California Initiative Review (CIR)

Volume 2018 Article 9

1-1-2018

Proposition 8: Fair Pricing for Dialysis Act

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Proposition 8:

Fair Pricing for Dialysis Act

Initiative Statute

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I. EXECUTIVE SUMMARY

Proposition 8, the Fair Pricing for Dialysis Act, seeks to ensure that outpatient dialysis clinics provide quality and affordable patient care to people suffering from end stage renal disease.[1] Specifically, Proposition 8 has three key provisions: (1) to limit chronic dialysis clinics' revenue and require clinics to refund profits above the limit, (2) to require clinics to submit an annual report to the state government, and (3) to prohibit clinics from refusing to treat patients based on the source of payment for care.[2]

A **YES** vote on this measure will require dialysis clinics to issue refunds for revenue above 115 percent of the costs of direct patient care and healthcare improvements. Clinics that do not issue the required refunds will be fined.[3] It will also require clinics to report their revenues to the state and will ensure that patients are not denied care based on their insurance status.

A **NO** vote allows dialysis clinics to continue to charge group and individual health insurers multiple times what government programs pay for dialysis treatment.

A pre-election review identified constitutional concerns that may also be litigated post-election.

II. BACKGROUND

A. Dialysis Treatment

Dialysis is a medical treatment that removes waste products and excess fluids and chemicals from a person's bloodstream. Individuals with kidney failure may receive dialysis treatment. Dialysis artificially mimics what healthy kidneys do. Most people on dialysis undergo hemodialysis treatment which lasts about four hours and typically occurs three times per week. Dialysis patients may receive dialysis treatment at home or at a hospital, but most patients receive treatment at chronic dialysis clinics (CDCs). The California Department for Public Health (CDPH) is responsible for licensing and inspecting CDCs. Two private for-profit entities, DaVita Inc. and Fresenius Medical Care, operate and have at least partial ownership of the majority (72%) of CDCs in California.

B. Paying for Dialysis Treatment

CDCs have total revenues of roughly $3 billion annually from their operations in California. These revenues consist of payments for dialysis from a few main sources: Medicare, Medi-Cal, and Group and Individual Health Insurance.

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[1] Cal. Proposition 8 at § 2 (2018).
[2] CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 6, 2018, at 48–55, *available at* https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf ["NOVEMBER 2018 VOTER GUIDE"].
[3] California Proposition 8, Limits on Dialysis Clinics' Revenue and Required Refunds Initiative (2018), Ballotpedia, https://ballotpedia.org/California_Proposition_8,_Limits_on_Dialysis_Clinics%27_Revenue_and_Required_Refunds_Initiative_(2018) (last visited Sept. 19, 2018) (on file with the *California Initiative Review*) ["Prop 8 Ballotpedia"].

1. Medicare

Medicare is a federally funded program that provides health coverage to most people age 65 and older and certain younger people who have disabilities.[4] Federal law generally makes people with kidney failure eligible for Medicare coverage regardless of age or disability status. Medicare pays for dialysis treatment for the majority of people on dialysis in California.[5]

2. Medi-Cal

Medi-Cal is California's federal-state Medicaid program. Medi-Cal provides health coverage to low-income people.[6] The state and federal government share the costs of Medi-Cal. For people that qualify for both Medicare and Medi-Cal, Medicare covers most of the payment for dialysis treatment as the primary payer and Medi-Cal covers the rest.[7] For people only covered by Medi-Cal, the Medi-Cal program is solely responsible to pay for dialysis treatment.[8]

3. Group and Individual Health Insurance

Group and individual health insurance coverage is often provided by a private insurer that receives a premium payment in exchange for covering the costs of an agreed-upon set of health care services. When an insured person develops kidney failure, that person can usually transition to Medicare coverage.[9] Federal law requires that a group insurer remain the primary payer for dialysis treatment for a "coordination period" that lasts 30 months.[10]

Group and individual health insurance typically pay higher rates for dialysis than government programs[11]. Medicare and Medi-Cal rates for dialysis treatment are largely determined by federal and state regulations.[12,13]On the other hand, group and individual health insurers establish their rates by negotiating with CDCs. On average, group and individual insurers pay multiple times what government programs pay for dialysis treatment.[14]

Once a person is eligible for Medicare for kidney dialysis treatment, there will be a "coordination period" when the employer or union health group plan will continue to pay the employee or plan member's health care bills. If the employer or union health group plan doesn't

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[4] *See* NOVEMBER 2018 VOTER GUIDE, *supra* note 2.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] Centers for Medicare & Medicaid Services promulgate regulations on Medicare payments for renal dialysis services, https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ESRDpayment/index.html (last visited Oct. 19, 2018).
[13] Cal. Welf. & Inst. §14105 authorizes the Director of State Department of Health Services to limit the rates of payment for health care services and adopt rules and regulations for carrying out the Medi-Cal program.
[14] *See* NOVEMBER 2018 VOTER GUIDE, *supra* note 2.

pay 100% of costs, Medicare may pay some of the remaining costs. During the "coordination period", the employer or union health group plan "pays first" and Medicare "pays second."[15]

If a self-payer meets the eligibility requirements for Medicare, they may be eligible for 12 months retroactive coverage.[16] To help with costs not covered by Medicare, patients can get a secondary source of coverage through Medigap or Medicaid. If no secondary insurance is available, the patient will incur out of pocket costs.[17]

Uninsured patients would be subject to out of pocket costs. The cost of dialysis treatment varies depending on where treatment is received. If emergency dialysis treatment is received at a hospital, a single treatment could be $9,900. If a single dialysis treatment is received at a clinic, the same treatment could cost $500. The annual cost of hemodialysis treatment at a clinic is about $89,000. Costs for dialysis treatment are increasing.[18]

