SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 3129 (Wood)
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AM

SUBJECT

Health care system consolidation

DIGEST

Requires a private equity group or hedge fund to provide written notice to, and obtain the written consent of, the Attorney General prior to a transaction with: a health care facility; provider group; a provider, if the private equity group or hedge fund has been involved, directly or indirectly, in a transaction involving a health care facility, provider group, provider, or related health care services within the past seven years; or, any health care facility, provider group, or provider as described in the prior clause that is under common control or affiliated with a payor, if the private equity group or hedge fund has been involved, directly or indirectly, in a transaction involving a health care facility, provider group, or provider, as specified.

EXECUTIVE SUMMARY

Under existing law, nonprofit health facilities that are subject to public benefit corporation law are required to obtain written consent from the AG prior to entering into an agreement to sell, transfer, lease, exchange, option, convey, or otherwise dispose of assets, or transfer control or governance of assets. (Corp. Code § 5914 et. seq.) The AG is required to review the agreement to determine, among other things, whether the proposed agreement or transaction is in the public interest. (Corp. Code. § 5917(i).) This bill seeks to enact a similar requirement for private equity groups or hedge funds prior to a transaction with a health care facility, provider group, or a provider, as specified. The bill is sponsored by the Attorney General. The bill is supported by numerous organizations, including, among others, labor organizations, advocates for health care access and affordability, and associations representing physicians and other providers. The bill is opposed by various organizations, including, among others, associations representing hospitals, dental and orthopedic providers, and businesses and private equity investors. The bill passed the Senate Health Committee on a vote of 6 to 2.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Requires any non-profit corporation that operates or controls a health facility to provide written notice to, and obtain the written consent of, the Attorney General (AG) prior to entering into any agreement or transaction to do either of the following:
    a) 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
    b) 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. Code § 5914 & § 5920.)

2) Requires the AG, within 90 days of the receipt of a written notice of a proposed transaction involving a non-profit health facility, to notify the non-profit corporation in writing of the decision to consent to, give conditional consent to, or not consent to the agreement or transaction. (*Ibid*.)

3) Authorizes the AG to extend the 90-day deadline described above for one additional 45-day period if any of the following conditions are satisfied
    a) the extension is necessary to obtain specified information;
    b) the proposed transaction is substantially modified after the first public meeting conducted by the AG; or
    c) the proposed transaction involves a multi-facility health system serving multiple communities. (*Ibid*.)

4) Requires the AG to conduct one or more public meetings to hear comments from interested parties prior to issuing any written decision regarding a transaction involving a nonprofit health facility. (Corp. Code § 5916 & § 5922.)

5) 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. Code § 5917 & § 5923.)

6) 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. Code § 5917.7.)

7) Establishes the Office of Health Care Affordability (OHCA) in the Department of Health Care Access and Information (HCAI), which is responsible for analyzing the health care market for cost trends and drivers of spending, developing data-informed policies for lowering health care costs for consumers and purchasers, creating a state strategy for controlling the cost of health care and ensuring affordability for consumers and purchasers, and enforcing cost targets. (Health & Saf. Code § 127501.)

8) Requires OHCA to review and evaluate consolidation, market power, and other market failures through cost and market impact reviews of mergers, acquisitions, or corporate affiliations involving health plans, health insurers, hospitals, physician organizations, pharmacy benefit managers, and other health care entities. (*Ibid*.)

9) Requires OHCA to monitor cost trends, including conducting research and studies on the health care market, including, but not limited to, the impact of consolidation, market power, venture capital activity, profit margins, and other market failures on competition, prices, access, quality, and equity. (Health & Saf. Code § 127507.)

10) Requires OHCA to promote competitive health care markets by examining mergers, acquisitions, corporate affiliations, or other transactions that entail a material change to ownership, operations, or governance structure involving health plans, health insurers, hospitals or hospital systems, physician organizations, providers, pharmacy benefit managers, and other health care entities, in a manner supportive of the efforts of the AG, Department of Managed Health Care (DMHC), and California Department of Insurance. Requires OHCA to prospectively analyze those transactions likely to have significant effects, seek input from the parties and the public, and report on the anticipated impacts to the health care market. (*Ibid*.)

11) Requires a health care entity to provide OHCA with written notice of agreements or transactions that will occur on or after April 1, 2024, at least 90 days prior to entering into an agreement to do either of the following:
    a) Sell, transfer, lease, exchange, option, encumber, convey, or otherwise dispose of a material amount of its assets to one or more entities; or,
    b) Transfer control, responsibility, or governance of a material amount of the assets or operations of the health care entity to one or more entities. (*Ibid*.)

12) Exempts the following from 11) above:

a) agreements or transactions involving health plans that are subject to review by the DMHC director;
b) agreements or transactions involving health insurers that are subject to review by the Insurance Commissioner;
c) agreements or transactions where a county is purchasing, acquiring, or taking control, responsibility, or governance of an entity to ensure continued access in that county; and
d) agreements or transactions involving nonprofit corporations that are subject to review by the AG, as specified. (*Ibid*.)

13) Authorizes exempt agreements to be referred to OHCA for a cost and market impact review by the reviewing authority. (*Ibid*.)

14) Authorizes the court, in any civil action brought by the AG or a district attorney, in addition to granting such prohibitory injunctions and other restraints as it may deem expedient to deter the defendant from, and insure against, his committing a future violation, as specified, to grant such mandatory injunctions as may be reasonably necessary to restore and preserve fair competition in the trade or commerce affected by the violation. (Bus. & Prof. Code § 16754.5.)

