



California Initiative Review (CIR)

Volume 2014

Article 7

1-1-2014

Proposition 46: Drug and Alcohol Testing of Doctors. Medical Negligence Lawsuits.

Easton Broome

University of the Pacific, McGeorge School of Law

Fay Saechao

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/california-initiative-review>



Part of the [Legislation Commons](#)

Recommended Citation

Broome, Easton and Saechao, Fay (2014) "Proposition 46: Drug and Alcohol Testing of Doctors. Medical Negligence Lawsuits.," *California Initiative Review (CIR)*: Vol. 2014 , Article 7.

Available at: <https://scholarlycommons.pacific.edu/california-initiative-review/vol2014/iss1/7>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in California Initiative Review (CIR) by an authorized editor of Scholarly Commons. For more information, please contact mgbibney@pacific.edu.

Proposition 46:
Drug and Alcohol Testing of Doctors.
Medical Negligence Lawsuits.

Initiative Statute

Copyright © 2014 by the University of the Pacific,
McGeorge School of Law

By

Easton Broome

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Philosophy, University of California, Berkeley, 2006

&

Fay Saechao

J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2016
B.A., Political Science, University of California, Davis, 2011

I. EXECUTIVE SUMMARY

Proposition 46, the Troy and Alana Pack Patient Safety Act of 2014 (“Patient Safety Act”), is an attempt to protect the safety of patients, including regulating doctor¹ conduct and adjusting damage awards for persons in medical malpractice lawsuits.² Specifically, Proposition 46 has three key provisions: (1) to increase the \$250,000 cap on pain and suffering damages in medical negligence lawsuits to adjust for inflation, (2) to require alcohol and drug testing and reporting of doctors, and (3) to require doctors to check the State prescription drug history database before prescribing certain controlled drugs.³

A “yes” vote would increase the cap on noneconomic damages in medical malpractice lawsuits from \$250,000 to \$1.1 million.⁴ It would also require hospitals to do random alcohol and drug testing on physicians.⁵ Additionally, it would require doctors to check the electronic database, known as the Controlled Substance Utilization Review and Evaluation System (“CURES”) before prescribing certain drugs.⁶

A “no” vote would add no new requirements for health care providers, and the noneconomic damages cap in medical negligence lawsuits would remain at \$250,000, where it has been since 1975.⁷

II. THE LAW

A. Existing Law

1. *The Medical Injury Compensation Reform Act*

In 1975, the Legislature enacted the Medical Injury Compensation Reform Act (“MICRA”) to reduce and stabilize medical malpractice costs, and to increase access to health care for Californians.⁸ MICRA made several changes intended to limit medical malpractice liability, two of which are relevant to Proposition 46.⁹ First, MICRA limited malpractice liability by establishing a \$250,000 cap on the noneconomic damages that may be awarded to an injured person.¹⁰ Second, MICRA established a cap on fees going to the attorneys representing injured

¹ “Doctor” is used interchangeably with the term “health care provider” in a broad sense to include physicians, surgeons, and pharmacists.

² See CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2014, at 26–33, 68–70, available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf> [“NOVEMBER 2014 VOTER GUIDE”].

³ See *id.*

⁴ *Id.* at 29.

⁵ *Id.* at 28.

⁶ *Id.*

⁷ *Id.* at 27; see CAL. CIV. CODE § 3333.2(b) (2014).

⁸ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27; MICRA: A Brief History, CAL. MEDICAL ASS’N (Sept. 10, 2014), <http://www.cmanet.org/issues-and-advocacy/cmas-top-issues/micra/micra-a-brief-history/> [“MICRA: A Brief History”].

⁹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27.

¹⁰ *Id.*; see CAL. CIV. CODE § 3333.2(b).

persons in medical malpractice cases.¹¹ The fee structure was made dependent upon the amount of damages awarded.¹² The percentage declines as the amount of the award grows.¹³ Specifically, attorneys cannot receive more than 40 percent of the first \$50,000 recovered; 33.33 percent of the amount recovered between \$50,000 and \$100,000; 25 percent of the amount recovered between \$100,000 and \$600,000; or more than 15 percent of any amount recovered greater than \$600,000.¹⁴

2. *The Medical Board of California Regulates Physician Conduct*

The Medical Board of California¹⁵ (“Board”) currently licenses and regulates physicians, surgeons, and certain other health care professionals.¹⁶ The Board is also responsible for investigating complaints and disciplining physicians and certain other health professionals who violate the laws that apply to the practice of medicine.¹⁷ Violations include failure to follow an appropriate standard of care, illegally prescribing drugs, and drug abuse.¹⁸ There are currently no requirements for hospitals to test doctors for alcohol or drugs.¹⁹

3. *Health Care Providers Required to Register for, but not Check, CURES Beginning in 2016*

Currently, the State Department of Justice (“DOJ”) administers CURES.²⁰ Pharmacies are required to provide specified information to DOJ on patients and the type of prescription drugs dispensed to be included in the CURES database.²¹ The information is used to reduce drug abuse and to identify potential “doctor shoppers” – persons who obtain prescriptions from various physicians with the intent to abuse or resell the drugs for profit.²² Generally, the prescription drugs that have a higher potential for abuse, like OxyContin, Vicodin, and Adderall, are subject to the reporting.²³

To register, physicians and pharmacists must first submit an application form electronically.²⁴ Beginning April 1, 2014, an annual fee of \$6 is charged to licensed prescribers

¹¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27.

¹² *Id.*

¹³ *Id.*; see CAL. BUS. & PROF. CODE § 6146.

¹⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 24; CAL. BUS. & PROF. CODE § 6146(a).

¹⁵ “Medical Board of California” is used interchangeable with “Medical Board” and “Board” to mean the Medical Board of California.

¹⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 28, 32.

²⁰ *Id.* at 28.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 28, 70.

²⁴ CURES / PDMP, ST. CAL. DEPARTMENT JUST. – OFF. ATT’Y GEN., <http://oag.ca.gov/cures-pdmp> (last visited Oct. 3, 2014) [“CURES”].

and licensed pharmacists.²⁵ The registration must be followed up by a notarized application and copies of validating documentation which includes: Drug Enforcement Administration Registration, State Medical License or State Pharmacy License, and a government-issued identification.²⁶ The notarized application and validating documents may be submitted by email or standard U.S. mail to the DOJ.²⁷

The DOJ limits access and dissemination of the information in CURES “to licensed prescribers, licensed pharmacists, law enforcement personnel, and regulatory board personnel strictly for patient care or official investigatory/regulatory purposes.”²⁸ Furthermore, “DOJ pursues regulatory and/or criminal sanctions for misuse [of patient] information.”²⁹

Currently, health care provider registration for CURES is optional, and there is no requirement that physicians consult with the CURES database before prescribing drugs. Health care providers will be required to register for CURES beginning on January 1, 2016.³⁰ Even when registration is required, physicians will not be required to check the database before prescribing or dispensing drugs.³¹