III. PREVIOUS ATTEMPTS TO CHANGE THE LAW

Although there have not been identical legislative attempts to regulate the revenue of CDCs, the topic of dialysis treatment has been one that has garnered legislative attention. There have been previous attempts by the Legislature to improve patient care for dialysis patients and to ensure that income to dialysis centers is directed to patient care, not corporate profit, for instance:

A. AB 251 Health and care facilities: dialysis clinics. (2017-2018) [19]

In 2017, AB 251 was amended to establish a medical loss ratio for chronic dialysis clinics. The medical loss ratio would require the clinics to spend at least 85% of their revenue on direct patient care, health care quality improvement, and taxes and license fees. Clinics that do not meet this ratio would be required to issue rebates to non-government payers in an amount sufficient to meet the minimum spending of 85%.[20] Services Employees International Union (SEIU) California, which sponsored the bill, stated that the bill would "incentivize quality care and rein in the price of dialysis treatment by requiring CDCs to spend at least 85% of their revenue on direct patient care expenses, quality improvements, taxes and licensure fees."[21] However, AB 251 failed to move forward as a dialysis clinics bill and was subsequently amended to include a completely unrelated set of legislative changes.

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[15] Centers for Medicare and Medicaid Services, *Medicare Coverage of Kidney Dialysis and Kidney Transplant Services*, https://www.medicare.gov/Pubs/pdf/10128-Medicare-Coverage-ESRD.pdf (last visited Oct. 1, 2018).
[16] *Id*.
[17] *Id*.
[18] Specialty Management Care, *The Annual Kidney Dialysis Cost in USA*. https://www.specialtycm.com/annual-kidney-dialysis-cost-usa/ (last visited Oct. 1, 2018).
[19] On August 6, 2018, AB 251 was gutted and amended to Bar pilots: pilotage rates. (2017-2018)
[20] *See* Official California Legislative Information Assembly Bill 251, Analysis by Senate Committee on Health (Sept. 18, 2018), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB251.
[21] *Id*.

B. SB 349 Chronic dialysis clinics: staffing requirements. (2017-2018).[22]

In 2017, SB 349 was introduced. Initially, the bill set out requirements for minimum staffing ratios for dialysis clinics and minimum transition time between dialysis patients. The purpose of this bill, as introduced, was "to improve the quality of patient care at dialysis centers by increasing frequency of inspections, requiring a higher level of staffing, and imposing a minimum transition time between patients at dialysis machines."[23] In August 2018, the dialysis language was completely removed from SB 349 and it became a bill to protect people from civil arrest when visiting California courthouses.

In response to SB 349 in its original form, SEIU-United Healthcare Workers West (SEIU-UHW) President Dave Regan stated:

> "This legislation has successfully raised awareness of the disturbing patient care problems in dialysis clinics that the industry claimed were not happening, and we are eager to have productive discussions to find solutions that improve patient care for the 66,000 Californians who need dialysis to survive. If the discussions are not productive, we will ask California voters to stand up for dialysis patients through a statewide ballot initiative planned for the November 2018 election."[24]

California Chamber of Commerce "opposed SB 349 because it would have significantly increased health care costs, reduced the availability of dialysis clinics and patient shifts at clinics and resulted in job losses with no clear evidence of a clinical benefit to patients."[25]

C. California Limits on Charges for Dialysis and Minimum Staffing of Clinics Initiative (#17-0015)[26]

Following the failure of SB 349 and AB 251, the proponents drafted two initiatives for the November 2018 ballot. One was the "California Limits on Charges for Dialysis and Minimum Staffing of Clinics Initiative (#17-0015)" and the other was the current Proposition 8, the "Fair Pricing for Dialysis Act." SEIU decided to focus the signature collection on Proposition 8 and not the measure that was more directed to staffing concerns.[27]

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[22] On August 24, 2018 SB 349 was gutted and amended, and transformed to Courthouses: Privilege from civil arrest. (2017-2018)

[23] *See also* Official California Legislative Information Senate Bill 349, Analysis by Assembly Appropriations (Sept. 18, 2018), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB349.

[24] J W August, *Questions About Patient Safety in Kidney Dialysis Clinics*, NBC 7 SAN DIEGO (Dec. 20, 2017). https://www.nbcsandiego.com/investigations/Questions-About-Patient-Safety-in-Kidney-Dialysis-Clinics-465078823.html.

[25] Karen Sarkissian, *Dialysis Clinic Staffing Ratio Bill Stopped*, California Chamber of Commerce (Sept. 11, 2017). https://advocacy.calchamber.com/2017/09/11/dialysis-clinic-staffing-ratio-bill-stopped/.

[26] *California Limits on Charges for Dialysis and Minimum Staffing of Clinics Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/California_Limits_on_Charges_for_Dialysis_and_Minimum_Staffing_of_Clinics_Initiative_(2018). (last visited Sept. 19, 2018) ["Kidney Dialysis Patient Protection Act"]; https://oag.ca.gov/system/files/initiatives/pdfs/17-0015%20%28Dialysis%20Clinic%20Care%29_0.pdf.

[27] *Id*.

D. Ohio Initiative

A similar initiative measure was circulated in Ohio, called "The Ohio Limits on Dialysis Clinics' Revenue and Required Refunds Initiative."[28] The measure will not appear on the Ohio ballot as an initiative constitutional amendment on November 6, 2018. The initiative petition was ruled invalid by the Ohio Supreme Court because documentation required for managing paid signature gatherers was not filed prior to signature gathering by paid circulators.

