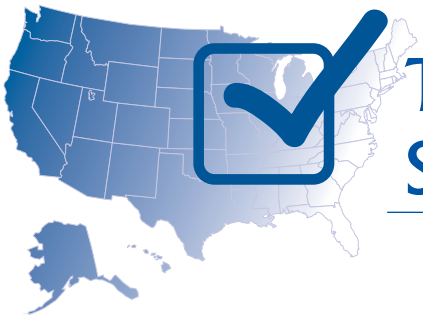

The Perils of Health Insurance Sold Across State Lines

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Introduction

Every few years, we see legislation introduced in state legislatures or in Congress that would allow insurers to sell health plans across state lines.[1] That is, instead of having to be licensed and regulated in each state where they do business, insurers could be licensed and regulated in just one state but still sell insurance in other states. Proponents say that this would give consumers more "choice" and would allow them to buy policies that cost less. But these cheaper policies often have surprising holes in the coverage they offer. Before jumping on this bandwagon, policy makers should consider the consequences: States have passed insurance laws to protect consumers in response to real problems and abuses. Will consumers really get the protection they need when they buy insurance across state lines from a company that is not regulated by their state?

Eventually, under the Affordable Care Act, the federal government will contract with two "multistate plans"—but those plans will still be licensed in each state in which they operate and will be subject to both state and federal laws. The Affordable Care Act also allows states to enter into "multistate compacts" to sell insurance across state lines, beginning in 2016. Specific standards for those compacts are yet to be developed, so consumer advocates may want to urge their states to wait until there is more federal guidance before weighing this option. But some legislators are pushing for even more discretion to sell policies across state lines *now*, and you should be aware of the potential dangers.

What's at stake?

Recently, the American Legislative Exchange Council (ALEC), a conservative organization that works with legislators to promote free markets and limited government, has been pushing bills to allow the sale of insurance across state lines.[2] These bills have been introduced both in state legislatures and in the U.S. Congress. ALEC generally points to the cost of "benefit mandates"—state laws requiring insurers to cover specific benefits or providers—as the rationale for the bills: They say across-state-lines insurance sales should be allowed because consumers could then buy cheaper policies from neighboring jurisdictions where the policies are required to cover less. But while insurance should be affordable, doing away with covered benefits is a risky approach to lowering costs: You never know when you are going to get sick, and if you have bought a policy that, to your surprise, does not cover the treatment you need, that cheap policy will turn out to have been a bad investment.

Across-state-lines proposals often exempt insurers from a number of other state laws in addition to benefit mandates. Although insurance companies (and some national associations that sell insurance) might find it profitable to locate in a state with very little insurance regulation and oversight and then to sell to consumers in other parts of the country, this would not serve the best interests of consumers. It would create a "race to the bottom" by insurers, who would be free to relocate to those states with the fewest consumer protections.

Furthermore, these across-state-lines sales could hurt older and sicker individuals. If consumers can choose between a policy that includes a list of benefits and consumer protections and one that does not, older and sicker people would be likely to choose the more protective policy, while healthier people might gamble on the lowest cost option. If the healthiest people exited the plans in their own state, premiums in those plans would spiral out of control for the sicker people who were left in them, a phenomenon known as an "adverse selection death spiral."

A Closer Look:

Consumer protections that may be at stake

- **Benefits**

  Many states now require health plans to cover certain specified benefits when they sell to individuals and/or small employers. Such "benefit mandates" often arise in response to a particular problem. For example, young women may assume that any comprehensive health insurance policy they buy will cover maternity care—but unfortunately, that is not always the case. In fact, in some states, it is hard to purchase *any* insurance as an individual that covers maternity care.[3] Some states have now mandated that at least certain insurers (e.g., small group insurers, or HMOs, or particular individual plans) include maternity coverage.[4] Similarly, many states enacted laws over the past two decades to require that plans cover cancer screening tests, emergency room visits if the person presents symptoms indicating an emergency, and breast reconstruction after mastectomies (the latter requirement has since become federal law). Other common mandates say that if a plan covers a given service, it must do x: For example, if a plan covers mental health services, it cannot exclude coverage of alcohol treatment, or, if a plan covers prescription drugs, it must cover chemotherapy pills.

