Office of Senate Floor Analyses
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THIRD READING

Bill No: SB 977
Author: Monning (D)
Amended: 6/19/20
Vote: 21

SENATE HEALTH COMMITTEE: 7-2, 5/13/20
AYES: Pan, Lena Gonzalez, Hurtado, Leyva, Mitchell, Monning, Rubio
NOES: Nielsen, Grove

SENATE APPROPRIATIONS COMMITTEE: 5-2, 6/18/20
AYES: Portantino, Bradford, Hill, Leyva, Wieckowski
NOES: Bates, Jones

SUBJECT: Health care system consolidation: Attorney General approval and enforcement

SOURCE: Attorney General Xavier Becerra

DIGEST: This bill requires a health care system (which is an entity or entities that includes or owns two or more hospitals within multiple counties or three or more hospitals in one county), private equity groups and hedge funds to provide written notice and obtain consent of, the Attorney General (AG) prior to an affiliation or acquisition between the health care system, private equity group or hedge fund and a health care facility or provider. This bill makes it unlawful conduct for a health system with substantial market power to engage in specified anticompetitive activities. This bill establishes the Health Policy Advisory Board to evaluate and analyze health care markets, advise the AG, and produce an annual report.

ANALYSIS:

Existing law:

1) Establishes the Department of Justice, led by the AG, who has charge of all legal matters in which California is interested, including enforcement against

anticompetitive conduct through the Cartwright Act. [HSC §1340, et seq., INS §106, et seq., GOV §12500, et seq., BPC § 16700, et seq.]

2) Requires any non-profit corporation that operates or controls a health facility, as defined, to provide written notice to, and obtain the written consent of, the AG prior to entering into any agreement or transaction to sell, transfer, lease, exchange, option, convey, or otherwise dispose of, its assets to a for-profit corporation or entity, or another non-profit corporation; or, transfer control, responsibility, or governance of a material amount of the assets or operations of the non-profit corporation to any for-profit corporation or entity, or another non-profit corporation. [CORP §5914, §5920]

3) Provides the AG with the discretion to consent to, give conditional consent to, or not consent to any agreement or transaction involving a nonprofit health facility based on the consideration of any factors that the AG deems relevant, including but not limited to:

   a) Whether the agreement or transaction is at fair market value;

   b) Whether the proposed use of the proceeds from the transaction is consistent with the charitable trust on which the assets are held by the health facility or by the affiliated nonprofit health system;

   c) Whether the transaction would create significant effects on the availability or accessibility of health care services to the affected community; or,

   d) Whether the transaction is in the public interest. [CORP §5917, §5923]

4) Prohibits the AG from consenting to a health facility transaction in which the seller restricts the type or level of medical services that may be provided at the health facility that is the subject of the transaction. [CORP §5917.7]

This bill:

1) Requires the AG to establish the Health Policy Advisory Board responsible for evaluating and analyzing health care markets in California and providing recommendations to the AG; and produce a report annually on healthcare markets in California. Prohibits board members from receiving compensation, and from using their position to influence decisions that will have a foreseeable material financial effect on the member or his or her family. Requires members to file a statement of economic interest, as specified.

2) Requires a health care system, private equity group, and hedge funds to provide written notice to, and obtain the written consent of, the AG prior to an affiliation or acquisition of a health care facility or provider.

3) Establishes time frames for the AG to respond, as specified, and permits the AG to adopt regulations including that extend these time periods or regulations provide a process for requesting a waiver.

4) Requires the AG to deny consent to an affiliation or acquisition of a health care facility, provider, or both, unless the health care system demonstrates that the affiliation or acquisition will result in a substantial likelihood of clinical integration, a substantial likelihood of increasing the availability and access of services to an underserved population, or both.

5) Permits the AG to deny consent to an affiliation or acquisition of a health care facility, provider, or both, if there is a substantial likelihood of anticompetitive effects that outweigh the benefits of a substantial likelihood of clinical integration, a substantial likelihood of increase in services to an underserved population, or both. Includes as a substantial likelihood of anticompetitive effects in providing hospital or health care services, a substantial likelihood of raising market prices, diminishing quality, reducing choice, or diminishing availability of, or diminishing access to, hospital or nonhospital health care services.

6) Requires the AG to apply a public interest standard in making a determination to grant or deny consent, defined as being in the interests of the public in protecting competitive and accessible health care markets for prices, quality, choice, accessibility, and availability of health care services for local communities, regions, or the state as a whole.

7) Permits a health care system that is acquiring or affiliating with a provider, group of providers, or health care facility for a transactional value of $500,000 or less, or an academic medical center, as defined, for any transactional value, to provide written notice to the AG, and requires AG to notify the health care system within 30 days, as specified.