This bill:

1) Requires a private equity group or hedge fund to provide written notice to, and obtain the written consent of, the AG prior to a transaction between it and any of the following:
    a) a health care facility, which includes hospitals, clinics, labs, long-term care, outpatient settings, ambulatory surgical centers, clinical laboratories, imaging facilities and others;
    b) a provider group;
    c) a provider, if the private equity group or hedge fund has been involved, directly or indirectly, in a transaction involving a health care facility, provider group, provider, or related health care services within the past seven years; or
    d) any health care facility, provider group, or provider as described in c), above, under common control or affiliated with a payor, if the private equity group or hedge fund has been involved, directly or indirectly, in a transaction involving a health care facility, provider group, or provider.

2) Requires a private equity group or hedge fund to provide advance written notice to the AG before a transaction between a private equity group or hedge fund and a nonphysician provider or between a private equity group or hedge fund and a provider, if the nonphysician provider has gross annual revenue of more than $4,000,000 or the provider has gross annual revenue between four million dollars $4,000,000 and $25,000,000 and is not required to provide written notice under 1), above. Transactions between a private equity group or hedge fund and a

nonphysician provider, or transactions between a private equity group or hedge fund and a provider, that are required to be notified are not subject to consent by the Attorney General.

3) Authorizes the AG to grant a waiver from the notice and consent requirements if all of the following conditions apply:
    a) The party makes a waiver request by submitting, in writing, a description of the proposed transaction, a copy of all documents that effectuate any part of the proposed acquisition or change of control, an explanation of why the waiver should be granted, and any other information the Attorney General determines is required to evaluate the waiver request.
    b) The health care facility's, provider group's, or provider's operating costs have exceeded its operating revenue in the relevant market for three or more years and the party cannot meet its debts as they come due.
    c) The health care facility, provider group, or provider is at grave risk of immediate business failure and can demonstrate a substantial likelihood that it will have to file for bankruptcy under Chapter 11 of the Bankruptcy Act (11 U.S.C. Sec. 1101 et seq.) absent the waiver.
    d) The health care facility, provider group, or provider provides substantial evidence that it is at risk of liquidation under Chapter 7 of the Bankruptcy Act (11 U.S.C. Sec. 701 et seq.).
    e) The transaction will ensure continued health care access in the relevant markets.
    f) The health care facility, provider group, or provider has made commercially reasonable best efforts in good faith to elicit reasonable alternative offers that would keep its assets in the relevant markets and that would pose a less severe danger to competition and access to care than the proposed transaction.

4) Provides that written notice to, and the consent of, the Attorney General is not required for a transaction or agreement between a health care service plan and another payor that is not under common control or affiliated with a health care facility, provider group, or provider that is subject to review by the Director of DMHC pursuant to subdivision (b) of Section 1399.65 of the Health and Safety Code.

5) Defines various terms, including:
    a) "Hedge fund" means a pool of funds managed by investors for the purpose of earning a return on those funds, regardless of the strategies used to manage the funds. Hedge funds include, but are not limited to, a pool of funds managed or controlled by private limited partnerships.
        i. Hedge fund does not include:
            1. Natural persons or other entities that contribute, or promise to contribute, funds to the hedge fund, but otherwise do not participate in the management of the hedge fund or the fund's

assets, or in any change in control of the hedge fund or the fund's assets.

2. Entities that solely provide or manage debt financing secured in whole or in part by the assets of a health care facility, including, but not limited to, banks and credit unions, commercial real estate lenders, bond underwriters, and trustees.

b) "Nonphysician provider" means a group of two or more health professionals that are licensed as defined under Division 2 (commencing with Section 500) of the Business and Professions Code, except for a provider or a provider group.

c) "Payor" means a private or public entity that is: a health insurer, a health care service plan or specialized mental health care service plan, Medi-Cal managed care plan, a publicly funded health care program, a third party administrator, any public or private entity, other than an individual, that arranges, pays for, or reimburses for any part of the cost for the provision of health care, or an organization or business entity that purchases health care services.

d) "Provider" means a group of two to nine licensed health professionals acting within their scope of practice, including a lawfully organized group of two to nine physicians that provides, delivers, or furnishes health care services, except for a provider group.

e) "Provider group" as a group of 10 or more licensed health professionals, or, two to nine licensed health professionals with gross annual revenue over $25 million. A provider group may include any combination of licensed health professionals but does not include a professional medical corporation or medical partnership that provides, delivers, or furnishes health care services and is composed of nine or fewer physicians with gross annual revenue of less than $25 million.

f) "Transaction" means the direct or indirect acquisition in any manner, including, but not limited to, lease, transfer, exchange, option, receipt of a conveyance, creation of a joint venture, or any other manner of purchase, by a private equity group or hedge fund of a material amount of the assets or operations, or a change of control, of a health care facility, provider group, or provider doing business in this state.

    i. A transaction involves a "material amount of the assets or operations" if either the transaction affects more than 15 percent of the market value or ownership shares of the health care facility, provider group, or provider or the transaction involves a hospital. A transaction that vests rights significant enough to constitute a change in control, including, but not limited to, supermajority rights, veto rights, exclusivity provisions, and similar provisions, involves a "material amount of the assets or operations" even if less than 15 percent of the market value or ownership shares of the health care facility, provider group, or provider is affected.

6) Requires the notice to be submitted at the same time that any other state or federal agency is notified, and otherwise to be provided at least 90 days before the transaction, and to contain information sufficient to evaluate the nature of the transaction and information sufficient for the AG to determine that the specified criteria have been met or that a waiver may be granted.
    a) Authorizes the AG to extend this 90-day period for one additional 45-day period, in addition to any time for which the period is stayed, if specified conditions are met.
    b) Authorizes the AG to extend the timeframes by 14 days if the AG decides to hold a public meeting.
    c) If the time periods expire and the AG has not issued a written decision, the private equity group or hedge fund may close the transaction.

