# How ObamaCare-Style Preexisting Condition Regulations Failed In the States

**Peter Suderman** **March 14, 2012**

Republicans like Sen. John Cornyn have occasionally suggested that although ObamaCare's individual mandate—the requirement to purchase health coverage or pay a fine—should be struck down, the law's preexisting condition exclusions should be left in place. But at this point, even the Obama administration agrees that if the mandate goes, the major preexisting condition regulations should be thrown out too. Why? In part because, as I've noted before, we've watched what happens in states that have enacted the two key insurance market regulations: community rating, which limits how insurers can charge based on health history, and guaranteed issue, which requires insurers to sell to all comers. Those insurance markets have essentially melted down, with prices going through the roof and enrollment declining.

Ian Millhiser at the Center for American Progress has more detail on what happened in the seven states that tried such regulations:

- **Kentucky:** Forty insurers left Kentucky's market by some estimates, and only two remained before the law was repealed.
- **Maine:** Thirteen of Maine's 18 major insurance carriers stopped issuing new individual policies. Many also doubled their premiums.
- **New Hampshire:** New Hampshire's insurance law left it with nearly no carriers in its individual insurance market. The state enacted an emergency tax to compensate insurers for the costs of the law, which was repealed in 2002.
- **New Jersey:** Premiums rose as much as 350 percent in New Jersey after its pre-existing conditions law took effect. Even HMO plans, which tend to resist premium increases, nearly doubled in price.
- **New York:** The percentage of nonelderly New Yorkers without insurance grew 21 percent, with premiums increasing as much as 40 percent per year.
- **Vermont:** Vermont fared better than other states with similar laws, but its premiums spiked an average of 16 percent in two years.
- **Washington:** Non-managed care options disappeared entirely from Washington's individual market. Eventually, entire counties had no private individual insurance options at all.

With these regulations in place, it becomes too easy to game the system: Wait until you're sick, then buy insurance. Insurers have no choice but to sell, and can't charge special rates because you're buying in late. In theory, the mandate mitigates these effects by forcing everyone to buy in, which is why Millhiser and CAP argue in favor of a mandate. Millhiser points to

Massachusetts as an example of a successful mandate. (The Bay State, however, has seen individuals game its rules as well.)

And as John Goodman of the National Center Policy Analysis points out, "a weakly enforced mandate with minor penalties would produce the same results" as a no-mandate environment. Which may be the case. In January, Princeton professor Paul Starr, author of a Pulitzer Prize winning book on American health policy, argued in The New Republic that the mandate as written is "soft" and will be difficult to enforce:

The word “mandate” suggests to most people that a failure to comply will bring serious consequences. But the law explicitly bars the government from the means available to the IRS to collect taxes: the government cannot threaten to seize property, garnish wages, or levy any other source of income, much less impose criminal penalties for failing to insure. What can it do? Withhold a tax refund. In other words, the mandate is enforced only by forfeiture—the forfeiture of a tax refund, if someone who fails to insure is due a refund.

This does not make the mandate any less offensive. But it may well make it less effective.

So although it is not a foregone conclusion, it is at least possible that if the Supreme Court does not strike down the mandate, we may be left with the worst of all worlds: an unbound Commerce Clause and a newly dysfunctional health insurance market.