8) Permits a health care system, private equity group, or hedge fund located in a rural area to request, in writing, a waiver of the prohibition in 4) above. Requires the AG to grant a waiver if specified conditions exists related to improving the access or availability services; or, improving the health, safety, and well-being of consumers of health care services in rural areas.

9) Permits any of the parties to the acquisition or affiliation to appeal the AGs final determination by a writ of mandate to the superior court pursuant to the Civil Code, as specified.

10) Makes the following unlawful conduct of a health care system:

    a) A health care system with substantial market power in any market for hospitals or nonhospital health care services where the health care system's conduct has a substantial tendency to cause anticompetitive effects, including substantial likelihood of raising market prices, diminishing quality, reducing choice, increasing the total cost of care or diminishing availability of, or diminishing access to, hospital or nonhospital health care services.

    b) A health care system is presumed to be acting unlawfully if it has substantial market power in any market for any service in trade or commerce and the health care system's conduct involves tying or exclusive dealing.

11) Exempts from 10) a health care system if its conduct directly and significantly benefits consumers of any services in that same market in which the conduct is taking place, or the health care system, and the conduct that it is committing, are located entirely within a rural area, it otherwise meets the criteria of this bill, the benefits are not achievable by less restrictive alternatives, the benefits substantially outweigh any actual or likely anticompetitive effects of the conduct, and no benefit is based on the need to meet a public federal, state, or local requirement or mandate of any kind.

12) Permits the AG to bring a civil action on behalf of the state or any of its political subdivisions or public agencies or in the name of the people of California. Requires any civil action to enforce any cause of action for a violation to be commenced within four years after the cause of action. Establishes civil fines and state monetary relief, interest on total damages, and the cost of suit.

13) Includes several definitions including for: substantial market power, acquisition, affiliation, and academic medical center.

Comments

Author's statement. According to the author, access to affordable, quality healthcare for Californians is more important than ever. As some hospitals and provider groups struggle financially during the COVID-19 crisis, action by the

Legislature is crucial to protect the healthcare system for today as well as for the future. Large healthcare systems that own multiple hospitals, and other providers such as physician practices or outpatient surgical centers, can use anti-competitive practices to raise prices and limit services without increasing the quality of care. In an effort to stop these types of market abuses, California Attorney General Xavier Becerra and union healthcare trust UEBT settled a landmark case against Sutter Health, Northern California's largest healthcare system. The settlement prohibited Sutter Health from engaging in these types of practices and required it to make policy changes that would restore competition and choice in the market. While this settlement addressed Sutter Health's specific market abuse, California must prevent new large healthcare systems from forming unless they increase care coordination to improve quality or lower costs and/or increase access to care. This bill ensures proper oversight of the growth of large healthcare systems and their impact on the healthcare market.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee, staff indicates that according to the Department of Justice, assuming 20-25 qualifying transactions annually, $499,000 ($290,000 General Fund, $209,0000 Legal Services Revolving Fund) in FY 2020-21; $866,000 ($503,500 General Fund, $362,500 Legal Services Revolving Fund) in FY 2021-22, and ongoing, for 2.0 Deputy Attorney General, 1.0 Legal Secretary, and 1.0 Associate Governmental Program Analyst. The Legal Services Revolving Fund would be reimbursable through direct billings to client agencies.

SUPPORT: (Verified 6/23/20)

Attorney General Xavier Becerra (source)
American Civil Liberties Union of California
California Labor Federation, AFL-CIO
California State Council of Service Employees International Union
Center for Public Interest Law
Health Access California
NARAL Pro-choice California
Pacific Business Group on Health
United Nurses Associations of California/Union of Health Care Professionals
Western Center on Law & Poverty, Inc.

OPPOSITION: (Verified 6/19/20)

Adventist Health

America's Physicians Groups
American Investment Council
Association of California Healthcare Districts
California Ambulatory Surgery Association
California Association of Hospitals and Health Systems
California Association of Public Hospitals & Health Systems
California Chamber of Commerce
California Children's Hospital Association
California Hospital Association
California Medical Association
Civil Justice Association of California
County of San Bernardino
Dignity Health
Economic Vitality Corporation, San Luis Obispo County
Kaiser Permanente
Keck Medicine of University of Southern California
Loma Linda University Health
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Orange County Business Council
Private Essential Access Community Hospitals
Providence St. Joseph Health
San Gabriel Valley Economic Partnership
San Ramon Chamber of Commerce
Scripps Health
Silicon Valley Leadership Group
Southwest California Legislative Council
Stanford Health Care
Stanford Health Care Valleycare
Sutter Health
Templeton Chamber of Commerce
Tenet Healthcare Corporation
United Hospital Association
Valley Industry and Commerce Association