  Opponents of benefit mandates allege that they drive up the cost of insurance. But many of the mandates are requirements that consumers would expect a reasonable insurance policy to cover and that, in fact, would be covered by all but the skimpiest

plans—even if the mandates were not in place. In 2008, the Massachusetts Division of Health Care Financing and Policy found that the additional cost of Massachusetts' mandated benefits for a typical insurance plan was about 3 percent of premiums.[5] Similarly, a Maryland commission found that the added cost of mandating benefits that might not otherwise be covered by a typical large employer-based plan in Maryland was just 2.2 percent of premiums.[6] Further, some mandated benefits save money because they require coverage of preventive services or early treatment of conditions that could otherwise worsen and become more costly.

In 2014, the Affordable Care Act sets a nationwide floor for benefits: Individual and small group health plans must cover a federally defined "essential benefit package," but states can continue to require that plans cover *additional* benefits. After rules further define what must be covered nationally, it will be easier for states to assess whether state mandates are needed to cover any remaining gaps.

For more information, see *Limited Benefit Plans: Expanding Coverage or Holding Your State Back*, available online at http://www.familiesusa.org/assets/pdfs/limited-benefit-plans.pdf.

Protection for people with pre-existing conditions

Right now, states vary a great deal with respect to their protections for people with pre-existing conditions who wish to buy individual health insurance policies. Some states require one specific insurer to offer policies to people with pre-existing conditions, other states require all insurers to offer them policies, and a few states offer no protection except when people first leave job-based plans. Some states limit premium surcharges that are based on health status, while other states have no such limits. Additionally, state laws vary with respect to how long a newly purchased individual policy can exclude coverage of a person's pre-existing condition.

Allowing people to buy coverage across state lines could undermine a state's protections for people with pre-existing conditions. People who are healthy would likely buy coverage in a state with few rules about this, because policies for healthy people would be cheaper if no people with pre-existing conditions were enrolled in that coverage. But this would be unfair to people with health conditions: They could be left as the only people enrolling in certain policies within the state, and their premiums would therefore spiral higher and higher.

Right now, the Affordable Care Act prohibits health plans from denying coverage to children with pre-existing conditions. In 2014, the Affordable Care Act will also prohibit health plans from denying coverage to adults with pre-existing conditions, but at least until this provision goes into effect, all insurers selling in a state should be required to comply with the state's protections for people with pre-existing conditions.

Premium rates

Some states have rules about how much an insurer can vary premiums by age or by occupation. Proposals to sell insurance across state lines could undermine rating protections for older people or for people who work in jobs considered hazardous.

In 2014 under the Affordable Care Act, federal rules will go into effect that set a limit on this type of variation.

Premium review

State insurance regulators review proposed premium rates with two concerns in mind: First, they make sure that the insurance company is, and will continue to be, solvent and able to pay claims; second, many states now also review proposed premium rates to determine if they are reasonable or excessive for the benefits provided, and states require insurers to lower rates that would be excessive. However, this is not the case in all states—in some states, insurance commissioners have little authority to disapprove excessive rates or do not have sufficient staff to review proposed premium increases.

If consumers bought insurance across state lines, their own state would not oversee their premium rates.[7] Insurers would have incentives to locate in states with little premium oversight.

While the Affordable Care Act provides a set of standards for state premium review, some states go much farther, while others will need to improve their oversight. Even with the Affordable Care Act in place, there is room for insurers to pick a state with the least regulation.

Provider networks

Some states have laws to ensure that members of a health insurance plan will have adequate access to health care providers, and that if a needed specialist is not available in a plan's network, members can go out of the plan's network for services. Also, state laws often require insurers to pay providers promptly, another measure that encourages providers to participate in a health plan. Standards for provider networks will continue to vary among states when the Affordable Care Act is fully implemented.

Some proposals to allow across-state-lines sales would not preserve such provider network protections.

Unfair trade, unfair marketing, and fraud

State insurance regulators have the essential responsibility to stop fraudulent insurers from doing business in their state and to prevent or stop insurers and their agents from employing misleading and deceptive marketing practices. They do this by reviewing forms and marketing materials, inspecting company records, and taking away licenses or imposing fines when necessary.

Most bills to allow across-state-line sales would allow each state in which the insurer does business to continue to regulate unfair marketing and fraud, but you may want to talk further with state regulators about specific oversight tools they would and wouldn't have if a proposal to allow across-state-lines sales were enacted. Could they investigate an out-of-state company if a resident complained about an unfair practice? Or could they insist that the other state's regulator do so? What could they do—even before complaints arise—to ensure that the company will operate fairly?