IV. THE LAW

A. Existing Law

Health and Safety code, Division 2 (Licensing Provisions), Chapter 1 (Clinics), Article 3 (Regulations) provides regulations for clinics including chronic dialysis clinics. Health and Safety Code, Division 2 (Licensing Provisions), Chapter 2 (Health Facilities), Article 2 (Administration) provides that the health care facilities pay fees to the Licensing and Certification Division to fund the administration of the state programs. Except with Medicare and Medi-Cal reimbursements, current law does not limit how much chronic dialysis clinics can charge.

B. Proposed Law

This measure adds section 1226.7, 1226.8, and 1266.3 to the Health and Safety Code. 1226.7(a)(2)(B) requires CDCs to issue rebates to payers, excluding Medicare and other government payers, in the amount that revenues exceed the cap. Section 1226.7(a)(1) caps revenue for dialysis clinics at 115 percent of specified "direct patient care services costs" and "health care quality improvement costs." Such "allowable" costs include the costs of staff wages and benefits, staff training and development, drugs and medical supplies, facilities, and electronic health information systems.[29] Allowable costs are costs that can be counted toward determining the revenue cap. Other costs, such as administrative overhead, would not be counted toward the revenue cap. This measure allows CDPH to identify through regulation additional CDC costs that would count as allowable costs, which could serve to reduce the amount of any rebates otherwise owed by CDCs.[30]

The measure also provides a process for the CDCs to challenge the revenue cap number.[31] A CDC must prove that the cap of 115 percent will violate due process or effect a taking of private property requiring just compensation.[32] First, a CDC can propose a new revenue cap. Then, a CDC must prove that any whole number below the proposed cap will not violate due process or effect a taking of private property requiring just compensation. If the court

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[28] *Ohio Limits on Dialysis Clinics' Revenue and Required Refunds Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Limits_on_Dialysis_Clinics%27_Revenue_and_Required_Refunds_Initiative_(2018) (last visited Sept. 19, 2018) ["Ohio Initiative Ballotpedia"].
[29] Cal. Proposition 8 § 1226.7(c)(1) and (3) (2018).
[30] *Id*.
[31] Cal. Proposition 8 § 1226.7(a)(6) (2018).
[32] *Id*.

determines the proposed cap is the lowest whole number that will not violate due process or effect a taking, the proposed cap will apply for only one year.

The measure also requires CDCs to pay interest on the rebate amounts, calculated from the date of treatment.[33] CDCs would be required to pay a penalty to CDPH of five percent of the amount of any required rebates, up to a maximum penalty of $100,000.[34] Rebates would be calculated at the level of a CDCs "governing entity," which refers to the entity that owns or operates the CDC ("owner/operator").

Proposition 8 requires CDCs to submit annual reports to CDPH.[35] These reports would include the number of dialysis treatments provided, the amount of allowable costs, the amount of the owner/operator's revenue cap, the amount by which revenues exceed the cap, and the amount of rebates paid.[36]

Finally, the measure prohibits CDCs from refusing to provide treatment to a person based on the source of payment for care.[37] A clinic cannot choose to treat a patient with private insurance instead of a patient with government insurance.

The California Department of Public Health would issue regulations to implement and enforce this measure.[38] The Department would review the annual reports and determine the amount of penalties for violations. Proposition 8 delegates the power to prescribe additional categories of "direct patient care services" and "health care quality improvement costs" to the CDPH.[39] Also, since the surrounding sections in the Health and Safety Code define "department" as the Department of Public Health, it is likely that a court or other body interpreting the measure would find "department" to be the California Department of Public Health.

V. CONSTITUTIONAL ISSUES

A. Taking private property without fair legal proceedings

Both the California Constitution and the United States Constitution prohibit the government from taking private property (which includes the value of a business) without fair legal proceedings. A CDC may prove in court that, in its particular situation, the required rebates would amount to taking the value of the business and therefore violate the state or federal constitution. If a CDC owner/operator is able to prove this, the measure outlines a process where the court would reduce the required rebates by just enough to no longer violate the constitution.

In Section 1226.7 (a)(6), the proposition recognizes that the terms of the initiative may lead to violations of the state and federal constitution. It sets up a process to avoid unconstitutional takings. The U.S. Constitution and California Constitution provide that private

[33] Cal. Proposition 8 § 1226.7(a)(2)(E) (2018).
[34] Cal. Proposition 8 § 1226.7(a)(4) (2018).
[35] Cal. Proposition 8 at § 1226.7(b) (2018).
[36] *Id*.
[37] Cal. Proposition 8 § 1226.8(a) (2018).
[38] Cal. Proposition 8 § 1226.7(a)(4) (2018).
[39] Cal. Proposition 8 at § 1226.7(c)(1) and (3) (2018).

property shall not "be taken for public use, without just compensation."[40] A regulatory action will be deemed a per se taking for Fifth Amendment purposes when a government regulation requires an owner to suffer a permanent physical invasion of his or her property or completely deprives the owner of "all economically beneficial use" of his or her property.[41]

The rebate requirement of Proposition 8 may be subject to both facial and as-applied challenges. To determine whether the adoption of a regulation affects a taking, a court must consider: (1) Does the regulation substantially advance a legitimate governmental interest?; and (2) Does the regulation deprive the owner of economically viable use of property?[42] The existence of a "regulatory taking" will be decided by evaluating the following *Penn Central*[43] factors: (1) The regulation's economic impact on the claimant and the extent to which it has interfered with distinct investment-backed expectations; and (2) The character of the governmental action (e.g., whether it is a physical invasion or merely affects property interest).[44]

Proposition 8 provides a corrective process to avoid an unconstitutional taking. This measure defines its revenue cap by formula, with adjustments to the formula possible only through a court challenge.[45] The measure envisions the possibility that a CDC/governing entity might challenge the measure in court on the grounds that the rebate requirement is an unconstitutional taking of private property without due process or just compensation. If such a legal challenge is successful, the measure requires that the rebate provision still apply, but only after the court replaces the measure's revenue cap with the lowest possible alternative (a ratio of specified costs higher than 115 percent) that would not be unconstitutional. The measure places the burden of identifying the alternative cap on the CDC/ governing entity.