7) Authorizes the AG to consent to, give conditional consent to, or not consent to a transaction depending on the Attorney General's determination of whether the transaction may have a substantial likelihood of anticompetitive effects, including a substantial risk of lessening competition or of tending to create a monopoly, or may create a significant effect on the access or availability of health care services to the affected community.

8) Requires the AG to apply the "public interest standard" when making a determination. Public interest is 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 all health care services for local communities, regions, or the state as a whole. Establishes the following additional parameters:
    a) "protecting competitive and accessible health care markets" includes considering the substantial risk of lessening competition in horizontal, vertical, or related markets, the substantial risk of anticompetitive effects from increased leverage or the ability to tie, the substantial risk of foreclosing competitors in the same or related markets, the substantial risk of decreased access or services in local markets, any other negative effects from the transaction, any benefits from the transaction that are specific to the transaction, any views from local communities on the transaction, and any other factors the AG determines to be a public benefit;
    b) "negative effects" may involve the substantial risk of increases in prices or costs, decreases in quality, or the lessening of access to or availability of services; and
    c) "benefits from the transaction" may include price or cost decreases directly passed to patients, improvements in access or availability of services in the community, or capital improvements that will benefit local community care where that financing cannot be reasonably obtained elsewhere.

9) Authorizes the AG, in the public interest, to take account of any other negative or positive effects of the transaction. Prohibits transactions from being presumed to be

efficient for the purpose of assessing compliance with the public interest standard.

10) Requires the AG to make a written determination, including the factual and legal basis for that determination.

11) Authorizes the AG, prior to issuing a written determination, to hold a public meeting, which may be held in any of the counties in which the transaction will take place, or, in or in the case of a declaration of an emergency in any of those counties or in the state, online, to hear comments from interested parties.
    a) Prior to holding a public meeting, the AG is required to provide notice of the time and place of any meetings by electronic publication, or publication in newspapers of general circulation, to consumers that may be affected by the transaction, as provided.

12) Authorizes the private equity group or hedge fund, within 14 days after service of the written determination, to elect to proceed to an evidentiary hearing before an administrative law judge (ALJ) assigned to the Office of Administrative Hearings on the issue of whether the transaction, as proposed, may have a substantial likelihood of anticompetitive effects, including a substantial risk of lessening competition or of tending to create a monopoly, or may create a significant effect on the access or availability of health care services to the affected, and any other issue identified by the AG in the written determination.

13) Requires the hearing to be conducted according to the following procedures:
    a) The AG is required to present evidence to support the written determination.
    b) The private equity group or hedge fund is required to present evidence in support of the request for review and the issues identified therein.
    c) All testimony received during the hearing is to be sworn.
    d) Any relevant evidence is to be admitted by the ALJ in accordance with the rules of evidence applicable to administrative proceedings.
    e) The ALJ has the authority to compel the attendance of witnesses and the production of documents.
    f) The ALJ has full discretion to determine the facts of the case.

14) Requires the AG to have the burden of proof to establish whether the transaction has a substantial likelihood of anticompetitive effects, including a substantial risk of lessening competition or of tending to create a monopoly, or may create a significant effect on the access or availability of health care services to the affected community, and all other factors forming the basis for the AG's written decision.

15) Requires the ALJ, at the conclusion of the administrative hearing, to establish such post-hearing briefing requirements as the administrative law judge deems appropriate.

a) Within 60 days after receipt of post-hearing briefs, if any, or at the close of the hearing, whichever is later, the ALJ must issue a statement of decision, which is to include findings of fact and conclusions of law regarding the issues presented during the hearing.
b) Within 45 days after service of the statement of decision, the AG must issue a final determination accepting or rejecting the statement of decision, in whole or in part, and consenting to, giving conditional consent to, or refusing to consent to the transaction. The Attorney General is required, relying solely on the administrative record, to set forth the specific facts and conclusions of law which support the final determination.

16) If the AG does not consent or gives conditional consent to a transaction in the final determination issued pursuant to 15)b), above, the private equity group or hedge fund may, within 30 calendar days after service of the final determination, seek judicial review of the final determination by filing a petition for a writ of administrative mandamus with the superior court pursuant to Section 1094.5 of the Code of Civil Procedure.
    a) Specifies that the administrative record consists of all of the following:
        i. the Attorney General's written determination;
        ii. the record of proceedings before the ALJ;
        iii. the statement of decision, including findings of fact and conclusions of law, issued by the ALJ following the proceedings; and
        iv. the AG's final determination;

17) Requires the superior court to consider the following issues in its consideration of the petition:
    a) whether the Attorney General proceeded without, or in excess of, jurisdiction;
    b) whether there was a fair trial;
    c) whether there was any prejudicial abuse of discretion, which is established if the AG has not proceeded in the manner required by law, the Attorney General's final determination is not supported by the findings, or the findings are not supported by the evidence.

18) Authorizes the superior court to exercise its independent judgment on the evidence, and provides that abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.

19) Requires the superior court, barring extraordinary circumstances or the consent of the parties, to issue its response to the petition not later than 180 days after the filing of the petition.

20) Prohibits a private equity group or hedge fund involved in any manner with a physician, psychiatric, or dental practice doing business in this state, including as an

investor in that physician, psychiatric, or dental practice or as an investor or owner of the assets of that practice, from either:

a) interfering with the professional judgment of physicians, psychiatrists, or dentists in making health care decisions; or
b) exercising control over, or be delegated the power to do, specified thins, including owning or determining the content of patient medical records, approving selection of medical equipment, or selecting, hiring, or firing physicians or other medical providers.