The Affordable Care Act provides some new tools to stop unfair marketing and fraud. For example, plans must provide some standardized information to consumers that will more clearly explain what is covered in the policy that they are considering. Another new tool is designed to combat fraudulent plans that sell to associations of employers, which are called "multiple employer welfare arrangements" (MEWAs). Under the Affordable Care Act, the federal Department of Labor can step in to stop fraudulent MEWAs from selling to employers anywhere in the country instead of waiting for each state to take action. But both now and when the Affordable Care Act is fully implemented, states will remain the primary overseer of insurance company behavior, so it is important that they have the capacity to watch for, and stop, abusive plans.

If health insurance companies were allowed to sell plans across state lines, the resulting fragmentation of oversight and enforcement responsibilities would likely lead to a litigation nightmare, with constant disputes over which laws, and of which state, apply. State regulators' hands would be tied as they were unable to interpret the laws of another state. Such scenarios would create new and fertile opportunities for fraud and abuse by unscrupulous players.

For a case example, see *Buyer Beware: Unlicensed Insurance Plans Prey on Health Care Consumers*, available online at http://www.familiesusa.org/resources/resources-for-consumers/Scam-Insurance-Plans.pdf.

Who Will Protect Consumers' Interests?

- **Where can you complain if something goes wrong, and will you get a helpful response?**

  Now, if a consumer is dissatisfied with a health plan's decision about whether or not to cover a service, the consumer can appeal first to the health plan and then to an independent reviewer, using either a state-run or federally run appeals process. An across-state-lines bill that has been introduced in Congress would weaken the appeals process: Under H.R. 371, a reviewer who is affiliated with or related to the insurer (i.e., has a "familial, financial, or professional relationship with the insurer") might sometimes serve as a so-called "independent" reviewer, clearly undermining the possibility of independent review.

  If consumers have other questions or concerns about their insurance company, they can complain to their state insurance departments and ask them to help investigate the problem. And consumers have their elected officials to go to bat for them. But what if your insurance company were located in another state—would regulators and politicians in that state work as vigorously on your behalf?

- **Will your insurance department have a say in plans' across-state-lines sales?**

  Bills vary as to who can determine that an insurer will be permitted to sell across state lines. Under some proposals, such as the "Health Care Choice Act" that has been introduced in Congress (H.R. 346 and H.R. 371), the insurer would get to decide: If the insurer was licensed in the "primary state," it would be permitted to sell in a "secondary state" and would be exempt from most of the secondary state's laws. Or, in another variation often seen in state bills, if an insurer sold through an association that is headquartered elsewhere, the state would automatically exempt that insurer from all of its own insurance laws except the requirement to be licensed.[8] In other proposals, the insurance commissioner in each state could decide on a case-by-case basis whether to allow an out-of-state insurer to sell, which could provide a bit more protection if your insurance commissioner is attentive to consumer interests and disapproves sales from states with weak laws or oversight.

How the Affordable Care Act Changes the Picture

The Affordable Care Act sets a floor for consumer protections

The Affordable Care Act sets a strong floor for consumer protection in all states. It requires plans selling to individuals and small groups to cover a set of essential benefits, including, for example, maternity care; requires insurers to cover people with pre-existing conditions without long waits; limits the amount that premiums can vary based on age and other factors; and makes other improvements. While federal protections will thus greatly improve, states can still go further than the standards, and states will still have primary responsibility for oversight of individual and small group plans to make sure that they comply with the law.

Under some across-state-lines proposals, the Affordable Care Act would become a ceiling rather than a floor, because no state could maintain stronger requirements if insurers who did not like them could just do business out of another state. Worse still, some across-state-lines bills seek to repeal the protections in the Affordable Care Act instead of building upon them, thus entirely removing the floor for consumer protection.

The Affordable Care Act allows for multistate plans

The Office of Personnel Management, which now contracts with health plans to serve federal employees and members of Congress, will also contract with two multi-state plans in each state. One of those plans must be a nonprofit. The plans will still have to be licensed in each state where they are selling policies, so states will continue to have leverage if the plans do not adhere to state laws or meet residents' needs. The plans will be required to offer at least a uniform benefit package across the country, but a state can require the plans to provide additional benefits.