Proposition 8's required rebate provisions arguably might affect an unconstitutional "taking of private property for public use without just compensation."[46] First, to determine what property is at issue, a court must determine whether there is a price control. Both sides of the initiative disagree as to whether the price cap is a price control. Proponents argue there is no price control because the measure is not limiting clinics to a certain price. On the other hand, opponents urge that revenue caps are a roundabout way of limiting the clinics pricing structure and results in a price control. Since the measure limits the price, a court will likely find there is an indirect price control in place.

Under the per se or *Penn Central*[47] factors, dialysis companies argue there is a taking. If dialysis companies can show that the rebate will deprive the clinics of all economic beneficial use of the clinic, forcing the clinics to close down, a court could find a per se violation of the takings clause of the Fifth Amendment. If dialysis companies are unable to make a showing for a per se violation, a court will look to the *Penn Central*[48] factors to determine if the required rebate provisions affect an unconstitutional taking.

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[40] U.S. CONST., AMEND V; U.S. CONST., AMEND XIV; Cal. Const., Art. I, § 19.
[41] *Lingle v. Chevron U.S.A. Inc.*, 544 US 528, 538, (2005).
[42] *Agins v. City of Tiburon*, 447 U.S. 255 (1980).
[43] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).
[44] 544 US at 538–539 (2005).
[45] Preliminary Opp. of RPIs, *Messina v. Padilla*, No. S248732, 2018 CA S. Ct. Briefs LEXIS 564, at *20.
[46] U.S. CONST., AMEND V; U.S. CONST., AMEND XIV; Cal. Const., Art. I, § 19.
[47] 438 U.S. 104, 124 (1978).
[48] *Id.*

First, a cap on dialysis clinics' revenue and requiring any money above the cap to be rebated to private payers deprives clinics of profits and has the potential to force closure of clinics. Dialysis companies are businesses and expect to make a profit by running dialysis clinics in California. Limiting dialysis companies' revenues interferes with the companies' investment backed expectations because they would not be receiving the profits they expected to receive when entering into the dialysis business.

Second, the measure would affect dialysis companies' interest in profits above the 115 percent revenue cap. Proponents argue that clinics can still make a 15% profit with the revenue caps. Moreover, proponents assert the revenue is not limited because the more money spent on "allowable costs" leads to more profits for clinics. Thus, the proponents say they are trying to incentivize clinics to spend more money on "direct patient care services" and "health care quality improvement", which will improve the conditions of dialysis treatment in California.

Ultimately, limiting clinics revenue effectively deprives clinics of their profit and supports a finding of a taking. Additionally, the text of Proposition 8 specifically provides a process in case an unconstitutional taking occurs.[49] For these reasons, a court will likely find a taking.

B. Due Process Challenge

Under the due process guarantee, a regulated entity may not be compelled to absorb its own costs rather then pass them on to the consumers, but it also may not be allowed to pass on expenses incurred unnecessarily or for the purpose of expansion.[50] Price control laws have the potential to limit the return that a member of the regulated community can realize on his or her investment to such a great extent that the law must provide a mechanism to guarantee a constitutionally required fair and reasonable return.[51] For this reason, Court has required a mechanism for obtaining relief to avoid that unconstitutional result.[52] Opponents argue that the measure would violate due process because it does not include an administrative procedure for rate review that would grant adequate remedy for relief.

1. Administrative Procedure for Rate Review

The lack of adequate administrative procedure for rate review if the rate is confiscatory would be the first due process challenge. The mechanism for rate adjustment would guarantee CDCs receive fair and reasonable return if the revenue cap rate is too low and deprives them of fair return.

Proponents have argued that "the state and federal constitutions impose no independent requirement that every economic regulation must be accompanied by an administrative procedure for seeking an individualized variance."[53] They cite *Chevron USA, Inc. v. Cayetano*[54]

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[49] Cal. Proposition 8 § 1226.7 (a)(6) (2018).
[50] 16D C.J.S. Constitutional Law § 2286.
[51] *Guar. Nat. Ins. Co. v. Gates,* 916 F.2d 508, 512 (9th Cir. 1990).
[52] *Id*
[53] *Messina v Padilla,* Preliminary Opposition of Real Parties in Interest at 37.

to argue that there are no constitutional requirements that price controls must provide "individualized consideration and administrative relief." In *Chevron v. Cayetano*, the Ninth Circuit Court of Appeal approved a Hawaii statute that a set maximum rent that oil companies could collect.[55]

Opponents counter that price control was acceptable in *Chevron v. Cayetano* because Chevron has two streams of revenue – rental revenue and earnings on Chevron gasoline sold through the stations, whereas CDCs and governing entities only operate one primary revenue stream – the provision of dialysis care – which is encompassed entirely by the restrictions of the Initiative.[56] Opponents also point to *Guar. Nat. Ins. Co. v. Gates*, where a rate regulation was found unconstitutional because in part it did not "provide any mechanism to guarantee constitutionally required fair and reasonable return."[57]

The measure does provide a mechanism to review and adjust the revenue cap rate if it "violate[s] due process or effect a taking of private property requiring just compensation under that Constitution of this State or the Constitution of the United States."[58] If CDCs can prove in any court action that the measure would violate its due process rights, the CDC can propose a replacement revenue cap rate for the fiscal year in question, and must prove that any number below the proposed replacement rate would violate due process or effect a taking of private property.[59] However, there is a question whether giving the court the power instead of an administrative agency is legitimate and constitutional. If it is, then there exists an administrative procedure for rate review.

