SJC-13238

LORY-SAN CLARK & another[1] vs. ATTORNEY GENERAL & others.[2]

Suffolk. May 2, 2022. - June 15, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Initiative. Dentist. Insurance, Rate setting. Constitutional Law, Initiative petition. Attorney General.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on February 7, 2022.

The case was reported by Lowy, J.

Thaddeus Heuer (Andrew London & Seth Reiner also present) for the plaintiffs.

Adam Hornstine, Assistant Attorney General (Anne Sterman & Michael MacKenzie, Assistant Attorneys General, also present) for the defendants.

Matthew R. Perry for the interveners.

M. Patrick Moore, Jennifer Grace Miller, & Ryan P. McManus, for America's Health Insurance Plans, Inc., & another, amici curiae, submitted a brief.

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[1] Wendy Sutter.

[2] Secretary of the Commonwealth; Committee on Dental Insurance Quality, Mouhab Rizkallah, Robert Petrosino, Andrew Chase, Patricia Brown, and Laura Rizkallah, interveners.

CYPHER, J. An initiative petition signed by at least ten registered voters, entitled "Initiative Petition for a Law to Implement Medical Loss Ratios[3] for Dental Benefit Plans," was submitted to the Attorney General and numbered by her as Initiative Petition 21-13. On September 1, 2021, the Attorney General certified to the Secretary of the Commonwealth (Secretary) that Initiative Petition 21-13 was in proper form for submission to the people; that it was not, either affirmatively or negatively, substantially the same as any measure that had been qualified for submission or submitted to the people at either of the two preceding biennial State elections; and that it contained only subjects that were related or mutually dependent and that were not excluded from the initiative process pursuant to art. 48, The Initiative, II, § 2, of the Amendments to the Massachusetts Constitution.

In accordance with the requirements of art. 48, the Attorney General prepared a "fair, concise summary" of the measure proposed by Initiative Petition 21-13 and transmitted

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[3] A medical loss ratio is the proportion of premium revenues that an insurance carrier spends on clinical or patient services as opposed to administrative costs. See Massachusetts Center for Health Information and Analysis, Annual Report Series 2015: Performance of the Massachusetts Health Care System, Massachusetts Medical loss Ratios 1 (2015), https://www.chiamass.gov/assets/docs/r/pubs/15/MLR-Brief-2015.pdf [https://perma.cc/JFF2-TYD8].

that summary to the Secretary with the September 1 certification letter. The proponents of Initiative Petition 21-13 then filed it with the Secretary. Following receipt of the summary and certification from the Attorney General, the Secretary prepared blank signature collection forms and provided them to proponents for circulation to members of the public. On December 22, 2021, the Secretary's elections division sent a letter informing the proponents of Initiative Petition 21-13 that a sufficient number of certified signatures had been submitted pursuant to art. 48, The Initiative, II, § 3, as amended by art. 74 of the Amendments, and art. 48, The Initiative, V, § 2, as amended by art. 81 of the Amendments. The Secretary submitted Initiative Petition 21-13 to the clerk of the House of Representatives on January 28, 2022. See 2022 House Doc. No. 4378.

Thereafter, two registered voters commenced an action in the county court challenging the Attorney General's certification of Initiative Petition 21-13. They allege that the measure is not in compliance with the requirement that an initiative petition "contain[] only subjects . . . which are related or which are mutually dependent," art. 48, The Initiative, II, § 3, as amended by art. 74, and request that the Secretary be enjoined from placing the measure on the ballot. Five registered voters who are licensed dentists, along with the Committee on Dental Insurance Quality, of which they are members

and which was organized by them to sponsor Initiative Petition 21-13, moved to intervene as defendants, and their motion was allowed. A single justice reserved and reported the case to the full court on a statement of agreed facts. We conclude that Initiative Petition 21-13 does not contain unrelated subjects and that the Attorney General's certification therefore complied with art. 48.[4]

The proposed law. If passed into law, Initiative Petition 21-13 would establish a new G. L. c. 176X (proposed chapter), which would apply to all dental benefit plans in place on or after January 1, 2024, and which would be effectuated by regulations promulgated by October 1, 2023. The proposed chapter would be comprised of four sections. Section 1 would create definitions for various terms used therein, and § 4 specifically would exclude from the chapter's requirements "dental benefit plans issued, delivered or renewed to a self-insured group or where the carrier is acting as a third-party administrator."