B. Proposed Law

Proposition 46, the Troy and Alana Pack Patient Safety Act of 2014 (“Patient Safety Act”), is intended to improve patient safety by (i) adjusting the cap on noneconomic recovery to reflect inflation and to ensure those who are injured by negligent doctors are made whole for their loss;³² (ii) regulating doctor conduct to prevent medical errors; and (iii) preventing abuse of prescription drugs.³³

1. Adjusting the \$250,000 Cap on Noneconomic Damages

Proposition 46 would amend Section 3333.2 of the Civil Code, which currently sets the cap on noneconomic recovery for medical malpractice at \$250,000.³⁴ Proposition 46 would adjust the cap to reflect the increases in inflation since the cap was established in 1975 – effectively raising the cap from \$250,000 to \$1.1 million starting on January 1, 2015.³⁵ The noneconomic damages award cap has remained the same since the Legislature enacted MICRA in 1975.³⁶ Under Proposition 46, any case that “has not been resolved ... as of January 1, 2015”

²⁵ SB 809 (Steinberg and DaSaulnier) at § 2 (2013-2014), available at http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0801-0850/sb_809_cfa_20130812_113851_asm_comm.html; approved and codified into CAL. BUS. & PROF. CODE § 208 (a) (2014).

²⁶ CURES, *supra* note 24.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

³¹ *Id.*

³² *Id.* at 68.

³³ *Id.*

³⁴ CAL. CIV. CODE § 3333.2.

³⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

³⁶ *Id.* at 32; MICRA: A Brief History, *supra* note 8.

would apply the new adjusted noneconomic damages award.³⁷ Furthermore, the cap would be adjusted annually thereafter to reflect any increase in inflation.³⁸

The sliding scale for attorneys' fees established under MICRA, however, would remain and attorneys in medical malpractice litigation would continue to be limited to 15 percent on recoveries over \$600,000.³⁹

2. *Regulating Doctor Conduct by Required Alcohol and Drug Testing*

Proposition 46 would add Article 14, the "Physician and Surgeon Alcohol or Drug Impairment Prevention," to Chapter 5 of Division 2 of the Business and Profession Code.⁴⁰ Article 14 details four main requirements related to the alcohol and drug testing.⁴¹

a. Random and Specific Alcohol and Drug Testing

This provision requires hospitals to test physicians for alcohol and drugs randomly and in three specific instances: (1) when a patient under the care and treatment of the physician suffers an adverse event;⁴² (2) when the physician is reported for possible alcohol or drug use while on duty; or (3) when the physician failed to follow the appropriate standard of care as determined by the hospital or the Medical Board.⁴³ Article 14 also requires hospitals to report verified positive test results, or the willful failure or refusal of a physician to submit to a test, to the Board.⁴⁴

b. Required Discipline of Impaired Physicians

Proposition 46 would require the Medical Board to discipline physicians who violate the alcohol and drug provisions.⁴⁵ The Board is currently tasked with licensing and regulating physicians, surgeons, and certain other health care professionals.⁴⁶ In addition, the Board is responsible for investigating complaints and disciplining physicians and certain other health professionals who violate the laws that apply to the practice of medicine.⁴⁷ Proposition 46 would specifically require the Board to discipline physicians found to be impaired by alcohol or drugs while on duty or during an adverse event, or if a physician refused or failed to comply with a drug and alcohol testing.⁴⁸

³⁷ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 69.

³⁸ *Id.* at 28, 69.

³⁹ *Id.*

⁴⁰ *Id.* at 69.

⁴¹ *Id.* at 69.

⁴² Adverse events include mistakes made during surgery, injuries associated with medical errors, or any event that causes the death or serious disability of a patient. *See id.* at 29.

⁴³ *Id.* at 29, 69.

⁴⁴ *Id.*

⁴⁵ *Id.* at 29.

⁴⁶ *Id.* at 28.

⁴⁷ *Id.*

⁴⁸ *Id.*

c. Required Reporting of Suspected Physician Misconduct

The measure also requires physicians to report other physicians to the Board if they suspect physician misconduct.⁴⁹ Individual physicians are currently not required to report this information.⁵⁰ The new reporting requirement could increase the number of doctors reported for misconduct. If the reporting system is effective in ensuring that doctors follow proper procedures to minimize medical errors, then patient safety may be improved because doctors are likely in the best position to recognize misconduct in their respective areas of practice.

d. Presumption of Professional Negligence

Proposition 46 would also add Section 1714.85 to the Civil Code.⁵¹ Section 1714.85 would allow a presumption of professional negligence by the doctor in medical malpractice lawsuits in the following circumstances: (1) when the doctor tested positive for drug or alcohol giving rise to the suit; (2) when the doctor does not comply with the testing requirements after the adverse event occurred and the lawsuit arises as a result; or (3) when the doctor failed to check the electronic drug database system⁵² and the lawsuit arises from the doctor's failure to comply.⁵³ If this measure is passed, when the doctor in a medical malpractice suit meets any of the above circumstances, then the law would assume that the doctor has committed a medical error unless she or he can prove otherwise.⁵⁴ This shifts the burden of proof from the plaintiff to the defendant doctor where one of the above conditions that create the presumption exists.

3. *Preventing Prescription Drug Abuse with Mandate to Check CURES*

Proposition 46 would add Section 11165.4 to the Health and Safety Code, which requires doctors to check the existing statewide drug monitoring program, known as the Controlled Substance Utilization Review and Evaluation System ("CURES").⁵⁵

Health care providers are required to register for CURES beginning on January 1, 2016, but the electronic system does not have the capacity to handle the higher level of use yet.⁵⁶ The system is currently in the process of updating, which is expected to be complete in summer of 2015.⁵⁷ The system recently received funding for the upgrades.⁵⁸

⁴⁹ *Id.* at 29, 69.

⁵⁰ *Id.* at 29.

⁵¹ *Id.* at 70.

⁵² Known as Controlled Substance Utilization Review and Evaluation System ("CURES"). *See id.* at 28.

⁵³ *Id.*

⁵⁴ *See id.* at 70.

⁵⁵ *Id.* at 28, 70.

⁵⁶ *Id.* at 28 (upgrades to the system expected to be complete in the summer of 2015).

⁵⁷ *Id.*

⁵⁸ *See* CAL. BUS. & PROF. CODE § 208 (a) (where an annual fee of \$6 is charged on doctors to offset the cost associated with the maintenance of CURES).

Although doctors are required to register for CURES beginning January 1, 2016, they are not yet required to check the database prior to prescribing or dispensing drugs.⁵⁹ If Proposition 46 becomes law, doctors would be required not only to register for CURES, but also required to check the electronic database prior to prescribing or dispensing certain drugs for the first time to the patient.⁶⁰ This requirement could help to reduce prescription drug abuse.⁶¹ However, since the system cannot handle the higher level of use yet, so it may be an impossibility for this provision of the law to take effect upon passage.