21) Prohibits a private equity group or hedge fund, or an entity controlled directly or indirectly in whole or in part by a private equity group or hedge fund, from entering into any agreement, or arrangement, with any physician, psychiatric, or dental practice doing business in this state that would enable the person or entity to interfere with the professional judgement of physicians, psychiatrists, or dentists in making health care decisions or exercise control or be delegated powers.

22) Prohibits any contract involving the management of a physician, dental, or psychiatric practice doing business in this state by, or the sale of real estate or other assets owned by a physician, dental, or psychiatric practice doing business in this state to, a private equity group or hedge fund, or any entity controlled directly or indirectly in whole or in part by a private equity group or hedge fund from explicitly or implicitly including any clause barring any provider in that practice from competing with that practice in the event of a termination or resignation of that provider from that practice, or from disparaging, opining, or commenting on that practice in any manner as to any issues involving quality of care, utilization of care, ethical or professional challenges in the practice of medicine or dentistry, or revenue-increasing strategies employed by the private equity group or hedge fund. Voids, any such explicit or implicit contractual clauses making them unenforceable, and against public policy.

23) Provides that the AG is entitled to injunctive relieve, and other equitable remedies, including recovery of attorney fees and costs.

24) Authorizes the AG to adopt regulations to enforce these provisions.

25) Provides that that these provisions do not narrow, abrogate, or otherwise alter the bar on the corporate practice of medicine or dentistry as set forth in any applicable state or federal law.

26) Makes this bill enforceable up to, but no further than, the maximum possible extent consistent with federal law and constitutional requirements. Makes the provisions severable if any are held invalid.

27) Exempts transactions involving private equity groups or hedge funds that are subject to review by the AG pursuant to this bill from the OHCA notice requirements to the same extent as notice requirements, as specified.

COMMENTS

1. Stated need for the bill

The author writes:

> Private Equity (PE) investments and acquisitions in health care are growing exponentially and research shows why these transactions need review to ensure they are in the public interest.
>
> Why do we need oversight? Because there is none. These transactions are currently flying under the radar without regulatory review and oversight. A recently published research paper by the California Health Care Foundation found these acquisitions resulted in higher prices, lower patient satisfaction, mixed to worse quality of care and worse financial outcomes.
>
> PE investment in health care in 2021 totaled $83 billion nationally and $20 billion in California. Compare that with the $12 billion and $1 billion, respectively, in 2005. PE's priority is on short-term profit for the investors. It takes control of an entity, restructures it and resells it at a profit within 3 to 7 years. Restructuring often involves "asset stripping," such as reductions in staff, replacing staff with lower cost staff, selling assets and limiting services provided.
>
> These acquisitions accelerate consolidation, reducing competition and creating monopolies that allow them to use their leverage to increase prices, negotiate higher fees that result in premium increases and restrict access to certain services, such as labor and delivery and reproductive health care. This can hit all communities hard, and more rural areas are especially vulnerable.
>
> Opponents will tell you that AB 3129 will risk closures of community hospitals or other facilities. What they don't tell you is their acquisitions often use large amounts of debt – 60 to 80 percent -- to finance the purchases and that debt is added to the books of the facilities. On May 7, just weeks ago, Steward Health Care, the struggling health care provider that relied on backing from private equity investors to quickly acquire dozens of community hospitals, including facilities in Massachusetts, Texas and Florida, announced in early May that it is filing for bankruptcy. Now the hospitals in these communities are at risk of closure.
>
> AB 3129 does not cut off or prohibit funding or investment for under-resourced or struggling hospitals or other health care facilities. If it is a change of control or an

acquisition, it will be reviewed by the AG to ensure it's in the public interest, and the AG will complete the review within a reasonable and predictable timeline defined in the language of the bill.

Opponents will tell you that this bill is unnecessary and that is what the Office of Health Care Affordability (OHCA) is for. It. Is. Not. I was intimately involved in the creation of OHCA. It was created to collect data, analyze cost drivers and develop policies to improve affordability, but they have no role in overseeing or approving these transactions before they happen. AB 3129 final language will make it clear that no duplication of cost and market impact reviews will occur for the entities covered under this bill.

Private equity acquisitions cannot continue under the radar. AB 3129 provides a process to assure these acquisitions do not create an anticompetitive environment.

Attorney General Rob Bonta, the sponsor of the bill, writes:

Over the past decade, there has been a sharp rise in private equity and hedge fund acquisitions of health care companies nationwide. Estimated deal values have totaled $750 billion between 2010 and 2019. Private equity often follows a 3 to 7-year timeline for entering and exiting new markets. When a short-term profit-driven business model is applied to our health care system, there is an incentive to raise prices, cut costs, and pay out any revenue to private equity investors. This often leads to staffing shortages, failures to pay vendors, and increased costs for patients and employers. Instead of practicing medicine in the best interest of patients, physicians are directed to hit patient quotas and push more profitable procedures. Over time, this directly leads to the closure or scaling back of health care providers.

In health care facilities, private equity backed acquisitions have led to a higher rate of serious medical errors in hospitals and increased mortality in nursing homes. Increased deaths among seniors in nursing homes is likely due to a combination of lower staffing levels and cutting corners on meeting standards of care. Also, appointment times can be curtailed and waiting times increased. Ultimately, this type of impact has been particularly noticeable on California patients that live in areas with limited health care access.