2. Adequate Remedy for Relief from Confiscatory Rate

Even if there is an administrative procedure for rate review, there is a question whether CDC can receive an adequate remedy from the administrative procedure. On one hand, the CDC that might suffer a taking from the confiscatory rate could get relief in a court action. However, the relief could only apply to the fiscal year in question. If the CDC would need relief for a subsequent fiscal year, then it would have to file a civil action for each fiscal year in which it needs relief.

Opponents also argue that CDCs are deprived of a fair return because the proposed definition of "direct patient care services costs" limits any future regulation of the Department that would prescribe other potential allowable costs. Specifically, the initiative defines "direct patient care service costs" as "only" those costs listed, which seems to limit the power of the CDPH to craft regulations that would expand the universe of allowable costs.[60] The proponents argue that "categories of direct patient care services costs "may be further prescribed by the Department of Public Health through regulation."[61] Opponents counter that even if the

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[54] *Id* at 39.
[55] *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1042 (9th Cir. 2000).
[56] *Messina v Padilla,* Petitioners' Reply to the Preliminary Opposition of Respondent and Real Parties in Interest at 12.
[57] *Guar. Nat. Ins. Co. v. Gates,* 916 F.2d 508, 512 (9th Cir. 1990).
[58] Cal. Proposition 8, § 1226.7(a)(6) (2018).
[59] Cal. Proposition 8 (2018).
[60] Cal. Proposition 8 § 1226.7(c)(1) (2018).
[61] *Id*.

Department has authority to override the express limiting statutory language of "only," and even if it includes additional costs left out by the initiative drafter, a CDC or governing entity faced with a confiscatory result is still unable to obtain relief in a circumstance where the state agency fails to do so, as required by law.[62]

C. Separation of Powers

Proposition 8 adds Section 1226.7(a)(6) to the Health and Safety Code, which directs a reviewing court to adjust the 115% number in a civil action and determine a proper replacement number.[63] The proposition allows for such determination in civil cases which violate due process or effect a taking of private property requiring just compensation.[64] Proposition 8's proposed change to the Health and Safety Code raises a separation of powers issue because it directs the court to effectively rewrite the law and restricts the court's ability to issue a remedy by limiting the court to a remedy of a one-year modification of the price control.[65]

The California Constitution states, "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."[66] Opponents argue that the initiative violates constitutional separation of powers in two main ways.

First, opponents argue the initiative directs a court to determine the appropriate number over 115 percent. This results in the court effectively rewriting the law. Proponents argue the court is not rewriting the law. The court is only carrying out a process by which to preserve the constitutionality of the initiative. The court is not itself rewriting the law, but rather looking at the evidence and making a determination on whether a certain number constitutes a taking or violates due process.

Second, opponents argue the initiative limits the court's ability to issue a remedy after finding an unconstitutional taking or violation of due process because the initiative limits the remedy to one year. As a result, the opponents argue that the initiative "materially impairs" a court's exercise of its constitutional power. Proponents argue the initiative process and legislative branch do not restrict the judiciary's power to issue remedies. Courts act in an enforcement capacity, and enforce laws in other cases. In the same way, the court should follow Proposition 8 and issue the one year remedy. In similar cases, administrative agencies are charged with carrying out this process and issuing remedies. Therefore, the judiciary can enforce the proposition and issue the specified one year remedy.

In *20th Century Insurance Co. v. Garamendi*,[67], the California Supreme Court determined the "court is required to weigh the evidence in accordance with its independent judgment and then to sustain the order if it finds adequate evidentiary support and to strike it down if it does not." In this case, the initiative requires the same judicial inquiry. As proponents

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[62] *Messina v. Padilla*, No. S248732, 2018 CA S. Ct. Briefs LEXIS 564, at *30.
[63] Cal. Proposition 8 at § 3 (2018).
[64] *Id*.
[65] Cal. Proposition 8 at § 3 (2018).
[66] Cal. Const., art. III, § 3.
[67] *20th Century Ins. Co. v. Garamendi,* 8 Cal.4th 216, 318 (1994).

argue, "the fact that the court will need to consider evidence regarding costs and revenues, and the economic impact of the initiative on a particular entity, in no way makes the matter somehow unsuitable for adjudication."[68] For these reasons, a challenge based on separation of powers grounds will likely be unsuccessful.

D. California Constitution Article II, Section 12

The California Constitution states that "No amendment to the Constitution, and no statute proposed by the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect."[69]

Under Findings and Purposes, Proposition 8 states "In a market dominated by just two multinational companies, California must ensure that dialysis is fairly priced and affordable." Although the language of the initiative did not specifically name the two companies, the campaign materials identified them as DaVita and Fresenius.[70] The question is did the initiative identify these two companies to perform any function or to have any duty? Two California appellate court cases could provide guidance.

