



SUMMARY: The Campaign Against California's Proposition 79

***Drug Company Domination by Dirty Tricks and Deception:
A California Case Study of PhRMA's Bullying Behavior***

November 9th, 2005

The pharmaceutical industry has a long history of using its wealth and power to not just shape public policy, but to bully anybody who would seek prescription drug pricing reform.

As a result, the drug companies have been able to prevent prescription drug price reform under the Medicare bill, state laws, and even ballot initiatives in other states, as they have here in California.

**** Lobbying: Biggest in the Nation***

The pharmaceutical and health products industry has spent **more than \$800 million in federal lobbying and campaign donations** at the federal and state levels in the past seven years, according to a Center for Public Integrity investigation. **The drug companies' lobbying operation, on which it reports spending more than \$675 million, is the biggest in the nation.** No other industry has spent more money to sway public policy in that period. Its combined political outlays on lobbying and campaign contributions is topped only by insurers.

This lobbying helped ensure that the Medicare bill explicitly prohibited the Department of Health and Human Services from being able to negotiate with the drug companies for lower prices. This meant that the cost of the Medicare Part D drug benefit was more expensive, and the actual benefit provided to seniors more paltry. With this signal that the drug companies could dictate federal legislation, consumer advocates focused more intently on state-based reforms.

**** Campaign Contributions: to Governor Schwarzenegger and Others***

The drug industry has donated more than \$400,000 to Governor Arnold Schwarzenegger in his short two years as Governor, making him the number two recipient of prescription drug industry campaign contributions, after President George Bush.

Governor Schwarzenegger vetoed six bills in 2004 that were designed to lower the cost of prescription drugs. Supported by health, senior, and consumer groups, these bills were opposed by the drug companies. With such an indication that drug company opposition would mean a veto for reforms, consumer advocates in 2005 pursued both legislation and Proposition 79 as a ballot initiative. Earlier this year, Governor Schwarzenegger again vetoed the prescription drug measures that made it to his desk, three bills that were opposed the drug industry.

** Aggressive Litigation*

The drug industry sued to keep Proposition 79 off the ballot. (They argued that a provision in Proposition 79 gave special, inappropriate power to the California Chamber of Commerce and the AFL-CIO. In fact, the provision—which is severable—only allowed an advisory role for these and other organizations in the set-up of a purchasing pool that the Department of Health Services had the discretion to set-up, to assist small businesses and union trusts in purchasing drugs.) The case was so weak that when the PhRMA lawyer started his presentation in front of Superior Court Judge Thomas Cecil, he said, “I realize I have a mountain to climb.” The Judge responded, “That’s putting it mildly.” PhRMA lost in both Superior Court and Appeals Court.

This isn’t the first time that PhRMA has sued to keep a prescription drug price reform off the ballot. In Ohio, after senior, consumer, and health advocates collected signatures to place a measure similar to Proposition 79 (and the Maine reform) on the ballot, **PhRMA sued in over half the counties in Ohio**, challenging the signatures on technical grounds. The advocates were overwhelmed and unable to financially respond to this torrent of litigation, and eventually were forced to agree to a “voluntary” plan that PhRMA favored.

PhRMA also sued, unsuccessfully, to prevent the Maine plan from going into effect. However, PhRMA has lost at the Appeals Court and the U.S. Supreme Court, even with high-powered lawyers on their side, including the newly-seated Chief Justice John Roberts. Some issues were referred back to a District Court, which again ruled in favor of Maine and against PhRMA.

** Confusing Counter-Measure: Proposition 78*

Proposition 79 was filed in January 2005 by California health advocates. **In response, the drug companies filed Proposition 78 about three weeks later, as a way to confuse California voters.** The drug companies were concerned that a measure for cheaper prescription drugs would be hard to fight on its face, so it would be easier to confuse voters by placing a competing measure on the ballot, but one that the drug companies could control. Under Proposition 78, the drug companies decide which drugs are included, what drugs are excluded, what level the discounts are, and whether the drug companies participate at all. If the drug companies don’t participate, the program ends.

If both measures pass, the one that gets the most votes pre-empts the other. So Proposition 79 not only has to get 50%, but has to get more votes than Proposition 78 as well, which could be a higher bar. Also, since it was hard to tell the two propositions apart, and voters who are confused vote “no,” the mere existence of Proposition 78 served to generate more “no” votes for Proposition 79.

Furthermore, **if Proposition 78 became law, it could only have been amended by a 2/3 vote of the legislature. This means that a Proposition 78 victory could have prevented future prescription drug price reforms, under a new legislature or Governor.**

**** Threatening Potential Funders: Other Initiative Threats***

On the same day they filed Proposition 78, **the drug companies also filed two other ballot initiatives, aimed at scaring away potential funders of Proposition 79.** One so-called “paycheck protection” measure would have restricted the ability of public employee unions for collecting political contributions. Another would have put limits on contingency fees.

Both measures were designed to threaten potential funders of Proposition 79, unions and lawyers, who have been traditional supporters of progressive proposals.

It was reported in the *Sacramento Bee* that the drug companies then made a deal with the Consumer Attorneys of California, to withdraw the contingency fee measure if the lawyers would agree not to support Proposition 79. (For the record, the Consumer Attorneys were not involved in any way in the drafting or development of Proposition 79, and no support was ever expected from them. This did not stop the drug companies from running an ad in violation of this agreement, entitled, “Why Trial Lawyers Love Prop 79.”) The drug companies’ “paycheck protection” measure was dropped, largely because another, similar measure was already heading to the ballot, sponsored by conservative activist Lew Uhler.

**** Massive Record-Breaking Ballot Campaign***

The drug companies quickly committed to raise \$80 million, to set **the record for the most expensive ballot campaign in the history of the nation.** Only two other times in the history of the nation has a ballot campaign for one side gone over \$30 million.