Private equity transactions are leading to further consolidation in the health care market through a practice called "roll ups" where health care providers purchase smaller providers in a given area or specialty to aggregate market power. As a result, competition is curtailed. Health care prices rise. Health care worker wages stagnate. Comparing communities where private equity dominate physician specialties to other U.S. markets, price increases are up to 3 times higher.

> By establishing review of private equity and hedge fund acquisitions of health care facilities and provider groups and enhancing oversight of the relationship between these corporate entities and health care providers, AB 3129 would protect health care access, availability, choice, cost, and quality for California communities across the state. […] [fn. omitted]

2. Background

a. Private equity in health care

The Senate Health Committee provides the following background on private equity in health care:

> According to a May 2024 California Health Care Foundation report, private equity investment into health care totaled about $83 billion nationally and $20 billion in California in 2021. While the majority of overall private equity dollars has been directed at biotechnology and pharmaceuticals in recent years, private equity acquisitions of health care service providers (such as clinics, hospitals, and nursing homes) make up a significant portion of all private equity health care deals. In California, acquisitions of providers totaled $4.31 billion dollars between 2019 and 2023, and represented roughly a third of all deals. Available data, while limited, show that private equity has gained a small but meaningful ownership foothold among certain kinds of providers. Private equity firms now own approximately 8% of all private hospitals in the U.S. and approximately 6% of private hospitals in California. Key features of private equity in health care involve a three to seven year investment strategy, limited financial risk for the private equity firm at the financial peril of the acquired entity, roll-ups of multiple neighboring clinical entities to command higher prices, and minimal tax and regulatory liability for the firm. Peer reviewed studies found that private equity acquisition led to higher costs for patients or insurers, with some finding no difference. Higher charges, which are often passed along to patients, have been documented in clinics, hospitals, and nursing homes. Twenty-seven studies reviewed found 12 with a harmful impact on quality of care, nine found a mixed impact, and three found a neutral impact. One rigorous study found that private equity acquisitions led to an 11% higher mortality rate during short-term nursing home stays.

b. Private equity playbook – seek a high return on investment in a short period of time

In a report by Private Equity Stakeholder Project, one of the sponsors of the bill, entitled *Private Equity Descends on Rural Healthcare* it notes that private equity firms seek high returns on their investments, generally trying to double or triple the investment in a

condensed time period, generally less than 10 years.[1] Typical ways this return on investment is achieved is through cutting operating costs, such as reducing staffing or the provision of less profitable services, such as obstetrics and pediatric care.[2] Another way private equity firms seek to make money is through sale-leaseback transactions where they sell the land a hospital, clinic, or nursing facility is located and require, as part of the sale, that medical facility enter a lease with the seller.[3] This provides a quick way for the private equity firm to turn an asset into cash, but can leave the medical facility with higher monthly payments than before the sale and also fewer assets.[4] Similarly, a private equity firm can take on new debt for the health facility, pay its self with the borrowed money, and then saddle the health facility with the debt and repayment of the loan. This leaves the health facility in a precarious position of carrying additional debt and having to repay the loan, without getting the benefit of the being able to use the borrowed money to invest in its facilities or services.[5]

There have been numerous documented situations that demonstrate the dangers private equity investment can pose in health care. One example is of Steward Health Care, which owns some 30 hospitals across eight states and "relied on backing from private equity investors to quickly acquire dozens of community hospitals."[6] Steward Health Care has entered bankruptcy. According to a year-and-a-half-long investigation by CBS News, reviewed records demonstrated that money was redirected away from hospital operations, such as selling off real estate, leading to the closure of facilities and "risking a shortage of potentially lifesaving supplies."[7] Another is Prospect Medical, which received $205 million in private equity funding and expanded from five hospitals in California to 17 across the U.S.[8] ProPublica reported that the investors have extracted $400 million in dividends and fees by saddling these hospitals with debt.[9] Not surprisingly, this has impacted patient care including: elevator breakdowns requiring patients to be wheeled across streets in Los Angeles, inability to fuel ambulances or access other needed supplies due to nonpayment of creditors, issues with bed bugs, and dilapidated facilities.[10] The article further noted that:

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[1] Eileen O'Grady, et. al., *Private Equity Descends on Rural Healthcare*, Private Equity Stakeholder Project, (Jan. 2023), available at https://pestakeholder.org/wp-content/uploads/2023/02/PE_Rural_Health_Jan2023.pdf at 4.
[2] *Ibid*.
[3] *Ibid*.
[4] *Ibid*.
[5] *Ibid.*
[6] Matt Schooley, Christina Hager, Michael Kaplan, *Steward Health Care files for Chapter 11 bankruptcy*, WBZ News, (May 7, 2024), available at https://www.cbsnews.com/boston/news/steward-health-care-bankruptcy/.
[7] *Ibid*.
[8] Peter Elkind & Doris Burke, *Investors Extracted $400 Million From a Hospital Chain That Sometimes Couldn't Pay for Medical Supplies or Gas for Ambulances*, ProPublica, (Sept. 30, 2020), available at https://www.propublica.org/article/investors-extracted-400-million-from-a-hospital-chain-that-sometimes-couldnt-pay-for-medical-supplies-or-gas-for-ambulances.
[9] *Ibid*.
[10] *Ibid*.