III. HISTORY

A. History of the MICRA Cap on Noneconomic Damages in Medical Malpractice Cases

In the mid-1970s, California doctors were embroiled in a malpractice insurance crisis.⁶² Driven by frivolous lawsuits and excessive jury awards, medical liability insurers levied massive insurance premium increases and cancelled insurance policies for many physicians across the State.⁶³ As their premiums more than tripled by 1975, anesthesiologists and surgeons began a walkout, refusing to handle any patients except those in imminent danger of death.⁶⁴ A grassroots campaign was then organized by the California Medical Association in May 1975, and more than 800 physicians, nurses, lab technicians and hospital personnel joined in a Capitol rally calling on then (and now) Governor Jerry Brown to convene a special session of the Legislature to deal with the crisis.⁶⁵ Three days later, Governor Brown issued the special session that resulted in a collection of statutes that is now known as the Malpractice Insurance Compensation Reform Act (MICRA).⁶⁶

As originally introduced at the special session, the bill limited compensation for certain noneconomic losses, including pain and suffering, to \$800 a month and provided that a claimant would not be entitled to noneconomic losses if his earnings exceeded \$1,500 a month.⁶⁷ These monthly restrictions were deleted at the request of the Assembly Judiciary Committee, and the bill (Assembly Bill 1xx) was passed on June 20, 1975, without any limit on the amount of damages that an injured party could recover.⁶⁸ A week later, the Senate Insurance and Financial

⁵⁹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

⁶⁰ *Id.* at 70.

⁶¹ *See* CURES, *supra* note 24 (DOJ expressly state that CURES is “an effort to identify and deter drug abuse and diversion through accurate and rapid tracking of Schedule II through IV controlled substances”).

⁶² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 27; MICRA: A Brief History, *supra* note 8.

⁶³ MICRA: A Brief History, *supra* note 8.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ S. COMM. ON INSURANCE AND FINANCIAL INSTITUTIONS, ANALYSIS OF ASSEMB. B. NO. 1 AS AMENDED JUNE 27, 1975) (on file with Cal. Assemb, B. Author A.B. 1xx 1975 files).

⁶⁸ Amanda Edwards, *Medical Malpractice Noneconomic Damages Caps*, 43 HARV. J. ON LEGIS. 213, 221–22 (2006).

Institutions Committee adopted significant amendments to the bill, which included the provision limiting noneconomic damages to \$250,000.⁶⁹

As the bill progressed through the State Senate, Senate Judiciary Committee consultant and later legislative counsel, Bion Gregory, suggested indexing the noneconomic damages cap.⁷⁰ However, this suggestion was disregarded because the plaintiff lawyers' lobby would not support the idea.⁷¹ Ironically, some of the representatives of the trial bar thought indexing the cap would improve the bill's overall chance for passage and increase the likelihood of the Governor signing it.⁷² As a result, they withheld their support of the indexed cap to try to kill the bill altogether.⁷³ Even without the provision indexing the cap, the Governor still signed the bill.

Following passage of MICRA, the constitutionality of the noneconomic damages cap was challenged on a number of occasions.⁷⁴ Then, in 1985, the California Supreme Court upheld the cap's constitutionality, stating:

[The limitation on recoverable noneconomic damages] is, of course, one of the provisions which made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation... It appears obvious that this section – by placing a ceiling of \$250,000 on the recovery of noneconomic damages – is rationally related to the objective of reducing the costs of malpractice defendants and their insurers.⁷⁵

In February 2014, State Senate Democratic leader Darrell Steinberg introduced a bill concerning the medical malpractice damages cap that would have avoided the current ballot box battle between doctors and lawyers over Proposition 46.⁷⁶ The compromise would have raised the damages limit to \$500,000 under MICRA, well below the rate of inflation.⁷⁷ While representatives for both doctors and lawyers seemed close to agreement, no agreement was reached.⁷⁸ Consumer Watchdog (a nonprofit organization with a focus on protecting patients, health care, political reform, privacy, and energy⁷⁹) then drafted Proposition 46.⁸⁰

⁶⁹ *Id.*

⁷⁰ *Id.* at 224.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Lawrence Fein v. Permanente Medical Group, S.F.*, 38 Cal. 3d 137, 139 (1985).

⁷⁶ Walton Law Firm, *Medical Malpractice Initiative Will Appear on November Ballot*, SAN DIEGO INJURY LAW BLOG (Apr. 3, 2014), <http://www.legalpad.com/2014/04/medical-malpractice-initiative-will-appear-november-ballot.html>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Who We Are*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about> (last visited Oct. 10, 2014).

⁸⁰ *Id.*

B. History of Random Alcohol/Drug Testing of Physicians

If Proposition 46 passes, California would become the first State to require doctors to submit random drug and alcohol tests.⁸¹ However, Massachusetts General Hospital in Boston and the Cleveland Clinic Foundation in Ohio have implemented random urine testing in their anesthesia residency teaching departments.⁸² The problem with drug testing doctors is that doctors are familiar with the signs of addiction and are sometimes able to mask their drug use from coworkers.⁸³ This makes it difficult to detect when they need help, and those determined to hide their habits have been known to find creative ways of beating drug tests, including submitting fake urine samples.⁸⁴ Despite the difficulties, the administrators of the programs in Boston and Cleveland believe they have been successful, and now hope more comprehensive studies will be done to determine whether such programs help stave off drug use long-term.⁸⁵

C. History of the CURES Database

To combat prescription drug abuse, the California Triplicate Prescription Program (TPP) was created in 1939.⁸⁶ It was replaced by the CURES database in 1997, and in 2009 the Prescription Drug Management Program (PDMP) system was implemented as a searchable database component of CURES.⁸⁷ In 2012, the program responded to more than 800,000 requests.⁸⁸

CURES is maintained by the DOJ.⁸⁹ CURES allows preregistered users including licensed healthcare prescribers eligible to prescribe controlled substances, pharmacists authorized to dispense controlled substances, law enforcement, and regulatory boards to access timely patient controlled substance history information.⁹⁰ As of August 2013, only 8.23 percent of prescribers and pharmacists in California were registered with the CURES database.⁹¹ According to the Legislative Analyst's Office (LAO) report on Proposition 46, that number has since increased to 12 percent.⁹²

⁸¹ Adam Nagourney, *California Asks: Should Doctors Face Drug Tests?*, N.Y. TIMES, Aug. 1, 2014, http://www.nytimes.com/2014/08/02/us/california-asks-should-doctors-face-drug-tests.html?_r=0.

⁸² Lauren Cox, *Urine Drug Tests for Doctors?*, ABC NEWS (Nov. 12, 2008), <http://abcnews.go.com/Health/PainManagement/story?id=6232694>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF S.B. 809, (Aug. 21, 2013), available at http://leginfo.ca.gov/pub/13-14/bill/sen/sb_0801-0850/sb_809_cfa_20130820_094453_asm_comm.html.

⁸⁷ *Id.*

⁸⁸ *Id.* at 2–3.

⁸⁹ CURES PRESCRIPTION DRUG MONITORING PROGRAM, CAL. DEP'T JUST. (Feb. 2013), available at http://www.deadiversion.usdoj.gov/mtgs/pharm_awareness/conf_2013/august_2013/san_diego/small.pdf. [“CURES Prescription Drug Monitoring Program”].

⁹⁰ CURES, *supra* note 24.

⁹¹ *CURES Prescription Drug Monitoring Program*, *supra* note 89, at 15-16.