Section 2 of the proposed chapter would create a framework in which the commissioner of insurance (commissioner), through the adoption of relevant regulations, would review and approve dental benefit policies, rate changes, and plan profitability as

[4] We acknowledge the amicus brief of America's Health Insurance Plans, Inc., and American Council of Life Insurers.

reflected by a medical loss ratio (MLR). Dental insurance carriers would be required to submit to the commissioner financial information, including "the current and projected [MLR] for plans" and "the components of projected administrative expenses." The commissioner would be required to adopt regulations under which dental insurance carriers must file annual base rates and group rating factors for their plans, which would be disapproved if rate changes were "excessive, inadequate, or unreasonable" or group rating factor changes were "discriminatory or not actuarially sound."

Section 2 sets forth three situations in which the commissioner would be required to presumptively disapprove an insurance carrier's rates as "excessive": first, if the insurer's administrative expense loading component[5] increases by a greater percentage than the dental services consumer price index[6] for the most recent calendar year; second, if a carrier's

[5] "Administrative expense loading component" refers to the amount included in an insurance premium to cover the carrier's administrative and maintenance costs. Cf. Massachusetts Division of Insurance, Health Coverage Policy Filing Guidance 2012-C (May 16, 2012) (explaining calculations for determining administrative expense loading for health insurance plans subject to G. L. c. 176J).

[6] The United States Bureau of Labor Statistics reports national consumer price indices that measure the average change over time in the prices paid by urban consumers for particular goods and services, including dental services. See United States Bureau of Labor Statistics, Consumer Price Index, Measuring Price Change in the CPI: Medical Care,

contribution to surplus[7] exceeds 1.9 percent; and third, if a carrier fails to meet a minimum MLR[8] of eighty-three percent. Insurance carriers would be required to refund to covered individuals and groups excess premiums in the amount necessary to return the plan's MLR to eighty-three percent, unless the commissioner determines that issuance of refunds would financially impair the insurance carrier. If the commissioner disapproves of a proposed rate change, the insurance carrier may contest this decision at a hearing.

Section 3 of the proposed chapter would require dental insurance carriers timely to submit detailed annual financial statements to the Division of Insurance (division),[9] which would

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https://www.bls.gov/cpi/factsheets/medical-care.htm [https://perma.cc/J3C6-4WPY].

[7] Carriers are required to maintain a certain amount of "surplus," the excess of assets over the sum of capital and liabilities. See G. L. c. 175, § 48. A carrier's contribution to surplus is an amount included in a premium to establish and maintain the insurer's surplus.

[8] Initiative Petition 21-13 does not propose a definition of the term "medical loss ratio." This ratio generally represents the proportion of insurance premiums directed towards patient care. See note 3, supra.

[9] The information that insurance carriers would be required to submit in such reports includes: "(i) direct premiums earned . . . [and] direct claims incurred . . . ; (ii) medical loss ratio; (iii) number of members; (iv) number of distinct groups covered; (v) number of lives covered; (vi) realized capital gains and losses; (vii) net income; (viii) accumulated surplus; (ix) accumulated reserves; (x) risk-based capital ratio . . . ; (xi) financial administration expenses . . . ; (xii) marketing

make such statements available to the public. If a carrier's risk-based capital ratio -- the amount of capital retained as a basis of support for the degree of risk associated with its company operations and investments, measured across all medical and dental plans -- were to exceed 700 percent, a public hearing would be held at which the carrier would be required to submit testimony on its over-all financial condition, the continued need for surplus, and how, and in what proportion to the total surplus, it planned to dedicate the surplus to reducing costs or improving quality for consumers. The division would be required to issue a report on the results of such a hearing.