> All but one of Prospect's hospitals rank below average in the federal government's annual quality-of-care assessments, with just one or two stars out of five, placing them in the bottom 17% of all U.S. hospitals. The concerns are dire enough that on 14 occasions since 2010, Prospect facilities have been deemed by government inspectors to pose "immediate jeopardy" to their patients, a situation the U.S. Department of Health and Human Services defines as having caused, or is likely to cause, 'serious injury, harm, impairment or death.'[11]

The author and sponsor of the bill state that the goal of this bill is to ensure that situations described above do not happen in California. By requiring prior approval and the ability for the AG to provide conditional consent the bill would help ensure that private equity investment in health facilities in this state will not merely strip the health facility of value and assets, leaving consumers of its services in the lurch.

c. AG review of transactions for nonprofit corporations that operate or control a health facility

Since 1997, California law has required nonprofit health facilities that are subject to public benefit corporation law to obtain written consent from the AG prior to entering into an agreement to sell, transfer, lease, exchange, option, convey, or otherwise dispose of assets, or transfer control or governance of assets. (Corp. Code § 5914 et. seq.) The AG is required to review the agreement to determine, among other things, whether the proposed agreement or transaction is in the public interest. (Corp. Code. § 5917(i).) Additionally, the AG is required to conduct at least one public meeting in the county where the health facility is located before issuing a written opinion making the determination whether to consent to, give conditional consent to, or not consent to any elimination or reduction of emergency medical services. (Corp. Code. § 5916.)

d. OHCA

OHCA was established through the California Health Care Quality and Affordability Act (Act) (SB 184 (Committee on Budget and Fiscal Review, Ch. 47, Stats. 2022)), which was enacted in recognition that health care affordability has reached a crisis point. The Act emphasized that it is in the public interest that all Californians receive health care that is accessible, affordable, equitable, high-quality, and universal. OHCA is responsible for monitoring the impact of market consolidation on cost trends and is required to evaluate and review prospective transactions that could adversely impact competition and affordability in California's health care market. Health care entities are required to provide OHCA with 90-day advance notice of material changes in ownership or governance such as mergers, acquisitions, and corporate affiliations; however, OHCA does not have authority to stop a transaction or require

[11] *Ibid.*

conditions on a transaction. If a transaction or other material change is likely to have a significant impact on market competition, the state's ability to meet cost targets, or costs for purchasers and consumers, OHCA will conduct a cost and market impact review. OHCA will make its findings and issue a preliminary report upon completion of that review, and allow all affected parties and the public to respond to the preliminary report. After all of these steps, OHCA will issue a final report. If a transaction is subject to a cost and market review, the transaction may not be implemented until 60 days after OHCA issues its final report. Based on the results, OHCA will then work with other state agencies to address market consolidation as appropriate, including referring matters to the AG. The AG has the authority under existing antitrust statutes to pursue cases they believe violate those statutes.

The author and sponsor of the bill believe that OHCA's review is not sufficient because it can only issue reports and recommendations with a 60-day stay for the transaction to be finalized. If the AG believes a transaction was anticompetitive under existing law it would need to institute a suit within that 60 day period. They also argue that it is extremely difficult to undo a merger or the harms to consumers after the fact and that is why prior notice and authority to approve is necessary.

3. Prior notice and consent of the AG for a transaction between a private equity group or hedge fund with specified health care facilities, provider groups, or providers

This bill seeks to require prior notice and consent of the AG for a transaction between a private equity group or hedge fund with specified health care facilities, provider groups, or providers. A transaction means the direct or indirect acquisition in any manner, including, but not limited to, lease, transfer, exchange, option, receipt of a conveyance, creation of a joint venture, or any other manner of purchase, by a private equity group or hedge fund of a material amount of the assets or operations, or a change of control, of a health care facility, provider group, or provider doing business in this state. A transaction involves a "material amount of the assets or operations" if either the transaction affects more than 15 percent of the market value or ownership shares of the health care facility, provider group, or provider or the transaction involves a hospital. A transaction that vests rights significant enough to constitute a change in control, including, but not limited to, supermajority rights, veto rights, exclusivity provisions, and similar provisions, involves a "material amount of the assets or operations" even if less than 15 percent of the market value or ownership shares of the health care facility, provider group, or provider is affected. The bill would not apply to transactions that occurred prior to January 1, 2025, or to any pledge of assets solely to secure a debt obligation, including, but not limited to, security agreements, deeds of trust, indentures, financing statements, and liens.

The bill would provide the AG with the power to approve, conditionally approve, or deny a proposed transaction depending on the AG's determination of whether the transaction may have a substantial likelihood of anticompetitive effects, including a

substantial risk of lessening competition or creating or tending to create a monopoly, or may create a significant effect on the access or availability of health care services to the affected community. The bill requires the AG in making the determination to apply the public interest standard.

The term "public interest" is 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 all health care services for local communities, regions, or the state as a whole. Protecting competitive and accessible health care markets includes considering the substantial risk of lessening competition in horizontal, vertical, or related markets, the substantial risk of anticompetitive effects from increased leverage or the ability to tie, the substantial risk of foreclosing competitors in the same or related markets, the substantial risk of decreased access or services in local markets, any other negative effects from the transaction, any benefits from the transaction that are specific to the transaction, any views from local communities on the transaction, and any other factors the Attorney General determines to be a public benefit. Negative effects may involve the substantial risk of increases in prices or costs, decreases in quality, or the lessening of access to or availability of services. Benefits from the transaction may include price or cost decreases directly passed to patients, improvements in access or availability of services in the community, or capital improvements that will benefit local community care if that financing cannot be reasonably obtained elsewhere. The Attorney General may, in the public interest, also take account of any other negative or positive effects of the transaction. Transactions are not to be presumed to be efficient for the purpose of assessing compliance with the public interest standard.

