

Date of Hearing: August 18, 2020

ASSEMBLY COMMITTEE ON APPROPRIATIONS

Lorena Gonzalez, Chair

SB 977 (Monning) – As Amended August 6, 2020

Policy Committee: Health

Vote: 8 - 4

Urgency: No

State Mandated Local Program: No

Reimbursable: No

SUMMARY:

This bill provides the Attorney General (AG) additional authority to review and approve proposed acquisitions of health care facilities and practices by health care systems, hedge funds or private equity groups and requires the AG to study health care markets and provide recommendations. Specifically, this bill:

- 1) Requires the AG to establish the Health Policy Advisory Board to analyze California health care markets and provide recommendations to the Attorney General's office, including issuing an annual report on cost and quality in health care markets in California as those topics relate to acquisitions and changes of control. Sunsets this board in January 2027 and allows the AG to request the board to review a written notification.
- 2) Requires a written notice to the AG and AG approval for transactions occurring before December 31, 2025:
 - a) Requires a health care system, hedge fund or private equity group seeking to acquire or control a health care facility or provider to provide written notice and obtain approval from the AG based on specified criteria, and spells out timelines, exemptions and details of the notice and approval process. Sunsets this requirement in January 2026.
 - b) Defines a health care system as an entity or system of entities that includes or owns three or more hospitals within the state of which at least one is a general acute care hospital, as defined.
 - c) Allows the AG to deny consent to a change of control or an acquisition unless it is demonstrated to result in a substantial likelihood of clinical integration, as defined, a substantial likelihood of increasing or maintaining the availability and access of services to an underserved population, or both.
 - d) Allows the AG to deny consent to a change of control or an acquisition if there is a substantial likelihood of anticompetitive effects that outweigh potential benefits, as specified.
 - e) Requires the AG to apply the "public interest" standard in approving or denying transactions, as defined to include the public's interest in the price, quality, choice, accessibility, and availability of all health care services, and states acquisitions shall not be presumed to be efficient for purposes of assessing compliance with this standard.
 - f) Allows potential purchasers to move forward with the transaction if they do not receive a notice of denial, approval or waiver.

- g) Allows the AG to waive specified requirements for a transaction in a rural area and to provide an expedited review for small transactions (market value under \$1 million) and transactions involving academic medical centers and county health facilities.
- 3) Makes the conduct of a health care system unlawful if the health care system has substantial market power in any market for hospitals or nonhospital health care services and the health care system's conduct has a substantial tendency to cause anticompetitive effects, as specified.
- 4) Presumes a health care system is acting unlawfully if it has substantial market power and the health care system's conduct involves "tying" (the seller coercively conditioning the sale of one or more services on the sale of a second distinct service or services, as specified) or "exclusive dealing" (an agreement in which a health plan or employer who buys health care services agrees implicitly or explicitly, whether coerced or voluntarily, to buy services exclusively from a health care system for a period of time).
- 5) Allows the AG to bring a civil action on behalf of the state or of any of its political subdivisions or public agencies or in the name of the people of the State of California for any violation of the bill's provisions.
- 6) Allows the AG to issue regulations and to hold a public meeting regarding a transaction.
- 7) Allows any party to the transaction to appeal the AG's final determination by filing a writ of mandate in superior court.
- 8) Specifies a four-year statute of limitation and specifies fines and penalties, including fines that double the gross gain to the health care system or gross loss to any other party.
- 9) Requires a court to award the state as monetary relief three times the total damage sustained the interest on the total damages, and the costs of suit, including a reasonable attorney's fee.
- 10) Allows a court to grant injunctions to prevent a defendant from committing future violations as well as grant injunctions as may be reasonably necessary to restore and preserve fair competition.
- 11) Specifies fees or fines obtained are deposited in the Attorney General antitrust account within the General Fund.

FISCAL EFFECT:

- 1) Costs to the Department of Justice of \$1.2 million annually through calendar year 2026 for legal and analytical staff to review and approve or deny transactions (GF/Legal Services Revolving Fund). There could be additional workload if the AG decides to pursue civil action under new authority granted in the bill, but the AG could allocate existing resources if this was deemed a priority.

There is disagreement between the Office of the AG and the provider community as to the number and types of transactions that are to be captured by this bill. The provider community believes the bill is far broader and would cover far more transactions than does the Office of the AG. If a greater number of transactions are sent to the AG for review, costs

could be commensurately higher. However, the AG can also simply choose to prioritize transactions of interest, as any transaction filed may proceed if the AG does not respond to within a certain period.

- 2) Potential cost pressure in the low hundreds of thousands of dollars annually through calendar year 2026 to contract for expertise necessary to assist the Health Policy Advisory Board in producing an annual report on health care market conditions and responding to inquiries from the AG about specific transactions.

