



INSIDE POLITICS: DIALYSIS & DYSFUNCTIONAL NETWORKS

Written By Ryan Work, Senior Vice President,
Government Relations
Self-Insurance Institute of America, Inc. (SIIA)

*S*hortly after the U.S. Supreme Court issued its decision in *Marietta v. DaVita* this past summer, dialysis providers and their allies were quick to introduce legislation that would have had a number of negative impacts and consequences for self-insured health plans. At the time, I didn't realize just how much the SIIA government relations team would learn about dialysis policy, and politics, over the course of the next few months. This is the story of that advocacy campaign, and the dark side of what a dysfunctional provider system means for patients, plans and members.

First, a bit of context. Under a competitive healthcare space, in-network provides choice and lower cost. It's 'usually' good for plans, for patients, and it creates a known and agreed upon price. I say usually because in the case of dialysis it's simply not the case.

While Medicare reimburses dialysis at \$264 per treatment, self-insured plans pay an average reimbursement rate of \$1,500. Rather than plans or patients having a number of providers to choose from and negotiate with, the dialysis space is a duopoly - two providers have approximately 80% of the market.

When that happens, that duopoly dictates and drives up prices, and creates a non-functioning network. As an example, while 12% of dialysis are on group health insurance, they account for 40% of provider revenue.

In August of this past year, SIIA became aware of legislative text being circulated by a large dialysis provider that sought to enshrine special protections for their ability to further control the dialysis market.

This legislation framed these special protections as parity standards for employer plans which would tie dialysis coverage benefits to coverage benefits for other chronic disease. This proposed legislation followed a Supreme Court decision on the issue of plans' ability to control dialysis costs. Providers didn't like the revenue impacts of this decision and were looking for a solution from Congress, claiming the decision created a new market dynamic.

This positioning was the first major problem. In actuality, the Supreme Court decision didn't change the status quo, rather it kept in place the three-part patient protections already enshrined in the Medicare Secondary Payer Act (MSPA), while allowing self-insured plans the ability to create lower cost reimbursement mechanisms through out-of-network programs or improved in-network rates.

Dialysis, along with ALS, are the only conditions that qualifies an individual for Medicare coverage regardless of age. The specifics of this coverage is spelled out in the MSPA, which mandates that employers are the primary payor for what amounts to the first 33-months of care.

During this initial coverage period, employers are prohibited from dropping coverage for those dialysis patients under their plan, something that employers and regulators take seriously. After 33-months, Medicare then becomes the primary payer.



The second major problem was the actual text of the legislation. If we learned anything over the past several years, it's that mandating parity in health care is complex and difficult, and simply doesn't work as intended. Different patients need different care, and ERISA provides flexibility to make that happen.

The mislabeled search for parity attempted to equate dialysis benefit coverage to that of other 'chronic' diseases." While that is noble thought in the abstract, in the concrete, there is no way to make that work, starting with the fact that there is no federal definition of chronic diseases. One can only imagine the chaos caused by mandating coverage for something that isn't defined.

Third, the legislation would have forced self-insured plans to only use in-network rates as the only way to attempt to control dialysis costs. Such a restriction would eat away at the very foundations of ERISA, curtailing the very flexibility that is at the heart of self-funded health plans and preventing the use of cost containment resources, whether reference-based pricing or carve-out methodologies.

Having identified those three major issues with the proposed legislation – misdirection, lack of practicality, and an undermining of basic flexibility – it was no surprise that just a week after introduction week later, Politico came out with an investigative piece citing the fact that DaVita itself wrote the legislation and had it introduced by allies on the Hill with no input or changes prior to introduction.

Dialysis providers are very active on the political and legislative fronts. Through September of 2022, DaVita spent over \$3 million in lobbying, with Fresenius spending \$5.65 million, in addition to millions in political contributions.

Dialysis providers were quick to use the patient groups they underwrite to start grassroots campaigns to boost support in Congress on their legislation, which was introduced as the *Restore Protections for Dialysis Patients Act*.

According to dialysis advocates misdirection, employers were using the Supreme Court decision to "kick patients off plans," make sure they didn't have to pay for their dependents and "dump" dialysis costs on to Medicare.