The bill requires the AG to make a written determination, including the factual and legal basis for that determination. The AG is authorized to hold a public meeting, which may be held in any of the counties in which the transaction will take place or online, if there is a declaration of an emergency in any of those counties or in the state at the time, to hear comments from interested parties. The bill provides for an administrative hearing process for a private equity group or hedge fund to contest the AG's determination. The hearing is to be conducted by an ALJ and provides for the introduction of evidence and testimony of witnesses. The AG has the burden of proof to establish whether the transaction has a substantial likelihood of anticompetitive effects and all other factors forming the basis for the Attorney General's written decision. The AG is required to either accept or reject the statement of decision issued by the ALJ within 45 days of the decision, which will be the AG's final determination. A private equity group or hedge fund may appeal the decision to a court pursuant to a writ of mandamus. The bill specifies what issues a court can consider on appeal, but authorizes the court to exercise its own independent judgement on the evidence. Abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.

4. Opposition concerns and issues with the bill

a. General opposition concerns and issues

A common concern among the opposition is that this bill will chill or deter investment in this state's health care market. The California Hospital Association asserts this is already happening for transactions with nonprofit health facilities and entities which require prior approval and consent by the AG under existing law. They note that the existing process requires the investment of thousands of hours and work from financial, legal, and other experts in order to submit a proposed transaction to the AG, and that the process can take up to a year or longer and can result in costs of hundreds or thousands of dollars billed to the hospital by the AG for reviewing the transaction. They argue that a lack of investment will actually lead to less access to services for patients and stifle the ability of the health care market in California to expand.

Additionally, opposition also asserts that this bill is premature and that there has not been enough data reported by OHCA to justify requiring prior approval of private transactions. They believe that after all the time, effort, and resources spent to establish OCHA, the Legislature should let OCHA do its job and use the data it provides to make informed decisions based off of that data. They note that the AG already has authority under existing antitrust laws to investigate and prosecute anticompetitive behavior, as does the federal government. One notable instance of this happening is the 2019 settlement that the AG entered into with Sutter Health for $575 million.[12]

Opposition also argues that this bill grants the AG unfettered authority to approve or deny private transactions as the definition of private equity or hedge fund is extremely broad and encompasses almost all private investments, not just those traditionally thought of as private equity or hedge funds. The American Investment Council argues that the public interest standard in the bill leads to potential due process issues since it includes a "catch all" that the AG can take account of any other negative or positive effects of the transaction. They state there is no way for potential investors to accurately predict if a potential transaction would meet the public interest criteria in the bill. The American Investment Council also notes that the bill broadly defines change of control, so it could include even immaterial operations of a health care entity—the appointment or substitution of a single board member or the appointment of a board observer—since the bill does not specify that change in control would mean a 50 percent or more ownership change. The Chamber of Commerce writes in their opposition letter that "a free market cannot appropriately function if certain segments of that market are subject to AG oversight whenever they want to engage in a transaction" and that "allowing

[12] Press Release, *Attorney General Bonta Announces Final Approval of $575 Million Settlement*, (Aug, 27, 2021.), available at https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-final-approval-575-million-settlement-sutter.

state authorities to unilaterally determine which private transactions are good or bad prior to them taking place runs counter to a free market system."

b. Requests for carve outs

Western Dental seeks a carve out from the bill for all transactions that are already subject to review by the Director of DMHC. A recent amendment to the bill carved out a transaction or agreement between a health care service plan and another payor that is not under common control or affiliated with a health care facility, provider group, or provider. Western Dental has indicated they are still opposed unless amended to extend this exception to all transactions subject to review by the Director of DMHC.

The County of Santa Clara seeks an amendment to exempt a political subdivision of the state that engages in a transaction to directly or indirectly purchase, acquire, or take control, responsibility, or governance of a health care facility, hospital, and provider group from a private equity group or hedge fund.

The California Independent Physician Practice Association writes that various provisions of the bill need to be addressed to ensure the state remains committed to preserving independent medical practices as a competitive counterbalance to higher cost care furnished in the hospital and health system setting. They also have concerns with the potential for double review under this bill and OHCA and seek (1) to carve out prior approval and review by the AG for providers, and (2) carve out from OHCA review of any transactions required to receive prior approval under this bill.

c. Concerns with non-compete language in the bill

The California Independent Physician Practice Association and the American Investment Council both express concerns over the language in Section 1190.40 of the bill and that it could be interpreted to abrogate the existing exception available under California law that allows for noncompete agreements entered in connection with the sale of a business. (*see* Bus. and Prof. Code §§ 16600 & 16601.) They ask that this issue be addressed.

5. Statements in support

The California Medical Association writes in support, stating:

> CMA strongly supports the provisions in the bill that strengthen the Ban on the Corporate Practice of Medicine (Corporate Bar) which maintains the autonomy and integrity of the patient-physician relationship in medical decision-making by preventing non-physicians and lay entities from influencing medical decisions for profit. To effectively strengthen the Ban on the Corporate Practice of Medicine via enforcement by the Attorney General against P.E., proposed amendments ensure

that the bill does not impede practices' ability to enter business arrangements and contracts that improve their day-to-day operations and help to increase quality and improve patient health outcomes.

Given the dangerous consequences P.E. has on cost, quality and access to care for all Californians, CMA respectfully requests that the bill move forward to ensure appropriate review of P.E. transactions and protect the patient-physician relationship against private equity in the health care delivery system.