⁹² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

Senate Bill No. 809, which became effective January 1, 2014, requires prescribers of medication and pharmacists to register with CURES.⁹³ Beginning January 1, 2016, providers will be required to register with CURES (even if Proposition 46 does not pass), but they will not be required to check the database prior to prescribing or dispensing drugs.⁹⁴ Currently, CURES does not have sufficient capacity to handle the higher level of use that is expected to occur when providers are required to register beginning in 2016.⁹⁵ The State is currently in the process of upgrading CURES, and these upgrades are scheduled to be complete in the summer of 2015.⁹⁶ Currently, CURES has 30,000 registered users.⁹⁷ If all prescribers of medication and physicians register with CURES, that total will increase to 200,000 users.⁹⁸ Currently, it takes about thirty days after a prescriber/pharmacist files their paperwork with the DOJ before they become registered with CURES.⁹⁹

IV. LIKELY FISCAL EFFECTS

Proposition 46 would likely have a wide variety of fiscal effects on State and local governments, many of which are subject to substantial uncertainty.¹⁰⁰

A. Fiscal Effects of Raising the Cap on Noneconomic Damages in Medical Malpractice Cases

Raising the cap on noneconomic damages would likely increase overall health care spending in California (both governmental and nongovernmental) by: (1) increasing direct medical malpractice costs, and (2) changing the amount and types of health care services provided.¹⁰¹

1. Direct Medical Malpractice Costs

Theoretically, raising the cap may encourage health care providers to practice medicine in a way that decreases malpractice. However, the prospect of a more substantial recovery could increase the number of claims and, of those that are successful, the damages awarded could be significantly higher.¹⁰² On balance, it is anticipated by the LAO that the increase in medical malpractice costs would result in higher total health care spending.¹⁰³

⁹³ CAL. HEALTH & SAFETY CODE § 11165.1.

⁹⁴ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 28.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Dave Roberts, *Hearings Dissect Prop 46 on Medical Malpractice*, CAL WATCHDOG.COM (Oct. 1, 2014), <http://calwatchdog.com/2014/10/01/hearings-dissect-prop-46-on-medical-malpractice/>.

⁹⁸ *Id.*

⁹⁹ *Joint Legislative Hearing on Proposition 46, California State Legislature*, (Sept. 29, 2014) (statement of Arwen Flint, Assistant Chief at Attorney General's Office), *video available at* http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=2456.

¹⁰⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 29.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 30.

California's counties would be greatly affected by the change in the noneconomic damages cap as the counties run hospitals and clinics, offering health care services to the underserved and hardest to reach populations.¹⁰⁴ Counties would have to pay higher medical malpractice premiums if Proposition 46 were to pass.¹⁰⁵ Counties that are self-insured would have to wholly cover the costs of higher payouts in medical lawsuits – meaning redirecting dollars out of the delivery, care, or other local services.¹⁰⁶

State and local governments pay for tens of billions of dollars of health care services annually.¹⁰⁷ Assuming additional costs for health care providers – such as higher direct medical malpractice costs – are generally passed along to purchasers of health care services (such as governments), and assuming State and local governments will have net costs associated with changes in the amount and types of health care services, there would likely be a very small percentage increase in health care costs in the economy overall from raising the cap.¹⁰⁸ However, a 0.5 percent increase in State and local government health care costs in California as a result of raising the cap would increase government costs by roughly a couple hundred million dollars annually.¹⁰⁹ Given the range of potential effects on health care spending, the LAO estimates that State and local government health care costs associated with raising the cap would likely range in the tens of millions of dollars to several hundred million dollars annually.¹¹⁰

Raising the cap would also affect the amount and types of health care services provided in California because health care providers would likely change how they practice medicine in an effort to avoid medical malpractice claims.¹¹¹ A physician may order a test that he or she would not otherwise have ordered, and this could either reduce future health care costs by preventing future illness or increase the total costs of health care services, with little or no future offset savings.¹¹² The LAO estimates that this would result in a net increase in total health care spending by 0.1 percent to 1 percent.¹¹³

B. Fiscal Effects of Random Alcohol and Drug Testing of Physicians

If Proposition 46 is passed, it could have the effect of savings from fewer medical errors, because testing would deter some physicians from using alcohol or drugs while on duty.¹¹⁴ This would decrease overall health care spending.¹¹⁵ However, these costs would be offset to a degree

¹⁰⁴ Matt Cate, *Opinion: California Cannot Afford Proposition 46*, PUBLIC CEO (Sept. 16, 2014), <http://www.publicceo.com/2014/09/opinion-california-cannot-afford-proposition-46/>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 30.

¹¹² *Questions and Answers About the MICRA Ballot Measure*, VOTE NO ON 46, <http://www.noon46.com/take-action/q-a/> (last visited Oct. 1, 2014).

¹¹³ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 30.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

by the costs of performing the tests.¹¹⁶ Some of these costs would be passed along to State and local governments in the form of higher prices for health care services provided by physicians.¹¹⁷

Physician alcohol and drug testing would also create State administrative costs, including the costs for the Board to enforce the measure.¹¹⁸ These costs would likely be less than \$1 million annually, to be paid for by a fee assessed on doctors.¹¹⁹

C. Fiscal Effects of Requiring Doctors and Pharmacists to Use CURES

If Proposition 46 has the effect on the CURES database that it intends to have, doctors will be using the system to check a patient's prescription history prior to prescribing certain medicines. This could result in lower prescription drug costs because a doctor would be more likely to identify potential doctor shoppers and, in turn, reduce the number of prescription drugs dispensed.¹²⁰ This would result in lower governmental costs associated with prescription drug abuse, such as law enforcement, social services, and other health care costs.¹²¹ However, these savings could be lessened if drug abusers find other ways to obtain prescription drugs.¹²²

Another likely fiscal effect associated with the proposed usage of the CURES database is that additional staff may need to be hired at hospitals if doctors are required to spend time using CURES.¹²³ Some of these cost increases would eventually be passed on to government purchasers of health care services in the form of higher prices.¹²⁴

D. Overall Fiscal Effect

The requirements to check CURES and test physicians for alcohol and drugs would likely result in annual savings to State and local governments.¹²⁵ Raising the MICRA cap would likely result in increased State and local government health care costs, ranging from the tens of millions of dollars to several hundred million dollars annually.¹²⁶ The amount of annual savings is highly uncertain, but potentially significant.¹²⁷ These savings would offset to some extent the increased governmental costs from raising the cap on noneconomic damages.¹²⁸

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ CalPERS, Pension & Health Benefits Committee, *Agenda Item 6 – Update on Proposition 46 – Drug and Alcohol Testing of Doctors and Medical Negligence Lawsuits*, at 7, (Sept. 16, 2014), available at <http://www.calpers.ca.gov/eip-docs/about/committee-meetings/agendas/pension/201409/item-6.pdf>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *The Situation – Costly for State & Local Governments*, VOTE NO ON 46, <http://www.noon46.com/costs/> (last visited Oct. 1, 2014).

¹²⁵ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 31.