In *Pala Band of Mission Indians v. Board of Supervisors*[71], the initiative defined a specific private corporation as "Applicant," and specified functions and duties that applicant had to perform in operating solid waste facility. It was found to have violated the California Constitution's prohibition on an initiative naming a private entity to perform any function or to have any power or duty.[72]

In *Hernandez v. Town of Apple Valley*[73], the Town of Apple Valley passed an initiative measure that allowed for a commercial development, which would include a Walmart Supercenter, and gave the developer duty to obtain the proper permits and approvals.[74] Although the initiative did not specifically name Walmart, the ballot materials referenced Walmart.[75] Furthermore, some town residents and others knew the commercial development included a Walmart store.[76] The California Court of Appeal found that, because the initiative did not name or identify Walmart and did not assign powers or duties to Walmart exclusively, it did not violate the California Constitution.[77]

Between the two cases, Proposition 8 is most similar to *Hernandez*. The language in the proposition referred to "two multinational companies," which were clearly identified as DaVita and Fresenius in Yes On 8 campaign materials. However, the dialysis clinic companies were not

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[68] Preliminary Opp. of RPIs, *Messina v. Padilla*, No. S248732, 2018 CA S. Ct. Briefs LEXIS 564, at *46.
[69] Cal. Const., art II, § 12.
[70] Fact Sheet, Yes on 8, *available at*, https://www.yeson8.com/wp-content/uploads/2018/09/Fact-Sheet_Yes-On-8_September.pdf (last visited Oct. 19, 2018) ["Yes on 8 Fact Sheet"].
[71] *Pala Band of Mission Indians v. Bd. of Supervisors,* 54 Cal. App. 4th 565, 570 (4th Dist. 1997).
[72] *Id at 570*.
[73] *Hernandez v. Town of Apple Valley*, 7 Cal. App. 5th 194, 196 (4th Dist. 2017).
[74] *Id* at 196.
[75] *Id*.
[76] *Id at* 203.
[77] *Id* at 213.

specifically named within the "four corners" of the initiative. Therefore, similar to *Hernandez,* Proposition 8 would not likely violate the constitutional prohibition on an initiative to give a private entity power or duty. Furthermore, if passed, Proposition 8 would affect the entire industry of chronic dialysis clinics and not just the two corporations. Although the two corporations own 70% of the clinics at this time, the initiative, if passed, would have broader application on chronic dialysis clinics, not just the ones owned by the two corporations.

VI. DRAFTING ISSUES

A. Severability

Proposition 8 contains a severability clause which allows provisions to be severed from any portions of the initiative that are invalidated.[78] Although a severability clause establishes a presumption in favor of severance, it is not determinative.[79] If a court finds that a provision of the Proposition 8 is unconstitutional, the court will apply a three-part test to determine whether the unconstitutional provision can be severed. For a provision to survive this test and be severed from the potential unconstitutional provisions, the California Supreme Court has explained that "the invalid provision must be grammatically, functionally, and volitionally separable."[80] First, a court will find grammatical severability if the invalid parts "can be removed as a whole without affecting the wording" or coherence of what remains.[81] Second, the court will consider whether the remainder of the statute is functionally independent and "complete in itself."[82] Finally, the court will decide whether the voters would have adopted the rest of the act without the invalid portions.[83]

Severability will be permitted if by eliminating some language in Proposition 8 the remaining provisions make sense, the remaining sections can exist independent of the offending provision and the electorate would have adopted the section remaining had they known the offending provision was a problem. If not, then the courts can nullify the measure in its entirety. If the valid provisions of the remaining statute are not severable, the entire measure becomes a nullity.[84]

Section 1226.7(a) relating to issuing refunds for revenue above 115% of the costs of direct patient care and healthcare improvements is potentially invalid due to the constitutional issues that are described above. In fact, some amount of litigation on these issues has already occurred in a pre-election review challenge. If a court determines the revenue cap is an unconstitutional taking or violates due process, this section will be invalid.

Section 1226.7(a)(6) which allows CDCs to petition the court to adjust the 115 percent is potentially unconstitutional because it violates due process. If it is to be found unconstitutional, this provision will be removed from the measure. The omission of section 1226.7 will eliminate

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[78] Cal. Proposition 8 at § 9 (2018).
[79] *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 270 (2011).
[80] *Id*.
[81] *Id* at 271.
[82] *Id*.
[83] *Id*.
[84] *People's Advocate, Inc. v. Superior Court*, 181 Cal.App.3d 316, 330 (1986).

the measure's administrative process for rate review. Without a process for review, the remaining provisions may not be able to constitutionally function.

Section 1226.7(a)(3) requires clinics to report all rebates issued to the department. Section 1226.7(a)(3) is grammatically severable because it is a section of its own. However, it is not functionally severable because its implementation relies on "a report of all rebates issued under paragraph (2)" in Section 1226.7(a)(2). Since section 1226.7(a)(3) does not meet the functional requirement, we do not need to address the volitional element.

Section 1226.7(b) requires chronic dialysis clinics to submit annual compliance reports to the department regarding clinic costs, patient charges, and revenue. Section 1226.7(b) is potentially valid, but not severable from the preceding provisions. Section 1226.7(b) is grammatically severable because it is a section of its own. Section 1226.7(b) is not functionally severable because its implementation relies on reporting the issuing of refunds set forth in the preceding provision: Section 1226.7(b)(1)(H) refers to Section 1226.7(a)(2)(D) and Section 1226.7(b)(4) refers to Section 1226.7(a)(3). Since section 1226.7(b) does not meet the functional requirement, we do not need to address the volitional element.