A coalition of various organizations, including labor organizations, health advocacy organizations, and small businesses, write in support, stating:

Private equity acquisitions in health care have accelerated drastically in the last decade, totally $1 trillion nationally. In California, according to the California Health Care Foundation, private equity acquisitions of health care providers totaled $4.31 billion dollars between 2019-2023 and represented a third of all health care deals. Fund managers have little knowledge of health care, and use investments in health care organizations like they would another opportunity to maximize profit. They often aggressively seek quick profits, and own health care entities for a much shorter period than other buyers, averaging three to seven years. For example, a tactic used by firms is to flip the asset by selling their newly purchased health care organization to companies like CVS or Amazon, for a much higher price. But to attract those buyers, private equity firms boost profits through cutting costs, raising prices or increasing the number of more profitable procedures, and cutting less profitable services – even if those services are needed in the community. When private equity firms use health care facilities as collateral, they leave them with debt; and high levels of debt can increase their risk of bankruptcy – raising concerns about closures and loss of services.

All these choices are at the expense of the consumers who are going to hospitals and doctors to get the health care they need. Studies have shown that private equity acquisitions have negative impacts on costs, quality and access to care. Comparing communities where private equity dominate physician specialties, a study found that price increases are up to 3 times higher; And research has shown there are dangerous impacts of private equity acquisition on health outcomes in hospitals and skilled nursing homes, including higher death rates in skilled nursing facilities.

For decades the Attorney General has protected health consumers with oversight over nonprofit health care mergers, with the authority to review proposed mergers for their impacts on the health of communities, and approve, deny or approve with conditions these acquisitions. AB 3129 expands this to include private equity and hedge fund acquisitions to protect consumers from potential negative impacts before harm can be done.

6. Statements in opposition

The United Hospital Association writes in opposition, stating:

> […] Private equity investment helps provide capital for various purposes, sometimes serving as the only financing option available. For example, private equity investment has been used to purchase hospitals out of bankruptcy and to invest in other hospitals that do not qualify for commercial or bond financing. Without this investment, many of these facilities would be forced to close and residents of the communities they serve would lose access to much needed services.
>
> Private investment has helped bring new or additional services to communities across the state. These investments not only improve access but also can bring more advanced technology to patients, practitioners, and health facilities statewide.
>
> Across California, patients are facing delays in accessing emergency care, mental health services, and other medical procedures. Rather than creating unnecessary obstacles, the state should be encouraging additional investment in California's health care system. AB 3129 creates barriers to new investment at a time when more investment is needed.

Children's Choice Pediatric Dental Care (Children's Choice) writes in opposition, stating:

> If passed, AB 3129 will result in less capital being available to fund and diminished access to care for patients throughout the state. The underlying premise of the bill is flawed and the bill fails to provide the Office of Health Care Affordability ("OHCA") with sufficient time to collect and report data informative to the legislature regarding health care expenditures and cost trends in order to develop data-informed policies. […]
>
> We have been able to expand to 25 locations, because we have been able to access capital from a private equity firm. We plan to open new clinics that are dedicated to providing quality dental care in underserved communities and ensuring that low-income Californians' dental needs are met. However, the prospect of the enactment AB 3129 is threatening our ability to raise additional capital from private equity. The enactment of AB 3129 will send a strong message that private equity capital investment is no longer welcome in California. […]
>
> Rather than enact AB 3129, we urge the legislature to instead allow the Office of Health Care Affordability (OHCA) to collect sufficient data under its new transaction approval regime to analyze the health care market for cost drivers and trends and to develop data-informed policies.

SUPPORT

Attorney General Rob Bonta (sponsor)
ACCE Action
American Academy of Emergency Medicine
American Federation of State, County and Municipal Employees of California
Asian Resources Inc.
California Academy of Family Physicians
California Dental Association
California Labor Federation
California LGBTQ Health and Human Services Network
California Medical Association
California Nurses Association
California Pan-Ethnic Health Network
California Physicians Alliance
California Public Interest Research Group
California State Association of Psychiatrists
California State Council of Service Employees International Union
California Teachers Association
Coalition for Patient-Centered Care
Courage California
Health Access California
Long Beach Gray Panthers
Maternal and Child Health Access
National Union of Healthcare Workers
NextGen America
Private Equity Stakeholder Project
Public Law Center
Purchaser Business Group on Health
Reproductive Freedom for All California
Small Business Majority
The Leukemia and Lymphoma Society

OPPOSITION

American Investment Council
Association of Dental Support Organizations
Balboa Nephrology Medical Group
California Chamber of Commerce
California Hospital Association
California Independent Physician Practice Association
California Orthopedic Association
Children's Choice Dental Care
County of Santa Clara

Ivy Fertility
Smile Brands
United Hospital Association
Western Dental Services, Inc.

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 2080 (Wood, 2022) would have, among other things, required a medical group, hospital or hospital system, health facility, health plan, health insurer, or pharmacy benefit manager to provide written notice to, and obtain written consent from, the AG before entering into an agreement or transaction involving a material amount of assets. AB 2080 was not heard by the Senate Health Committee at the request of the author.

SB 977 (Monning, 2020) would have, among other things, required a health care system, a private equity group, or hedge fund to provide written notice to, and obtain the written consent of, the AG prior to a change in control, or an acquisition, between the entity and a health care facility or provider, and would have provided for an expedited review process for transactions under $1 million, county facilities, and academic centers, as defined. SB 977 was never taken up for a vote on the Assembly Floor.

AB 595 (Wood, Ch. 292, Stats. 2018) required prior approval by DMHC for a health plan that intends to merge or consolidate with, or enters into an agreement resulting in its purchase, acquisition or control by, any entity and allowed the DMHC to disapprove a transaction if the transaction would substantially lessen competition.

PRIOR VOTES

Senate Health Committee (Ayes 6, Noes 2)
Assembly Floor (Ayes 50, Noes 16)
Assembly Appropriations Committee (Ayes 11, Noes 4)
Assembly Judiciary Committee (Ayes 9, Noes 2)
Assembly Health Committee (Ayes 12, Noes 4)
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