¹²⁶ LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 46, DRUG AND ALCOHOL TESTING OF DOCTORS. MEDICAL NEGLIGENCE LAWSUITS. INITIATIVE STATUTE (Jul. 17, 2014), available at <http://www.lao.ca.gov/ballot/2014/prop-46-110414.pdf>.

¹²⁷ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 31.

¹²⁸ *Id.*

V. CONSTITUTIONAL ANALYSIS AND DRAFTING ISSUES

A. Single-Subject Rule

The California Constitution states that “an initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”¹²⁹ The single-subject rule seeks to prevent “logrolling,” whereby proponents “combin[e] in one measure two or more unrelated provisions” to get the weaker issue passed into law.¹³⁰ More importantly, the principal objective of the constitutional provision is to avoid confusion on voters.¹³¹ An initiative complies with the single-subject rule if, “despite its varied collateral effects,” all of its parts are “reasonably germane” to a common theme or purpose.¹³² The provisions are not required to “effectively interlock in a functional relationship.”¹³³ The court construes the reasonably germane test in “an accommodating and lenient manner so as not to unduly restrict the Legislature’s or the people’s right to package provisions in a single bill or initiative.”¹³⁴

On its face, Proposition 46 appears to have three distinct objectives: (1) to increase the noneconomic medical malpractice award; (2) to require alcohol and drug testing of doctors; and (3) to require physicians, surgeons, and pharmacists to check CURES prior to proscribing certain prescription drugs to patients.¹³⁵ A constitutional challenge may be brought under the single-subject rule arguing that each of the objectives in should be voted on separately. However, due to the standard for finding a single-subject violation, it is unlikely the challenge would succeed and the court would likely find that the provisions are “reasonably germane” to a common theme or purpose – patient safety.¹³⁶

B. Severability Clause

Proposition 46 contains a severability clause that allows invalid provisions to be removed from an otherwise enforceable law.¹³⁷ Specifically, Section 10 of Proposition 46 states: “If any of the provisions of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.”¹³⁸ A severability clause “establishes a presumption in favor of severance [although not conclusive.]”¹³⁹ Proposition 46 does contain a severability clause so the court will likely favor severance if part of the proposed law is found to be invalid or unconstitutional.¹⁴⁰

¹²⁹ CAL. CONST. art. II, § 8(d).

¹³⁰ *Independent Energy Producers v. MacPherson* (“*MacPherson*”), 38 Cal. 4th 735 (2006).

¹³¹ *See Senate v. Jones*, 21 Cal. 4th 1142 (1999).

¹³² *Senate v. Jones*, 21 Cal. 4th at 1157 (internal quotation marks and citation omitted).

¹³³ *Id.*

¹³⁴ *MacPherson*, 38 Cal. 4th at 764.

¹³⁵ *See generally* NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 26–31, 68–70.

¹³⁶ *See Senate v. Jones*, 21 Cal. 4th 1142; *see also MacPherson*, 38 Cal. 4th 735.

¹³⁷ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70.

¹³⁸ *Id.*

¹³⁹ *See California Redevelopment Assn. v. Matosantos* (“*Matosantos*”), 53 Cal. 4th 231, 270 (2011) (where the California Supreme Court established the three-part test for a severability challenge).

¹⁴⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70; *id.*

When determining whether to maintain other sections where one has been deemed invalid, the court will consider three factors.¹⁴¹ First, the court will identify the grammatical structure of the clause to determine whether the invalid portion “can be removed as a whole without affecting the wording or coherence of what remains.”¹⁴² Second, the court will consider whether the valid sections can function independently and is “complete in itself.”¹⁴³ Third, the court will decide whether voters would have still passed the legislation knowing that parts of the statute would be invalidated.¹⁴⁴

Proposition 46 has three distinct provisions relating to patient safety and recovery: (1) the alcohol and drug testing of doctors; (2) the checking of CURES; and (3) adjusting the noneconomic medical malpractice cap to reflect inflation.¹⁴⁵ Proposition 46 meets the grammatically separable factor because each of the three categories can be separated grammatically and still retain coherence. Proposition 46 is likely to meet the volitional factor, because voters who support the measure are likely in support of the proposed law’s focus on patient safety. Therefore, voters would likely support the measure “knowing that parts of the statute would be invalidated.”¹⁴⁶

However, the functional factor is not as clear. At first glance, Proposition 46 likely satisfies the functional separation factor because each provision appears to be complete on its own and can function independently without relying on the other sections. However, on a closer look, there is one provision that cannot stand on its own. Section 6 of Proposition 46, the presumption of professional negligence, relies on Section 4 of Proposition 46, the alcohol and drug testing, to be valid.¹⁴⁷ In other words, Section 6 cannot function independently if Section 4 is declared invalid or unconstitutional because Section 6 refers to the alcohol and drug testing as a prerequisite for the professional negligence presumption.¹⁴⁸

Nonetheless, if alcohol and drug testing of doctors is declared unconstitutional and invalid, then the severability clause will likely favor severance.¹⁴⁹

C. Alcohol and Drug Testing of Doctors May Be a Constitutional Violation

Opponents may challenge the drug and alcohol testing of doctors as a nonconsensual search and seizure in violation of the Fourth Amendment under the United States Constitution¹⁵⁰

¹⁴¹ *Matosantos*, 53 Cal. 4th at 271.

¹⁴² *Id.* (citation omitted).

¹⁴³ *Id.* (citation omitted).

¹⁴⁴ *Id.* (citation omitted).

¹⁴⁵ See NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 26–31, 68–70.

¹⁴⁶ See Christopher Cadelago, *Support Plummets for California Health Initiatives*, SACRAMENTO BEE, Sept. 11, 2014, <http://www.sacbee.com/2014/09/11/6697111/support-plummets-for-california.html> [“Support plummets”].

¹⁴⁷ See NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 68–70.

¹⁴⁸ *Id.*

¹⁴⁹ See *Matosantos*, 53 Cal. 4th 316 (the court gave great weight to the severability clause and allowed for severability after applying the three severability factors).

¹⁵⁰ U.S. CONST. amend. IV.

and a privacy violation of the California Constitution.¹⁵¹ If the challenge is successful, then the provisions related to alcohol and drug testing of doctors would be declared unconstitutional and be removed from the measure.¹⁵² However, such a challenge may not be successful since patient safety in the medical and health care industry will likely outweigh privacy rights of doctors.¹⁵³

In *Skinner v. Ry. Labor Executives' Ass'n*, the Supreme Court held that the Federal Railroad Safety Act of 1970, which allowed the Federal Railroad Administration “to regulate and mandate blood and urine tests of employees who are involved in certain train accidents[,]” did not violate the Fourth Amendment.¹⁵⁴ The Court in *Skinner* applied a balancing test and found that the Government had compelling interests that outweigh privacy concerns.¹⁵⁵ Privacy interests of employees in a regulated industry are considered minimal where the industry is “regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.”¹⁵⁶

The rationale for the alcohol and drug testing of doctors in Proposition 46 is similar to the rationale for alcohol and drug testing of employees in the rail industry.¹⁵⁷ The medical and health care industry is regulated by both federal and State statutes and regulations to ensure patient safety.¹⁵⁸ For instance, section 8355 of the California Government Code requires persons or organizations that are awarded a contract or grant from the State to provide a drug-free workplace.¹⁵⁹ Therefore, the provisions relating to alcohol and drug testing of doctors will likely be upheld as constitutional under both the U.S. Constitution and California Constitution.