ARGUMENTS IN SUPPORT: The AG writes that the COVID-19 pandemic has created enormous financial strain on hospitals and physician practices statewide, making these providers more susceptible to affiliation and acquisition attempts by large healthcare systems, private equity groups, and hedge funds. This type of predatory practice, if left unchecked, will result in large healthcare systems continuing to grow and utilize abusive market practices to drive up prices and

reduce access for patients. This bill ensures proper oversight of large healthcare systems and strengthen patient access to affordable, quality healthcare. Even before the COVID-19 pandemic, anticompetitive behavior in the healthcare market was a growing concern, particularly as a result of large, dominant healthcare systems that own multiple hospitals and other providers such as physician practices or outpatient surgical centers. This bill substantially strengthens the state's oversight over the formation and practices of large healthcare systems, helping to ensure access to affordable healthcare during a time when Californians need it the most. The California Labor Federation, AFL-CIO writes that while there is express antitrust law in California law, much of the statute dates back more than a century and much of the evolution of the law rests in case law. This bill is an effort to drag antitrust law into the 21st Century, using what the AG has learned in the process of recent litigation and merger oversight activity and what a resurgence of academic literature has demonstrated. This bill takes a comprehensive, reasonable, and flexible approach to addressing health care industry consolidation. It expands oversight over new mergers and acquisitions, including "vertical" integration of physician groups and hospitals. This bill also addresses the problem of already highly consolidated markets in parts of the state by increasing the ability of the AG to prevent anti-competitive and anti-trust practices of providers with market power, without breaking up existing systems. Consolidation drives up prices for all Californians without improving our health outcomes or the quality of care. Providers argue that consolidation is necessary for efficiency and for improving quality. However, a 2020 study published in the New England Journal of Medicine found that hospital consolidation resulted in modestly worse patient experiences and no significant improvements in readmission or mortality rates. The COVID-19 pandemic has also exposed another consequence of unchecked consolidation – a shortage of hospital beds, especially in rural areas. The economic toll resulting from the pandemic will likely fuel consolidation trends as physician practices face massive losses or bankruptcy and become targets for acquisition by large systems. Health Access California writes that in the world of anti-trust, it is often said that is hard to un-ring the bell once a transaction has occurred. Considerable consolidation of hospitals, health systems and physician organizations has already occurred in California. This bill takes steps to curb anticompetitive practices that some health systems have allegedly engaged in as a result of their market power.

ARGUMENTS IN OPPOSITION: The California Hospital Association (CHA) writes that this bill would strain access to the health care system by creating an extreme and burdensome process for transactions like mergers and affiliations. This, at a time when hospitals are already fighting to be there for their communities, would result in hospital closures and the loss of health care services throughout California. Although financial distress is a common reason for hospitals

to merge or affiliate, these arrangements also occur for myriad other reasons such as financial efficiency, expanded access to services, clinical integration, better coordinated patient care, and bolstered support for nurses and physicians. Under existing law, the AG has broad authority to review all sales and significant asset transfers of not-for-profit hospitals. The AG may place conditions on these transactions or deny them all together. Additionally, the AG enforces The Cartwright Act, which describes and prohibits an array of anticompetitive activity. This bill creates a presumption that these transactions are anticompetitive, placing the burden of proof on the purchaser without due process and effectively creating a "guilty until proven innocent" system. Sales, affiliations, and mergers are complex and expensive investments that require thousands of hours of work from legal, financial, operational, and clinical experts. Because of this substantive investment of time and resources, purchasers need some degree of certainty surrounding the process before undertaking such a risk. This bill gives arbitrary and absolute discretion to the AG to determine whether criteria are met, without clear definitions or parameters. Sutter Health writes that this approach to the review of healthcare affiliations is inconsistent with generally accepted legal and economic principles of antitrust merger analysis and years of judicial precedent. The vast majority of mergers, acquisitions and comparable affiliations do not involve competitors and thus are unlikely to substantially lessen competition in the form of higher prices or inferior quality of or access to care. Sutter Health also writes that the proposed "substantial likelihood" standard is speculative and uncertain, given the difficulty of quantifying likely cost and quality effects before a transaction closes. This bill provides payers and large provider groups that do not own a hospital an unfair competitive advantage by excluding them from this process. This bill does not require a showing of significant market share in a properly defined relevant market, but instead permits a finding of "market power" based simply on a finding of "substantial anticompetitive effect." The California Medical Association (CMA) believes this bill is broadly written to seemingly trigger review and presumptive denial of any lease, loan, grant, service agreement, or contract change a physician or medical group has, attaching new and uncertain process to the list of financial and administrative hurdles doctors are already facing. CMA writes that the process created seems to favor larger systems that can afford the legal counsel to hopefully get them necessary approvals for such agreements.

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