COMMENTS:

- 1) **Purpose.** This bill was introduced to address and prevent the public harm associated with health care transactions that increase consolidation and concentrate market power without providing commensurate public benefits like lower prices, higher quality or greater access. The author notes such transactions have been accelerating in recent years and that recent research continues to demonstrate the harm of continued consolidation and concentration of market power, including price inflation that does not improve quality of care.
- 2) **Background.** In recent years, a trend of consolidation among health care providers has emerged. Hospitals have merged into ever-larger health systems, and health systems have also acquired outpatient settings such as physician offices, clinics and ambulatory surgery centers. Although efficiency and better integration and coordination of care within health systems can benefit patients, research also shows it can lead to significant price increases that appear to outweigh the benefits to patients and premium payers. For instance, one study found highly concentrated markets were associated with higher prices and premiums.

The AG already has authority to review sales or transfers of nonprofit health care facilities, including hospitals and nursing homes. The AG also enforces antitrust law. This bill builds on existing authority by expanding the AG's oversight of transactions involving for-profit entities to ensure any potential anticompetitive effects from the transaction are outweighed by public benefit.

- 3) **Sutter Health Lawsuit and Settlement.** The AG filed a lawsuit in March 2018 that follows an investigation into the practices of the state's healthcare systems due to the wide disparities between Northern and Southern California healthcare costs. In December 2019, Sutter Health agreed to pay \$575 million to settle claims of anti-competitive behavior brought by the AG, as well as unions and employers. The settlement will go to compensate employers, unions and the state and federal governments. Sutter Health will also be prohibited from engaging in several practices that the AG said the hospital system used to ensure its market power—practices also banned by this bill.
- 4) **Related Legislation.** AB 2817 (Wood) of the 2019-20 Legislative Session creates the Office of Health Care Quality and Affordability (Office) to analyze the health care market for cost trends and drivers of spending, develop data-informed policies for lowering health care costs and create a strategy to control health care costs. AB 2817 was referred to Assembly Health Committee and not heard.
- 5) **Prior Legislation.** SB 538 (Monning) of the 2017-18 Legislative Session would have prohibited specified hospital contracting practices. SB 538 was held at the request of the author in the Assembly Health Committee.

AB 595 (Wood), Chapter 292, Statutes of 2018, requires a health plan that intends to merge or consolidate with, or enter into an agreement resulting in its purchase, acquisition, or control by, any entity, as defined, including another health care service plan or a licensed health insurer, to give notice to, and secure prior approval from, the Director of the Department of Managed Health Care.

AB 3087 (Kalra) of the 2017-18 Legislative Session would have established the Health Care Cost, Quality and Equity Commission to, among other functions, control in-state health care costs and set the amounts accepted as payment by health plans, hospitals, physicians, physician groups and other healthcare providers. AB 3087 was held on the Suspense File of this committee.

SB 932 (Hernandez) of the 2015-16 Legislative Session would have banned seven specified provisions from contracts between health care providers and payers and would have required prior approval from DMHC for mergers and other transactions between health plans, risk-based and other organizations. SB 932 was held at the request of the author in the Senate Appropriations Committee.

- 6) **Support.** This bill is sponsored by AG Xavier Becerra to strengthen the AG's authority to prohibit existing healthcare systems from engaging in abusive behavior that limits competition in the market.

California Labor Federation, Health Access and Pacific Business Group on Health, among others, support this bill and note that this bill gives the AG authority to ensure that consolidation in the health care industry benefits consumers and purchasers. The supporters point to empirical studies that demonstrate that dominant providers are using their market power to engage in unfair contracting practices and negotiate higher-than-competitive prices in the state. Supporters argue industry consolidation and anti-competitive practices have increased premiums for individuals, employers and workers, and that this bill will make health care markets work better for Californians.

- 7) **Oppose Unless Amended.** The County of Santa Clara (CSC) seeks an amendment to make clear that counties will not be subject to this bill. CSC contends that the additional process in this bill would be burdensome and costly for counties and without any public benefit, given that county systems do not make a profit and are publicly subsidized.

VSP Vision Care (VSP) states this bill would trigger review and presumptive denial of any changes to leases, loans, grants, service agreements or contracts that optometrists, optometric professional corporations and Independent Practice Groups, and physician medical groups undertake. VSP seeks an amendment to clarify that "private equity group" does not include VSP's acquisition program.

The California Optometric Association (COA), is opposed unless amended to exclude the AG's review of small private practice sales to private equity groups. COA is concerned that this bill would trigger a review of very small transactions that could not possibly have an anticompetitive effect, derailing the sale by the providers or devaluing the practice because of the cost of review and the uncertainty of the outcome.

- 8) **Opposition.** The California Hospital Association, California Medical Association, California Dental Association and the California Chamber of Commerce oppose this bill, in addition to

a range of other provider, finance and business groups. Opponents state this bill undermines principles of fair due process within the legal system by creating presumptions that these transactions are anticompetitive, placing the burden of proof on health care providers and effectively creating a “guilty until proven innocent” system. The opponents note that a provider must demonstrate that the acquisition or affiliation will result in clinical integration or an increase in access and availability of services to an underserved population, but provides no clarity on how a provider may do so. They argue the ability to regulate anticompetitive behavior is already governed by the AG’s current review authority, as well as federal and state antitrust laws. The opponents contend that this proposal would place the burden on all health care providers to meet arbitrary standards of proof, with no right to a hearing or meaningful appeal process.

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