Discussion. 1. Standard of review. We review de novo the Attorney General's certification of an initiative petition as compliant with art. 48. See Weiner v. Attorney Gen., 484 Mass. 687, 690 (2020), citing Abdow v. Attorney Gen., 468 Mass. 478, 487 (2014). "At the same time, we acknowledge the firmly

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and sales expenses . . . ; (xiii) distribution expenses . . . ; (xiv) claims operations expenses . . . ; (xv) dental administration expenses . . . ; (xvi) network operational expenses . . . ; (xvii) charitable expenses . . . ; (xviii) board, bureau or association fees; (xix) any miscellaneous expenses described in detail by expense, including an expense not included in (i) to (xviii), inclusive; (xx) payroll expenses and the number of employees on the carrier's payroll; (xxi) taxes, if any, paid by the carrier to the [F]ederal government or to the commonwealth; and (xxii) any other information deemed necessary by the commissioner." Additional information would be required from insurance carriers that administer services to one or more self-insured groups, including detailed information pertaining to self-insured customers.

established principle that art. 48 is to be construed to support the people's prerogative to initiate and adopt laws" (quotations and citation omitted). Weiner, supra.

2. Relatedness. "Article 48, The Initiative, II, § 3, as amended by art. 74, requires the Attorney General to certify that a proposed measure 'contains only subjects . . . which are related or which are mutually dependent' before the measure can be placed on the ballot." Weiner, 484 Mass. at 691. The plaintiffs argue that the provisions of Initiative Petition 21-13 address two distinct policy goals that are unrelated, namely, the creation of a mandatory minimum MLR for dental benefit plans (§ 2) and insurer transparency through mandatory comprehensive financial disclosures (§ 3). As discussed infra, we disagree.

"There is no single 'bright-line' test for determining whether an initiative meets the related subjects requirement." Hensley v. Attorney Gen., 474 Mass. 651, 657 (2016), citing Abdow, 468 Mass. at 500. "We have said that 'the related subjects requirement is met where one can identify a common purpose to which each subject of an initiative petition can reasonably be said to be germane'" (quotation omitted). Weiner, 484 Mass. at 691, quoting Hensley, supra. Nevertheless, "[t]his purpose 'may not be so broad as to render the relatedness limitation meaningless'" (quotation omitted). Weiner, supra,

quoting Carney v. Attorney Gen., 447 Mass. 218, 225 (2006), S.C., 451 Mass. 803 (2008).

Accordingly, "relatedness cannot be defined so broadly that it allows the inclusion in a single petition of two or more subjects that have only a marginal relationship to one another, which might confuse or mislead voters, or which could place them in the untenable position of casting a single vote on two or more dissimilar subjects." Abdow, 468 Mass. at 499. "At the same time, if we construe the relatedness requirement too strictly, we risk limiting initiative petitions to a single subject, a requirement rejected by the constitutional convention that approved art. 48." Weiner, 484 Mass. at 691, citing Abdow, supra. We balance these considerations by asking two questions:

> "First, '[d]o the similarities of an initiative's provisions dominate what each segment provides separately so that the petition is sufficiently coherent to be voted on "yes" or "no" by the voters?' Second, does the initiative petition 'express an operational relatedness among its substantive parts that would permit a reasonable voter to affirm or reject the entire petition as a unified statement of public policy'?" (Citations omitted.)

Hensley, 474 Mass. at 658. "We have not construed [the related subjects] requirement narrowly nor demanded that popular initiatives be drafted with strict internal consistency." Mazzone v. Attorney Gen., 432 Mass. 515, 528-529 (2000).

The Attorney General argues that, viewed in its totality, Initiative Petition 21-13 "would create an integrated regulatory

scheme that would comprehensively address dental insurance rates that are excessive, inadequate, or unreasonable" in light of the benefits afforded to policyholders, and that all of the provisions of the proposed chapter are designed to advance this common purpose. We agree. Section 2 would empower the commissioner to approve dental benefit policies and requires the commissioner to adopt regulations regarding eligibility; collect information regarding plans' current and projected MLRs, administrative expenses, and financial information; disapprove an insurer's proposed rates, subject to a hearing, in prescribed circumstances; and hold public hearings if a carrier's risk based capital ratio exceeds 700 percent. Section 2 therefore would establish much of the regulatory framework within which the commissioner is to carry out the duty of regulating dental benefit plans.

Unlike the information that the commissioner is required to collect under § 2 (b), carriers would be required by § 3 (e) to disclose entity-wide financial information across all of their lines of business, not just their dental benefits plans. According to the plaintiffs, this difference, along with the presence of a specific reporting provision in § 2, demonstrates that the proposed act's scheme for establishing and enforcing a minimum MLR can function without the comprehensive disclosures required by § 3 and thus that there is "no inherent connection"

between the establishment of a minimum MLR and the requirement of comprehensive annual disclosures.