The Affordable Care Act opens uncharted territory—multistate compacts

The Affordable Care Act also allows two or more states to join together into a "compact," an agreement to regulate health insurance, beginning in 2016. As in other across-state-lines proposals, the insurance company will be subject to some state laws and regulations only in its home state. However, the insurer will still be subject to certain specified laws in each state where it does business—laws about rating, unfair trade or marketing, provider networks, and resolution of consumer complaints, such as whether the plan was adhering to its contract, for example. It would have to provide specific notices to people buying the policy that explain any differences

in benefits or other protections in the plan from what would be offered under state law. The secretary of the U.S. Department of Health and Human Services will issue further regulations about multistate compacts in 2013. The secretary will also review and approve proposed compacts to make sure they 1) provide coverage that is as comprehensive and affordable as that which would be provided in a state exchange, and 2) do not weaken consumer protection laws.

While the Affordable Care Act thus will provide some protections that do not now exist when plans are sold across state lines, multistate compacts are still uncharted territory. Consumers will want to ask many questions to make sure their interests are protected if their states pursue such compacts.

Conclusion

While proposals to sell insurance across state lines may sound promising at first, policy makers, consumer organizations, and patients should be aware that these proposals present a minefield of possible danger points. Out-of-state plans might not offer the same benefits or consumer protections offered by in-state plans. If they sold plans primarily to low-risk, healthy people, they could undercut the health insurance market for plans that are subject to your state's laws, causing premiums in those plans to rise. Most proposals have no clear oversight mechanism for out-of-state plans: If something goes wrong, a regulator in another state might not act quickly or vigorously to protect residents of all the states where the plan sells policies.

The Affordable Care Act provides some new mechanisms for across-state-lines sales. First, the federal government will offer multistate plans that it directly oversees. Second, states can eventually join together to form "compacts" to regulate health insurance. Advocates will need to look carefully at the details of proposed compacts to ensure that they adequately protect consumers and patients in each of the affected states.

Endnotes

[1] Current state bills have names such as the "Health Care Choice Act," and the American Legislative Exchange Council (ALEC) has written a model bill with that name. For an example of a federal bill introduced in 2011, see H.R. 371, available online at www.thomas.gov.

[2] *News release*, "ALEC Commends Georgia Governor and Legislators for Passing Patient-Centered Health Care Bill" (Washington: American Legislative Exchange Council, May 17, 2011), available online at http://www.alec.org/AM/Template.cfm?Section=ALEC_Commends_Georgia_Governor_and_Legislators_for_Passing_Patient_Centered_Health_Care_Bill.

[3] Brigette Courtot and Julia Kaye, *Still Nowhere to Turn: Insurance Companies Treat Women Like a Pre-Existing Condition* (Washington: National Women's Law Center, 2009). In nearly half of states' capital cities, not a single plan was available through eHealthInsurance.com in 2009 that covered maternity care.

[4] As of January 2010, MA, NH, NY, OR, and VT required insurers to cover maternity care, and six other states required some types of individually purchased insurance plans to cover maternity benefits. Kaiser Family Foundation, Table, "Mandated Coverage of Maternity Care," available online at http://www.statehealthfacts.org/comparetable.jsp?ind=687&cat=7&sort=1558, accessed July 8, 2011.

[5] Sara Bachman et al., *Comprehensive Review of Mandated Benefits in Massachusetts: A Report to the Legislature*, Massachussetts Division of Health Care Finance and Policy, July 7, 2008, available online at http://www.mass.gov/Eeohhs2/docs/dhcfp/r/pubs/mandates/comp_rev_mand_benefits.pdf.

[6] Rex Cowdry, Executive Director, Maryland Health Care Commission, "Comprehensive and Standard: The Maryland CSHBP Experience," presentation to the Institute of Medicine, Washington, D.C., January 13, 2011, available online at http://iom.edu/~/media/Files/Activity%20Files/HealthServices/EssentialHealthBenefits/2011-JAN-12/1145%202%20Cowdry.pdf.

[7] Some bills allow states to perform a financial review of the out-of-state company's solvency if the other state has not performed one within a required time period. They do not provide for review of excessive premium increases, however.

[8] Some states require association plans to disclose to consumers that the plan is exempt from most of the state's laws. While disclosure may be somewhat helpful, we have not seen any research about whether consumers actually understand the disclosures and consider the implications when they buy an out-of-state plan. Furthermore, disclosure does not address the fundamental issue of adverse selection—that consumers with low health risks are more likely to buy out-of-state, leaving people in less-than-perfect health to purchase more comprehensive in-state policies, with resultant spiraling premiums.

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Selling Health Insurance Across State Lines

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