendment 63 on Nov. 2.

The measure, named the “Right to health care choice,” is expected to face court challenges if approved by voters, and has already survived one lawsuit from groups claiming the title was a misleading political “catch phrase.” The Colorado Supreme Court ruled in June that the ballot proposition was not impermissibly misleading and could proceed as named. The phrase, however, is not used to describe a right to have a state-mandated health plan, but a right not to participate in one.

Amendment 63, developed and pursued by the libertarian Independence Institute, is, according to its proponents, intended to prevent the state of Colorado from requiring anyone to participate in a health insurance plan. It would also insulate the current practice of individuals directly making arrangements with health care providers to receive and pay for services (a practice the proponents of Amendment 63 fear would be threatened by any future single-payer plan).

Much of the debate around Amendment 63 has operated as a proxy for the fight over whether the federal Patient Protection and Affordable Care Act, which is not scheduled to go fully into effect until 2014, does or does not represent a wise policy decision. For example, according to Linda Gorman, one of the authors of Amendment 63, “An individual mandate basically says I need to spend my money on health care first.” Opponents parry with a variety of arguments, including the claim that the individual mandate will ensure affordable health care for those with preexisting conditions.

Adela Flores-Brennan, a health care attorney at the Colorado Center on Law and Policy, asserts that the Amendment’s language is so ill defined, much of the interpretation of the Amendment will depend on the courts to decide in costly lawsuits.

There does appear to be consensus that Colorado does not have the authority to trump federal health insurance or health benefit requirements. But, there has been far less discussion on what the Amendment actually says.

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The Amendment states that Colorado shall not “directly or indirectly” impose a mandate on individuals. What “indirectly” means, and how voters are supposed to know the parameters of that term, is not clearly spelled out. Jane Orient, a physician in Arizona and executive director of the Association of American Physicians and Surgeons, which endorsed Amendment 63, said that indirect requirements might include any attempt by Colorado to prohibit an employer from operating in the state without carrying health insurance for its workers.

The scope of the prohibition on Colorado “enforcing” laws, regulations, or policies having to do with a requirement on individuals to purchase health insurance is also uncertain, although the covered laws, policies, and regulations do clearly include current or future federal law.

Orient said that a policy being “enforced” by the state of Colorado could perhaps extend to even just cooperating with the federal government. According to Jennifer Tolbert, a health policy analyst at the Kaiser Family Foundation, one area where such required cooperation is on the horizon is the federal government’s requirement that states issue a certification for individuals who are exempted from getting health coverage and report that exemption to the IRS.

Jon Caldara, the sponsor of the Amendment and president of the Independence Institute, did not respond to numerous requests from Remapping Debate soliciting his views on the intended scope of the Amendment.

Amendment 63 does state that Colorado is prohibited from either initiating action on the state level or from taking action “at the instance” of the federal government. However, the entire scope of “at the instance of” is similarly not clearly defined. According to Brian Schwartz, a blogger at the Independence Institute, one circumstance this would cover is where — perhaps in the aftermath of the federal act being found unconstitutional — “the federal government might pressure states to do what they want it to do.”

The most common way the federal government exercises such pressure is to tie federal funding availability to a state’s agreement to make policy changes. For example, the federal government persuaded most states to raise the legal drinking age to 21 by decreasing federal highway funds from those states that would not make the change. More recently, Race to the Top education grants were also used as an incentive to convince many states to change education policy.

The federal government has already used this incentive process to encourage states to update the way they review the proposed health insurance premium increases of insurers and take action against those making unreasonable rate hikes. Colorado has applied for and received a \$1 million grant to make these updates and improvements.

Remapping Debate asked Gorman, who is also the director of the Health Care Policy Center at the Independence Institute, whether the ban on taking federal money that required state action in support of mandating individual health insurance coverage applied no matter how much federal money was at stake, and no matter how limited the state action was in helping cause individuals partake in a mandated health plan.

Gorman confirmed that if Amendment 63 were adopted, it would apply in all cases unless and until Colorado voters were to repeal it. She described the Amendment as acting as a “safety valve for the people.”

Melissa Hart, an associate professor at the University of Colorado law school, said repealing the Amendment could be a very difficult and lengthy process because such an approach is only available in an election year cycle (the next being 2012), and because an amendment repeal referendum would first require collecting sufficient signatures to get the measure on the ballot, and then require an expensive, months-long ballot campaign.

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Full text of proposed Amendment 63

Article II of the Constitution of the State of Colorado is amended by the addition of a new section to read:

Section 32. Right to health care choice.

(1) All persons shall have the right to health care choice. No statute, regulation, resolution, or policy adopted or enforced by the state of Colorado, its departments and agencies, independently or at the instance of the United States shall: (a) require any person directly or indirectly to participate in any public or private health insurance plan, health coverage plan, health benefit plan, or similar plan; or (b) deny, restrict, or penalize the right or ability of any person to make or receive direct payments for lawful health care services.

(2) This section shall not apply to, affect, or prohibit: (a) emergency medical treatment required by law to be provided or performed by hospitals, health facilities, or other health care providers; or (b) health benefits provided in connection with workers' compensation or similar insurance.

(3) "Lawful health care services" means any service or treatment permitted or not prohibited by any provision of Colorado law.

(4) This section is intended to reflect and affirm the powers reserved to the state by U.S. Const., Amend. X, and to implement the powers reserved to the people by section 1 of Article V of this Constitution.

(5) This section shall become effective upon proclamation by the governor, shall be self implementing in all respects, and shall supersede any provision to the contrary in the constitution of the state of Colorado or any other provision of law.

(6) If any provision of this section or the application thereof to any person, entity, or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are declared severable.

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