VI. PUBLIC POLICY CONSIDERATIONS

A. Supporting Arguments

As of September 8, 2014, Proposition 46 supporters had raised more than \$7.8 million.¹⁶⁰ Among those supporters are the Consumer Attorneys Issue PAC, contributing \$1,108,000, Consumer Watchdog, contributing \$267,148, Casey, Gerry, Schenk, Francavilla, Blatt & Penfield, LLP, contributing \$100,000, Bruce G. Fagel, A Law Corporation, contributing

¹⁵¹ CAL. CONST. art. I, § 1 (“All people [...] have inalienable rights. Among these are enjoying and defending life and liberty, [...] and privacy.”).

¹⁵² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70; *Matosantos*, 53 Cal. 4th 231.

¹⁵³ *See generally Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (Supreme Court held that the drug testing regulation did not violate the Fourth Amendment).

¹⁵⁴ 489 U.S. at 606 (1989).

¹⁵⁵ *Id.* at 632.

¹⁵⁶ *Id.* at 626.

¹⁵⁷ *See Skinner*, 489 U.S. 602 (1989).

¹⁵⁸ *See generally Laws and Regulations*, MED. BOARD CAL., http://www.mbc.ca.gov/About_Us/Laws/ (last visited Oct. 5, 2014) (visit the website for a list of California Laws and Regulations on health care providers).

¹⁵⁹ CAL. GOV. CODE § 8355 (2014).

¹⁶⁰ *California Proposition 46, Medical Malpractice Lawsuits Cap and Drug Testing of Doctors (2014)*, § 3.3 Donors, BALLOTPEDIA, [http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_\(2014\)](http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_(2014)) (last visited Sept. 8, 2014).

\$85,000, Bisnar/Chase Personal Injury Attorneys, LLP, contributing \$75,000, and CA Nurses Association Initiative PAC, contributing \$50,000.¹⁶¹

1. *Medical Malpractice Insurance Will Not Skyrocket if the Cap is Raised, and Doctors Will Not Have to Flee California or Reduce Access to Care*

Over the last ten years, California medical malpractice insurers have earned a 16.7 percent return on net worth – more than 250 percent of the industry average (which was a 6.5 percent return).¹⁶² Medical malpractice insurers in California have consistently had such high profits that they would continue to make above-average profits even if the MICRA cap were indexed to inflation.¹⁶³ Moreover, in each of the last eight years California malpractice insurers had loss ratios of 38 percent or less, meaning that they always had at least 62 cents of each premium dollar, plus all investment income, left over for expenses and profit.¹⁶⁴

Doctors will not leave California to practice in another State with lower malpractice insurance rates because California already has an effective and successful system to regulate medical malpractice insurance premiums – a system that will not change because of an adjustment of the malpractice cap.¹⁶⁵ Proposition 103 gave the California State Insurance Commissioner the power to regulate many types of insurance rates, including medical malpractice insurance.¹⁶⁶ In 2012, the Insurance Commissioner found that California’s medical malpractice insurers were charging doctors too much in premiums and ordered several of the largest insurers to return \$52 million in premiums they overcharged California physicians.¹⁶⁷

2. *Raising the Medical Malpractice Cap Will Not Lead to the Closure of Community Health Centers*

Proponents assert that indexing the malpractice cap for inflation will not increase the malpractice insurance costs of community health centers because health centers and free clinics are protected under the Federal Tort Claims Act (FTCA).¹⁶⁸ Under the FTCA, individuals injured by the negligent acts of federal employees may seek and receive compensation from the federal government.¹⁶⁹ Therefore, health centers and free clinics are no longer liable for medical malpractice and have no need to buy medical malpractice insurance.¹⁷⁰

¹⁶¹ *Id.*

¹⁶² *Frequently Asked Questions, YES ON 46 SAVES LIVES*, <https://www.yeson46.org/frequently-asked-questions/> (last visited September 5, 2014) [“FREQUENTLY ASKED QUESTIONS”].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Op-Ed Bob Pack, *Prop. 46: When Health Care Kills*, CAPITOL WEEKLY (Oct. 6, 2014), <http://capitolweekly.net/health-care-medical-prop-46-negligence-pack/>.

¹⁶⁸ FREQUENTLY ASKED QUESTIONS *supra* note 162.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

3. *Proposition 46 is About Patient Safety, Not Profits for Attorneys*

Proponents of Proposition 46 argue that patient safety is the primary objective of Proposition 46 and that attorneys' fees are incidental.¹⁷¹ Medical malpractice litigation deters physicians and hospitals from committing medical errors and encourages them to gather and analyze information about past errors, thereby reducing the future costs associated with such errors.¹⁷² The deterrent effect of patient protection laws can save the health care system from these human financial losses;¹⁷³ increased attorneys' fees are merely incidental to the incentive for doctors and hospitals to fix bad behavior for fear of strong financial repercussion for malpractice.¹⁷⁴ Further, proponents point out that MICRA's strict attorneys' fees structure is left entirely in place by the initiative.¹⁷⁵

4. *Although Current Law Allows Unlimited Economic Damages, There is Still a Need for a Higher Cap on Noneconomic "Pain and Suffering" Damages*

The cap on noneconomic damages prevents people from getting fair compensation.¹⁷⁶ Economic damages are limited to wage loss and future medical bills, which means that if the victim does not have wages or if the victim dies, there can be no economic damages.¹⁷⁷ This largely has an effect on children, the disabled, the elderly, and stay-at home moms.¹⁷⁸ With a \$250,000 cap, you can rarely find an attorney to take the case, especially when it can cost \$100,000 or more to do the background work and provide expert witnesses.¹⁷⁹ This means the most vulnerable among us can recover at most \$250,000, while those with higher incomes have other avenues for financial redress.¹⁸⁰

Although most States have limits on noneconomic damages in medical negligence cases, California's cap of \$250,000 is among the lowest in the nation.¹⁸¹ Only two States, Kansas and Montana, have a fixed cap as low as California's.¹⁸² Four other States have a basic cap of \$250,000 on noneconomic damages that can be raised under certain circumstances such as gross negligence, serious, permanent, or catastrophic harm, or where justice requires.¹⁸³ Caps in other

¹⁷¹ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 32.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ John Wildermuth, *Patient Safety, Malpractice Cost at Issue in Proposition 46*, SF GATE (Sept. 18, 2014), <http://www.sfgate.com/politics/article/Patient-safety-malpractice-costs-at-issue-in-5765482.php> ["PATIENT SAFETY"].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ FREQUENTLY ASKED QUESTIONS, *supra* note 162.

¹⁸¹ *In Depth on Measure Proposition 46: Drug and Alcohol Testing of Doctors. Medical Negligence Lawsuits*, LEAGUE OF WOMEN VOTERS OF CAL., EDUCATION FUND, <https://cavotes.org/vote/election/2014/november/4/ballot-measure/proposition-46/more> (last visited Oct. 4, 2014).