Four top drug companies (Pfizer, Glaxo, Merck, and Johnson & Johnson) contributed nearly \$10 million each, breaking the California record for single contributions from a single source. Many other drug companies contributed \$4.5 million. **The head lobbyist for PhRMA said they would spend “whatever it takes” to beat Proposition 79.**

The large amounts of money, contributed early, in the summer, was also viewed as a **warning to consumer advocates in other states**, that if they tried prescription drug price reform, the drug companies would fight it with overwhelming money and force.

**** False and Misleading Advertising***

The drug companies have produced over 10 television commercials for their campaign, blanketing the airwaves with ads that have been found to be misleading by newspapers from the *Orange County Register* to the *Sacramento Bee*, as well as the independent website HealthVote.org. The Yes on 79 campaign called on TV stations to take down one ad that made false statements.

The nationally-recognized website Factcheck.org singled out, out of all the campaigns in this special election, the drug company ads as “seriously misleading.” The Yes on 79 campaign has also done Ad Watches of the PhRMA ads, which are available at:

<http://www.voteyeson79.org/ads.htm>

* *Purchased Studies*

Some of these ads featured official-sounding studies that were commissioned by the drug companies themselves. **PhRMA financially supported no less than five studies** to “analyze” components of the prescription drug initiatives. These studies contradicted independent studies done by the Legislative Analyst’s Office (LAO), RAND Corporation, and Medpin.

* *Financial Relationships*

According to the *Los Angeles Times* article entitled, “**Drug Firms Gave Money to Some Who Endorsed Proposition 78,**” “the nation's drug makers have given hundreds of thousands of dollars to political leaders and civil rights groups that have endorsed the industry's initiative on the Nov. 8 ballot. The measure, Proposition 78, would avert state caps on the price of prescription drugs. Those embracing it while taking the industry's money include the conservative Traditional Values Coalition, an emergency-room physician in Los Angeles, the California arm of the NAACP and the Mexican American Political Assn.”

<http://www.latimes.com/news/local/la-me-pharma4nov04,0,3284896.story?coll=la-home-headlines>

According to the *San Diego Union-Tribune* article entitled, “**Drug Industry Ties to Backers of Initiatives Questioned,**” “Several patient advocacy groups that support the drug companies' campaign also receive money from drug companies, including the California Arthritis Foundation Council and the California Hepatitis C Task Force.”

http://www.signonsandiego.com/uniontrib/20051027/news_1n27conflict.html

* *Caravan of Consultants*

The drug companies hired a raft of consultants, including several PR firms, and many of the politically connected, including Willie Brown, the former Speaker of the California Assembly. (“Drug industry gives \$450,000 payday to Willie Brown,” *San Francisco Chronicle*.) Also on the list of unusual consultants was Jason Kinney, adviser to Senate President Don Perata.

* *Purchasing of Slate Mailers Endorsements*

The drug company campaign against Proposition 79 has **spent over \$1.5 million to purchase 30 endorsements from slate mailers**, according to recent filings at the Secretary of State's office.

In their attempt to confuse voters, they have bought slates with a wide range of ideological perspectives, including **several which feature elected leaders who have taken an opposite position, against the drug companies' 78, and for the consumer groups' Prop 79.**

In addition, **these** slate mailers allow the drug companies to promote their position without disclosure. For example, the mailing "The Black Woman's Guide to California Politics" was entirely paid for by the PhRMA California Initiative Fund, and yet never includes the disclaimer that appears on other PhRMA campaign materials, that discloses the name of the campaign committee, as well as major funders like the Merck and Johnson & Johnson.

*** Push Polling**

There have been other tactics that intend to promote the drug companies' message without having to disclose the source. The Yes on 79 Campaign filed a complaint with the Fair Political Practices Commission, to ask for an investigation of **phone calls apparently made from a call center in Iowa that is calling California voters with a scripted communication against Proposition 79, and under the guise of market research, is not providing any disclosure of who paid for the call.** The complaint notes that the FPCC advertising disclaimer rules set out in FPCC Regulation 18450.1(a)(3) have been violated. This Section specifies that all advertising must include a disclaimer and states that the term advertisement includes "A telephone or facsimile message that is not solicited by the recipient and is intended for delivery in substantially similar form to 200 or more households." It is also unclear if this market research is reported in financial disclosure reports against Proposition 79 to the Secretary of State.

The complaint includes a declaration by Murat Erkam of San Diego , CA , who received a phone call on October 19th that included a scripted communication against Proposition 79.

- * The call appeared to be the type used by telemarketing firms that is scripted and repeated to many callers.

- * This communication did not include any disclosure of who paid for the call.

- * Mr. Erkam was able to talk to a supervisor, who provided the name of the market research company, and was told that this call was part of a full phone bank operation calling to California voters in opposition to Proposition 79.

- * This firm is not listed in the financial disclosure reports of the PhRMA California Initiative Fund. This either indicates that this "market research" work is not being reported to the Secretary of State, or that the firm misrepresented who they are.

Drug Company Deception: a Dead End?

This bullying behavior may be backfiring. While these tactics have been successful in delaying or defeating reforms, the public standing of drug companies has plummeted in just the past decade, according to the *Los Angeles Times*. While the drug companies were successful in defeating Prop 79, their measure also lost, and got only 2.6% more than Prop 79, despite outspending consumer groups 40-1. By proposing Prop 78, the drug companies have admitted that drug prices are too high, and increased attention and anger over their tactics.

By winning with such massive spending and dirty tricks, **the drug companies have won the battle of Proposition 79, but may be losing the overall war over prescription price reform.**

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