In addition, they claimed that the Justice Kavanaugh's opinion in the *Marietta* case gutted the patient protections under the MSPA. The



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problem? None of this dangerous rhetoric was true. There is no data to demonstrate that plans are removing dialysis patients, and it's illegal under three distinct federal laws.

Additionally, the healthcare space doesn't move that fast, nor can plans change benefits or documents mid-year. In fact, not only is there no data to prove this accusation, but any data showing changes in the dialysis market may take years to come to light.

According to the government's own data in the U.S. Renal Dialysis Database, dialysis patients receiving coverage under Medicare has decreased over 6% in the last 7 years, while employer coverage has increased over 3% during the same period.

Employer plans are covering more dialysis, not less. The kicker, the U.S. Department of Health & Human Services itself said that the Supreme Court did nothing to change the current MSPA protections.

To help counteract the fact that the dialysis providers had laid political groundwork for years in lobbying expenditures, SIIA immediately took an industry wide approach, and discussed the issues with employer

and trade coalitions, and with SIIA member companies.

In a matter of two weeks, SIIA sent out a coalition letter to all 435 Members of Congress with 45 signatories, comprised of national, state and regional associations, employer groups and unions in opposition to the dialysis legislation.

This was just the beginning of nearly 90 congressional meetings that SIIA held over the course of the next 4 months, encompassing House and Senate leadership, key committees, and individual Member staff. It became weekly planning calls, monthly coalition calls, and ongoing policy stakeholder meetings.



Slowly but surely, SIIA was able to change the course of the dialogue away from the dialysis providers misdirection with data, facts and impacts to self-insured plans. By November, we felt we had a good chance of ensuring that it would not become a provision in a year-end omnibus spending package, what amounts to a “Christmas Tree” bill of policy inclusions.

It was at that moment a key policy win came into play. The dialysis providers and their supporters had been advocating for months that their proposal would both protect patient and lead to up to \$4 billion in savings to Medicare.

In general, such savings are important to congressional policymakers who are always looking for cost savings to pay for other policy programs. Supporters of the legislation were so confident in the strength of their misdirection, that the Congressional sponsors asked for a legislative “score” from the Congressional Budget Office (“CBO”).

In a display of the process working the way it should, the CBO did its work in an unbiased way, uninfluenced by the misdirection and returned a score that estimated the proposed would cost the government \$8 billion.

Even more alarming, the CBO estimated the cost to employers of the legislation would be \$42 billion due to the increased cost of healthcare and an increase in costs of pre-tax health benefits. This unbiased, data driven analysis by the CBO, was a fatal blow to the legislation, and one SIIA quickly amplified in communications with congressional members and their staffs.



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And yet, the dialysis providers had one last trick up their sleeves. As end of the year omnibus language was being put together, SIIA, coalition partners, and even congressional staff became surprised to learn that dialysis providers were tweaking legislative language to bring down the cost and put it in to a last-minute deal. They did this behind closed doors, putting patient groups out in front with grassroots ads in Hill news outlets, and placing op-eds in D.C. and even Delaware, aiming to get to the President.

At this point, SIIA and its partners on the Hill doubled down on meetings and messaging.

One week later, on December 20th, omnibus language came out void of the special interest language put forward by the dialysis providers and their Hill allies. Common sense and good policy prevailed. Considering the time, funding and effort put in over years by the dialysis duopoly, this was a major win for employer-sponsored health, and self-insured plans specifically.

But our work isn't over. SIIA fully expects the dialysis providers and their partners to introduce revised legislation in the next Congress, particularly considering that Senate sponsor, Sen. Cassidy (R-LA), will be the next ranking member of the Senate Health Committee.

When it happens, SIIA and coalition partners will be more prepared to fight back. This is a policy and political campaign that should be based on facts and market realities.

Unfortunately, it is being subjected to the funding and misdirection of the dialysis provider duopoly. It's one that SIIA will continue to be at the forefront of – based on data, common sense, and member engagement. We want to shed light on the dialysis industry, through regular order, hearings and transparency. SIIA will continue to take an important lead on this and other policy issues on behalf of our members. ■