¹⁸² *Id.*

¹⁸³ *Id.*

States range up to \$750,000. At least seventeen States have no caps at all on noneconomic damages.¹⁸⁴

5. *Proposition 46 Will Save Lives By Cracking Down on Prescription Drug Abuse*

Proposition 46 would require all doctors and pharmacists to register with and use CURES. Checking this database will reduce the number of doctor shopping addicts who harm themselves and others.¹⁸⁵ The Journal of the American Medical Association found that doctors are the biggest suppliers for chronic prescription drug abusers, and called for the mandatory usage of State prescription drug databases.¹⁸⁶ Further, a 2012 Los Angeles Times investigation found that drugs prescribed by doctors caused or contributed to nearly half of recent prescription overdose deaths in Southern California.¹⁸⁷ Prescription drug addiction is the nation's fastest growing form of drug abuse.¹⁸⁸ Unfortunately, less than one in ten physicians bother to use CURES.¹⁸⁹

6. *Proposition 46 Will Save Lives By Protecting Patients From Impaired Doctors*

California's medical board estimates 18 percent of doctors suffer substance abuse during their lifetime.¹⁹⁰ Proposition 46 would help by mandating random testing of physicians.¹⁹¹ Drug testing is required for pilots, bus drivers, and other safety workers – but it is not required for doctors.¹⁹² A decade ago, Dr. Stephen Loyd was hooked on prescription painkilling drugs.¹⁹³ “I worked impaired every day,” Dr. Loyd says.¹⁹⁴ “Looking back, it scares me to death, what I could have done.”¹⁹⁵ Drug testing can save lives.¹⁹⁶ That is why random drug testing of doctors is supported by leading medical safety experts, consumer advocates, the Inspector General of the federal agency responsible for overseeing health care, and by doctors who themselves have abused drugs.¹⁹⁷

¹⁸⁴ *Id.*

¹⁸⁵ Op-Ed Holly Stewart, *Marin Voice: Proposition 46 is About Patient Care and Rights*, MARIN INDEPENDENT J. (Oct. 9, 2014), http://www.marinij.com/opinion/ci_26695938/marin-voice-proposition-46-is-about-patient-care.

¹⁸⁶ Consumer Watchdog, Troy and Alana Pack Patient Safety Act Fact Sheet, *available at* <http://www.consumerwatchdog.org/resources/mar24flyer.pdf> [“Consumer Watchdog”].

¹⁸⁷ *Id.*

¹⁸⁸ Pack, *supra* note 167.

¹⁸⁹ *Id.*

¹⁹⁰ J.G. Preston, *Doctors, Health Care Officials, Medical Ethicist Call for Doctor Drug Testing to Protect Patients*, PROTECT CONSUMER JUSTICE.ORG (Jul. 23, 2014), <http://www.protectconsumerjustice.org/doctors-health-care-officials-medical-ethicist-call-for-doctor-drug-testing-to-protect-patients.html>.

¹⁹¹ Pack, *supra* note 167.

¹⁹² NOVEMBER 2014 VOTER GUIDE, at 32.

¹⁹³ Pack, *supra* note 167.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 32.

¹⁹⁷ *Id.*

B. Opposing Arguments

As of September 8, 2014, Proposition 46 opponents had raised over \$56.3 million.¹⁹⁸ Among those supporters are the California Medical Association Physicians' Issues Committee, contributing \$5,064,542, Cooperative of American Physicians Independent Expenditure Committee, contributing \$5,000,000, NorCal Mutual Insurance Company, contributing \$5,000,000, The Doctors Company, contributing \$5,000,000, Kaiser Foundation Health Plan, Inc., contributing \$3,000,000, California Hospitals Committee on Issues, contributing \$2,500,000, and Medical Insurance Exchange of California, contributing \$2,500,000.

1. Proposition 46 Jeopardizes People's Access to Their Trusted Doctors

Opponents assert that if Proposition 46 passes and California's medical liability cap goes up, you could also lose your trusted doctor because many doctors will be forced to leave California to practice in States where medical liability insurance is more affordable.¹⁹⁹ Opponents argue that even respected community clinics, including Planned Parenthood, warn that specialists like OB-GYNs will have no choice but to reduce or eliminate vital services, especially for women and families in underserved areas.²⁰⁰ Not only are opponents concerned about doctors leaving the State, they are worried about doctors coming to the State.²⁰¹ If a medical student has just graduated from medical school and has upwards of \$200,000 in school related debt, they are far more likely to practice in an area with lower medical malpractice insurance costs.²⁰²

2. Proposition 46 Threatens People's Personal Privacy

Opponents argue that the provision of Proposition 46 that forces doctors and pharmacists to use the CURES database significantly jeopardizes the privacy of patients' personal prescription medical information.²⁰³ Currently, CURES does not have sufficient capacity to handle the higher level of use that is expected to occur when providers are required to register beginning in 2016, yet Proposition 46 provides no funding to improve functionality or security, and contains no security standards to protect patient information.²⁰⁴ This makes patient information even more vulnerable to hacking, breach and unauthorized access.²⁰⁵ Additionally, the CURES database expands the number of people who will have access to private health information, including non-medical professionals for reasons that have nothing to do with

¹⁹⁸ *California Proposition 46, Medical Malpractice Lawsuits Cap and Drug Testing of Doctors (2014)*, § 3.3 Donors, BALLOTPEdia, [http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_\(2014\)](http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_(2014)) (last visited September 8, 2014).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Proposition 46 Debate, McGeorge School of Law*, (Oct. 1, 2014) (statement of Hal Dasinger, Vice President of Government Relations, The Doctors Company).

²⁰² *Id.*

²⁰³ *Prop. 46 Threatens the Privacy of Your Personal Health Information, VOTE NO ON 46*, <http://www.noon46.com/get-the-facts/threats-to-personal-privacy/> (last visited September 12, 2014).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

medical history.²⁰⁶ For example, law enforcement, investigatory agencies, and the courts could access patient prescription records for investigations that don't even relate to prescription drug abuse and, in many cases, even where the patient is not the subject of the investigation.²⁰⁷

3. Opponents of Proposition 46 Are Not Necessarily Opposed to Drug Testing of Doctors, But Such a Law Should Be Drafted Judiciously

Proponents of Proposition 46 have openly admitted that the provision for random alcohol and drug testing of doctors was added as a political sweetener.²⁰⁸ The initiative sponsors were very smart when they tried to cover up a very controversial policy measure (indexing the noneconomic damages cap) with a very popular one (drug testing of doctors).²⁰⁹ In fact, when likely voters were polled on what parts of the proposition they would support, 68 percent were in favor of requiring random drug and alcohol testing of doctors, while 25 percent were opposed.²¹⁰ Respondents were far less enthusiastic about the increased cap: 42 percent of likely voters approved, while 47 percent opposed it.²¹¹

Opponents of Proposition 46 ask voters to look at the details of how Proposition 46 works.²¹² It applies to physicians in hospitals, but not those who are operating on their own.²¹³ It does not include nurses.²¹⁴ It calls for an immediate suspension for doctors who test positive or who fail to get tested within twelve hours of an adverse event – which can be impractical or impossible at times, especially in rural areas.²¹⁵ Such a rigid requirement could leave patients without health care until the California Medical Board has a chance to review the evidence.²¹⁶

4. Proposition 46 is Costly for Consumers

Opponents argue that trial lawyers, who are out to profit from medical lawsuits, carelessly threw together Proposition 46 without any concern for the taxpayer's pocketbook, privacy, health, or health care.²¹⁷ If medical malpractice awards go up, health insurance

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Poorly Crafted State Proposition 46 Puts Doctors on Defense*, SF GATE (Sept. 13, 2014), <http://www.sfgate.com/opinion/article/Poorly-crafted-state-Proposition-46-puts-doctors-5751918.php>.