Section 1226.8(a) prohibits clinics from refusing to treat patients based on the source of payment for care. This section is potentially valid and severable. Section 1226.8 is grammatically severable because it is a section in itself. Next, it is functionally severable because it can operate independent of the issuing of refunds and the reporting requirements. In determining volitional element, a court will consider whether the section (1) was significant in light of the stated purpose of the proposition, and (2) the attention of voters was sufficiently focused on the particular provision.[85] The Attorney General of California included in the title and summary of the chief purpose and points of the proposed measure, "Prohibits clinics from discriminating against patients based on the source of payment for care."[86] The ballot's argument urges voters to "Make patients the highest priority" and "vote yes on Prop. 8 and tell dialysis companies to prioritize lifesaving treatment for patients over corporate profits."[87] The Yes on 8 campaign materials highlight "Overcharging drives up costs for all Californians" and specifically, "California dialysis companies charge patients with private insurance an average $150,000 for a year of dialysis treatment — a 350% markup from the cost of providing care!"[88] The Proposition's title and summary, campaign materials, and ballot arguments stress the issue of increased costs for patients based on the source of payment for care. For these reasons, the volitional element is met.

In conclusion, if the Section 1226.7 is held invalid as an unconstitutional taking or a violation of due process, since Section 1226.8 meets all three requirements, it will likely be severed. Thus, Section 1226.8 would be valid and enforced on its own.

B. Defective Petition

In a pre-election review, opponents raised two instances where the initiative petition presented to voters violated the mandatory provisions of the Elections Code. First, the petition

[85] *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 271 (2011).
[86] *See* NOVEMBER 2018 VOTER GUIDE, *supra* note 2.
[87] *Id.*
[88] Yes on 8 Fact Sheet.

stated that the measure would "propose amendments to the Health and Safety Code and Corporation Code, relating to fair pricing of healthcare." The measure only amends the Health and Safety Code. Opponents argued that the initiative petition was unclear about the legal codes it was amending. In particular, the petition says in one place that the proposed initiative amends the Corporations Code and in another place it does not. Second, the petition used regular type instead of boldface in the title and summary. This would be inconsistent with Election Code §9008 that states "circulating title and summary prepared by the Attorney General" should be placed on the petition "in 12-point or larger roman boldface type." Opponents asserted "the deviation from the petition format requirements here thwarted the Legislature's objective to ensure that every petition presented to the voters provides clear and accurate information concerning its contents."[89]

On June 13, 2018, the Supreme Court of California rejected the pre-election review challenge to remove Proposition 8 from the November ballot.[90] Andrea Messina, executive director of the California Dialysis Council, and Patient and Caregivers to Protect Dialysis Patients filed the dismissed petition against the Secretary of State, Alex Padilla.[91] In the holding, the Supreme Court of California denied the petition for writ of mandate and denied the application for stay without comment.[92]

Proponents argued that "the initiative petition's erroneous mention of changes to the Corporations Code and its use of regular rather than boldface type in part of the title and summary" are minor technical mistakes and the "errors would not likely have misled the voters who signed the petition." Proponents seem to argue that substantial compliance is sufficient. In the Reply Brief, opponents reject Real Parties view that substantial compliance is sufficient in this case and argued strict compliance is essential.[93]

In *Costa v. Superior Court,* the Supreme Court found that despite the discrepancies between the initiative version submitted to the Attorney General and the version circulated for signature, there was "substantial compliance with these requirements." [94] The court reasoned that discrepancies did not "mislead the public or otherwise frustrate or undermine the purposes underlying any of the applicable constitutional or statutory provisions or threaten the integrity of the electoral process.[95]

It is not surprising based on Costa, that the California Supreme Court in the pre-election challenge did not remove Proposition 8 from the ballot. It is very likely that if the issues are raised again post-election, the California Supreme Court will conclude that the technical errors in the petition were not sufficiently defective to mislead the signatories, nor would the errors threaten the integrity of the electoral process. Signatories would have most likely paid more

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[89] *Messina v. Padilla*, No. S248732, 2018 CA S. Ct. Briefs LEXIS 564, at *2.
[90] Kelly Gooch, *California high court rejects attempt to remove dialysis initiative from November ballot*, Becker's Hospital Review (June 19, 2018). https://www.beckershospitalreview.com/legal-regulatory-issues/california-high-court-rejects-attempt-to-remove-dialysis-initiative-from-november-ballot.html.
[91] *Id*.
[92] *Messina*, 2018. http://www.seiu-uhw.org/wp-content/blogs.dir/166/files/2018/06/2018-06-13_SupremeCourtOrder_DeniesDialysisIndustryRequest.pdf
[93] *Messina v. Padilla*, No. S248732, 2018 CA S. Ct. Briefs LEXIS 564, at *15.
[94] *Costa v. Superior Court,* 37 Cal. 4th 986, 1028 (2006)
[95] *Id*.

attention to the substance of the initiative as opposed to the specific code stated that it was changing. A reasonable person would also be able to read the petition despite that it is in regular type as opposed to bold-type, because it is still a readable font size.

VII. PUBLIC POLICY CONSIDERATIONS

A. Supporting Arguments

Proponents are concerned that big corporate dialysis providers are making billions of dollars by overcharging these critically ill patients. Proponents of Proposition 8 believe it will provide strong incentives for dialysis companies to lower costs and improve quality of care. Dialysis corporation revenues will be limited to "no more than 15% above the amount they spend on patient care."[96] By linking revenue to care, dialysis corporations will have stronger incentives to invest in patient care.[97] When dialysis clinics overcharge patients for treatment, insurance companies are forced to pass the costs to all policyholders.[98] This drives up costs for all Californians. If we stop dialysis companies from overcharging, we can bring down the cost of healthcare premiums for all Californians.[99]

Additionally, proponents argue that California dialysis clinics lack sanitation and hygiene and are extremely unsanitary, with blood stains, cockroaches, and dirty bathrooms reported at dialysis clinics.[100] These poor conditions can contribute to high infection rates.[101] Further, patients in low income communities face additional difficulties of being treated with outdated equipment in facilities often located in run-down strip malls.[102] Limiting the amount of revenue for dialysis companies to 115% of patient care, will incentivize clinics to spend more money on patient care which will include improving the sanitation condition of the clinics.