The argument is unavailing. First, the common purpose of the two sections is apparent from the way they complement one another. See Dunn v. Attorney Gen., 474 Mass. 675, 681 (2016) (provision banning inhumane confinement of farm animals and provision banning sale of out-of-State products from animals so confined served common purpose because latter provision protected Massachusetts farms in compliance with former provision by preventing retailers from selling out-of-State products that could be underpriced as result of practices prohibited in Commonwealth). The disclosure and public hearing requirements of § 3 further the regulatory goals of the proposed act, and of the approval process laid out in § 2 specifically, by providing the commissioner with a comprehensive body of information on which to assess a carrier's compliance with the goals of reducing the cost of dental benefit plans or of improving the quality of care, patient safety, or efforts at cost containment. That the petitioners chose to propose such a broad mechanism for monitoring compliance is not fatal to the measure. See Abdow, 468 Mass. at 503 ("Provided the subjects are sufficiently related, the choice as to the scope of an initiative petition is a matter for the petitioners, not the courts").

Second, § 3 permissibly "anticipates and addresses a potential consequence" of the regulation scheme to be adopted in § 2 and, therefore, is operationally related to § 2. Oberlies v. Attorney Gen., 479 Mass. 823, 832 (2018). In Oberlies, an initiative petition proposed hospital staffing ratios designed to limit the number of patients assigned to each nurse and also prohibited facilities from reducing their remaining workforce as a result. Id. at 831. In concluding that the two provisions were operationally related, we observed that, if hospitals were required to hire additional nurses to meet the patient assignment limits, they might respond by eliminating other staff. Id. at 832. Because the workforce-reduction prohibition sought to preclude this consequence of the staffing ratio provision, we held that the two provisions were operationally related. Id.

Initiative Petition 21-13 likewise anticipates and mitigates a foreseeable consequence of prescribing a minimum MLR for dental benefit plan carriers with other lines of business. That is, by requiring financial reporting on an entity-wide basis, § 3 enables the commissioner to detect potential accounting abuses by carriers who may attempt, for example, to transfer overhead expenses from their dental insurance lines to other insurance lines in order to inflate artificially their MLRs for the dental insurance lines. We long have held that

initiative petitions designed to account for consequences of their primary objectives pass the relatedness test. See Weiner, 484 Mass. at 692 (age-verification requirements for alcohol sales and increased funding for regulatory enforcement operationally related to lifting restrictions on licensing of alcohol sales); Oberlies, 479 Mass. at 832-833; Dunn, 474 Mass. at 681-682; Hensley, 474 Mass. at 659 (comprehensive scheme for legalizing cannabis, licensing and regulating cannabis-related businesses, and taxing retail sales of cannabis satisfied relatedness requirement because all provisions were "piece[s] of the proposed integrated scheme").

The plaintiffs' reliance on Oberlies and Gray v. Attorney Gen., 474 Mass. 638, 648 (2016), is misplaced. In Oberlies, 479 Mass. at 836-837, we held that a second initiative petition that was identical to the first, see supra, except for the inclusion of a provision requiring hospitals to make broad financial disclosures did not comply with art. 48's relatedness requirement. We concluded that this requirement bore "only a marginal relationship" to the rest of the measure because the staffing ratios were mandatory and not related to a hospital's ability to pay additional nurses needed to comply with them, Oberlies, supra at 836, quoting Abdow, 468 Mass. at 499, and because the general goal of transparency had "no apparent connection" to the petition's purpose of ensuring patient safety

through adequate staffing, Oberlies, supra at 837. In Gray, supra at 648, we similarly held that a provision in an initiative petition that would have required annual release of standardized testing questions and answers neither shared a common purpose with nor was operationally related to other provisions setting the substantive requirements for educational curricula. The present case does not require the same conclusion. Here, the financial disclosures required by § 3 relate not to a separate, general goal of transparency but to the common purpose of enabling the commissioner to implement and monitor compliance with the new MLR scheme established by § 2.

Conclusion. We remand the matter to the county court for entry of a judgment declaring that the Attorney General's certification of Initiative Petition 21-13 was in compliance with the requirements of art. 48.

So ordered.