[*“Poorly Crafted State Proposition 46 Puts Doctors on Defense”*]

²⁰⁹ Melanie Mason, *Poll: Weak Support for Prop. 46 Targeting Medical Malpractice*, L.A. TIMES (Sept. 13, 2014), <http://www.latimes.com/local/politics/la-me-pol-poll-malpractice-20140913-story.html> - [page=1](#).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Poorly Crafted State Proposition 46 Puts Doctors on Defense*, *supra* note 208.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Oppose Proposition 46, A Costly Threat To Your Personal Privacy Californians Can't Afford*, VOTE NO ON 46, <http://www.noon46.com/get-the-facts/why-voters-should-oppose/> (last visited September 12, 2014).

companies will raise their rates to cover their increased costs.²¹⁸ If Proposition 46 is passed, medical lawsuits and jury awards will skyrocket, and the taxpayer will be the one to pay the costs.²¹⁹

5. *The CURES Database Is Not Ready For “Prime Time”*

If Proposition 46 is passed, prescribers of medicine and pharmacists will be required to register and begin using CURES on November 5, 2014 - the day after the vote.²²⁰ There are currently 30,000 users of the CURES database, a number which will increase to 200,000 when all prescribers and pharmacists are required to register.²²¹ Currently, CURES is undergoing updates to accommodate the 200,000 users required to register on January 1, 2016 (in accordance with SB 809), but the updates are an ongoing process.²²² We do not have the luxury of discussing what the CURES database will be able to handle next year, as Proposition 46 mandates usage of the CURES system by all 200,000 prescribers/pharmacists the day after the vote if the initiative is passed.²²³ Based upon the schedule for the needed updates of the CURES system to accommodate such traffic, CURES will not be ready to handle the increase in traffic on November 5, 2014.²²⁴

Proponents have argued that as long as a prescriber of medication “tries” to access the CURES system, their medical licenses will not be at risk.²²⁵ But opponents argue this is just not true.²²⁶ There is nothing in the text of Proposition 46 that says what happens when a prescriber of medication attempts to use the CURES system but is unable to access it.²²⁷ The text is clear: “Licensed health care practitioners and pharmacists shall access and consult the electronic history...”²²⁸ Therefore, if a patient is in need of medication but the CURES system does not respond, the physician will be faced with a dilemma: prescribe the medicine and run the risk of putting their medical license at risk, or deny the patient medication and violate their Hippocratic oath.²²⁹ Proposition 46 also imposes a presumption of negligence on the prescriber/pharmacist if they do not access and consult the CURES database.²³⁰ Therefore, since Article 2, Section 10 of

²¹⁸ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 33.

²¹⁹ *Id.*

²²⁰ *Informational Hearing on Proposition 46*, (statement of Alicia Wagon, Legal Counsel for California Medical Association).

²²¹ *Id.* (statement of Arwen Flint, Assistant Chief at Attorney General’s Office).

²²² *Id.*

²²³ *Id.* (statement of Alicia Wagon, Legal Counsel for California Medical Association).

²²⁴ *Id.* (statement of Arwen Flint, Assistant Chief at Attorney General’s Office).

²²⁵ *Id.* (statement of Bob Pack, Author of Proposition 46).

²²⁶ *Id.* (statement of Alicia Wagon, Legal Counsel for California Medical Association).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Press Release, No On 46 Campaign, New Video Raises Troubling Questions About Whether Gov’t Website Will Be Ready To Meet Prop 46 Mandate (Sept. 3, 2014), *available at* <http://www.prnewswire.com/news-releases/no-on-46-campaign-new-video-raises-troubling-questions-about-whether-govt-website-will-be-ready-to-meet-prop-46-mandate-273831121.html> [“No On 46 Press Release”].

²³⁰ NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 70.

the California Constitution requires the CURES provisions of Proposition 46 to go into effect the day after the election, doctors would be forced to use CURES or be presumed negligent.²³¹

VII. CONCLUSION

Proposition 46 will have major fiscal effects on the California budget. The goal of protecting the safety of patients by increasing the MICRA cap on noneconomic damages in professional negligence claims, requiring alcohol and drug testing of doctors, and mandating use of the CURES system by all health care professionals comes at a price. As mentioned earlier, increasing the malpractice cap will result in an increase in government spending by hundreds of millions of dollars annually.²³² This large number will be offset to a degree if malpractice claims decrease as a result of doctors taking added precautions to avoid malpractice claims.²³³ Although doctors have an incentive to avoid claims that could see them paying out up to four times more for noneconomic damages, malpractice claims will likely increase because of the attractively high awards, which was arguably the primary reason MICRA was implemented in 1975.

Requiring prescribers of medication and pharmacists to register with CURES and to use the system should help identify “doctor shoppers,” which would result in lower prescription drug costs. Eliminating some of the abuse of prescription medication will also allow government resources to be used elsewhere (like law enforcement and social services). However, there is a big question as to what will happen the day after the election with CURES if Proposition 46 passes. The system is not due for an upgrade until August 2015, and there is currently a 30-day turn around on getting new users registered. If Proposition 46 passes, prescribers of medication and pharmacists are required to check CURES. What is going to happen when a large number of these prescribers and pharmacists cannot access the system?

Opponents argue that MICRA was passed in reaction to a health care crisis in California regarding excessively high jury awards in malpractice cases.²³⁴ It would appear that if Proposition 46 were passed, the problems that MICRA was intended to solve could likely return. Malpractice insurance premiums will rise, but proponents of the initiative allege that this will not be to the detriment of doctors.²³⁵

If Proposition 46 is passed, it is difficult to say with certainty what effects it will have on California, because California would be the first State to implement the alcohol/drug testing requirement of doctors.²³⁶ Whether you are a proponent or opponent of Proposition 46, it is undeniable that the passing of the initiative will have profound effects on future generations in California.

²³¹ No On 46 Press Release, *supra* note 229.

²³² NOVEMBER 2014 VOTER GUIDE, *supra* note 2, at 30.

²³³ *Id.* at 29.

²³⁴ MICRA: A Brief History, *supra* note 8.

²³⁵ FREQUENTLY ASKED QUESTIONS, *supra* note 162.

²³⁶ Nagourney, *supra* note 81.