As of September 18, 2018, Proposition 8 supporters had raised over $17.4 million. Among those supporters are SEIU-United Healthcare Workers West, contributing $17,387,341 and International Brotherhood of Electrical Workers Local Union No. 617, contributing $2,500.[103]

B. Opponents Main Arguments

Opponents of Proposition 8 argue that the proposed initiative would set reimbursement rates too low and at a level that does not cover the actual costs of providing care.[104] In addition, opponents are concerned the definition of "patient care services costs" excludes critical staff and

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[96] Yes on 8 Fact Sheet.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *See* NOVEMBER 2018 VOTER GUIDE, *supra* note 2.
[101] *See* Prop 8 Ballotpedia, *supra* note 3.
[102] *Id*.
[103] *Id*.
[104] CMA, *California physicians oppose Proposition 8 that would put dialysis patients' lives at risk*, California Medical Association (April 26, 2018). https://www.cmadocs.org/newsroom/news/view/ArticleID/27150/t/California-physicians-oppose-November-proposition-that-would-put-dialysis-patients-lives-at-risk)

necessary services[105] required by federal regulators for operating a clinic.[106] Clinics could only recover 69% of their operating costs, forcing closures or major cutbacks. Their argument is further supported by a report by the Berkeley Research Group that found that 83% of dialysis clinics in California would operate at a loss. Opponents claim as dialysis clinics shut down, patients would be forced to seek regular treatment or treatment for complications in more expensive hospital Emergency Rooms. The measure would lead to potentially hundreds of millions of dollars in higher costs for Medi-Cal and Medicare to treat dialysis patients.[107]

As of September 18, 2018, Proposition 8 opponents had raised $53.3 million. Among those contributing to the opposition party are DaVita, contributing $27,987,686, Fresenius Medical Care North America, contributing $18,520,100, U.S. Renal Care, contributing $2,954,397, California Republican Party, contributing $2,150,000, and Satellite Healthcare, Inc., contributing $500,000.[108]

C. Fiscal Considerations

The overall annual effect on state and local governments could range from net positive impact in the low tens of millions of dollars to net negative impact in the tens of millions of dollars.[109] There are two sources of uncertainty. First, it is uncertain which costs are allowable.[110] Although the measure defines allowable costs, it is unclear for instance if staff costs for certain managerial staff that also provide direct patient care are allowable costs.[111] Consequently, it would also be uncertain how CDCs would respond to the measure.[112] Depending on how broad or narrow the interpretation of the allowable costs, CDCs may respond with modest or significant changes to their cost structure (for example: increase their allowable costs, reduce other costs, seek adjustments to the revenue cap, or scale back operations).[113] If the allowable costs are interpreted broadly, the amount of rebates CDCs are required to pay would be smaller.[114] CDCs would likely respond with modest changes to their cost structures.[115] This would result in lower state and local government costs for employee health benefits, and an overall net positive impact on state and local government finances in the low tens of millions of dollars annually.[116] On the other hand, if allowable costs are interpreted narrowly, the amount of

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[105] Examples include: physician medical director, nurse clinical coordinators, community-based kidney disease education, regulatory compliance, facility administrators, facility security, non-clinical information technology, professional services like accounting, human resources, payroll, and legal.
[106] No on Proposition 8, *Prop 8 Jeopardizes Access to Dialysis Treatment that Patients Need to Survive*, No on Proposition 8: Stop the Dangerous Dialysis Proposition (2018). https://noprop8.com/get-the-facts/.
[107] *Id*.
[108] *See* Prop 8 Ballotpedia, *supra* note 3.
[109] LEGISLATIVE ANALYST'S OFFICE, Proposition 8, Authorizes State Regulation of Kidney Dialysis Clinics. Limits Charges for Patient Care. Initiative Statute. (August 2018), *available at* https://lao.ca.gov/ballot/2018//prop8-110618.pdf.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.

rebates would be greater.[117] CDCs would likely respond with significant changes to their costs structures. This could potentially lead to increase in state and local government costs for employee health benefits, and an overall negative impact in the tens of millions of dollars[118]

VIII. CONCLUSION

Proposition 8 would impose limits on charges for patient care by chronic dialysis clinics. If passed, chronic dialysis clinics would have to rebate to non-government payers the amounts charged in excess of the "fair treatment payment amount" as defined in proposed initiative. CDCs would be required to report to the State information required to enforce to measure. CDCs would also be prohibited from refusing to treat patients based on the source of payment for care.

The pre-election review of the proposed initiative identified potential drafting and constitutional issues. While the Supreme Court of California allowed Proposition 8 to remain on the ballot, it did so without comment on the validity of the constitutional issues. So the issues may still be litigated in a post-election challenge, if Proposition 8 passes.

[117] *Id*.

[118] LEGISLATIVE ANALYST'S OFFICE, Proposition 8, Authorizes State Regulation of Kidney Dialysis Clinics. Limits Charges for Patient Care. Initiative Statute. (August 2018), *available at* https://lao.ca.gov/ballot/2018//prop8-110618.pdf.