AB 2080: A Statutory Solution to Addressing Anticompetitive Transaction & Behavior in the Healthcare Market

Consistent research has shown that consolidation in the health industry leads to an increase in healthcare costs without improved quality of care. Though many healthcare mergers have previously gone unchecked, antitrust enforcers are increasingly using their statutory and regulatory authority and the court system to address healthcare consolidation concerns.[1] In California, the attorney general has had the statutory authority to review *non-profit* hospital mergers for decades but the limited oversight does not extend over all anticompetitive transactions and behavior. This session, the legislature introduced AB 2080 aimed to broaden existing review authority of healthcare transactions. As the bill is currently being considered in the Assembly, we take a closer look at the need for the legislation, analyze its key provisions that would enhance existing law, and examine some of the opposition arguments to the proposal.

The Need to Address Healthcare Consolidation and Market Power

AB 2080—also known as The Health Care Consolidation and Contracting Fairness Act of 2022—was introduced by Assemblymember Jim Wood and motivated by substantial research finding that healthcare consolidation leads to less access and higher prices without improved quality of care.[2] “We have reviewed, time and time again, many reports and studies that

show these types of transactions in health care have, more often than not, resulted in higher health care costs and profits for the corporations rather than lower cost and better health care for patients," said Wood. "That's the wrong direction and absolutely something that needs more careful scrutiny by the Attorney General."[3] An increase in cost means more money out the of the pockets of Californians due to increases in premiums and costs of various procedures. According to a bill analysis, citing the Medicare Payment Advisory Commission which reviewed the published research on hospital consolidation, a "preponderance of the evidence suggests that hospital consolidation leads to higher prices."[4] For example, one study found that hospitals that do not have competitors within a 15-mile radius have prices that are 12% higher than hospitals in markets with four or more competitors.[5] But growing costs is not the only issue, as consolidation often leads to a reorganization of service delivery, which means less choice and thus less access to care. This phenomenon has been observed by the California AG with existing oversight of non-profit hospital mergers.

In response, the California legislature have made repeated efforts to address consolidation and anticompetitive contracting terms that negatively impact healthcare cost, access, and quality for Californians. In the current legislative term, Wood introduced his priority bill, AB 1130, which would create the Office of Health Care Affordability (OHCA) to analyze healthcare market cost drivers and trends (see The Source's post for more information). Though the AB 1130 proposal, currently in the Senate, would give OHCA the power to monitor the impact of consolidation on healthcare competition and prices, it does not impact the existing authority over review and enforcement of healthcare transactions. In terms of directly enhancing enforcement authority, SB 538 from 2017 proposed to prohibit

certain anticompetitive terms in provider contracts (e.g., gag clauses and all-or-nothing clauses), and SB 977 (2020) proposed to require healthcare systems, private equity groups, and hedge funds to obtain AG approval prior to an acquisition or change in control with any other healthcare facility or provider. While SB 538 and SB 977 did not pass, AB 2080 is the newest attempt that encompasses much of those two proposals.

The Proposal: AB 2080 Expands Upon Existing Law

Building upon past legislative efforts, AB 2080 consists of two main components aiming to curb anticompetitive practices: (1) expansion of Attorney General and DMHC's merger review and consent authority and (2) prohibition on anticompetitive contracting terms.

Expansion on oversight authority over healthcare transactions

First, AB 2080 expands and enhances the existing merger and transaction review authority of the Attorney General and the DMHC Director. While the federal and state governments have regulatory antitrust oversight in place, AB 2080 would strengthen, expand, and clarify California's existing authority to review healthcare mergers and acquisitions.

- *Attorney General's authority over healthcare transactions*

Existing California law requires non-profit hospitals to give premerger notification to the AG, who then has the authority to review and decide whether to consent to, give conditional consent to, or not consent to a proposed transaction involving the *non-profit* hospital.[6] AB 2080 would expand the Attorney General's current review authority beyond just non-profit hospital mergers. The proposal would require a medical group, hospital or hospital system, health care service plan health

insurer, or pharmacy benefit manager to notify the Attorney General at least 90 days before entering an agreement to make a material change of $5 million or more that either (1) sells, transfers, leases, exchanges, encumbers, conveys, or otherwise disposes of a material amount of its assets; or (2) transfers control, responsibility for, or governance of a material amount of its assets. Though the notice requirement reaches most health care entities, nonphysician providers and certain ambulatory surgical centers are excluded from the notice requirement.

As with existing law, after receiving notification, the Attorney General then has the discretion to consent to, give conditional consent to, or not consent to the proposed transaction. However, the Attorney General is required to hold at least one public meeting before making its decision. The Attorney General also has wide discretion to:

- use any factors it deems relevant in its decision inquiry,
- consult, contract, and receive advice from state agencies and experts or consultants to assist in reviewing the proposed transactions,
- monitor ongoing compliance terms, and
- adopt regulations

The Attorney General must notify the entity within 90 days of its decision, but they may extend its decision for one 45-day period under specific enumerated situations. Additionally, the Assembly's Health Committee recently amended AB 2080 giving an entity an opportunity to request an administrative hearing to appeal the AG's decision to not approve the proposed transaction.

In summary, the current AB 2080 mirrors the existing authority of the Attorney General over proposed non-profit hospital mergers but extends that authority to most other healthcare transactions valued at $5 million or more.

- *DMHC Director's authority over health plan mergers*

Like the proposed provisions expanding the Attorney General's authority over healthcare provider transactions, AB 2080 also proposes similar enhancements to the DMHC Director's existing authority over proposed health plan mergers and acquisitions. Through AB 595 (2018), also authored by Wood, health plans must provide premerger and acquisition notification to the DMHC Director, who then has authority to disapprove the transaction if the Director finds it would substantially lessen competition in the health plan products or create a monopoly in the state. Notably however, AB 595's notification requirement applies only when a health plan is being acquired, not when the plan acquires another type of entity.

Under AB 2080, however, when a health care service plan intends to merge, acquire, or obtain control of *any entity*—such as another health care service plan or a health insurer—the plan is required to give notice and secure prior approval from the Director. Thus, the main difference between the proposal and existing law is that the notice requirement and review authority is extended to transactions where the health plan is *not* acquiring another health plan.

As with the proposed Attorney General's broad discretion and authority, AB 2080 also proposes wide discretion to the DMHC Director, who has the authority to:

- disapprove a transaction or agreement if it would substantially lessen competition in the health system or among a category of providers, and
- work with consultants to assess the competitive impact of proposed transactions.

Additionally, the Director's authority, just as with the Attorney General's authority, is subject to accountability and

transparency measures. First, the DMHC is required to hold a public meeting on the proposed health plan transaction, and the Director is required to consider testimony and comments in its ultimate determination. Second, AB 2080 furthers goals of transparency and communication between government entities, and with the public. AB 2080 requires the Director to provide information regarding competition to the Attorney General. It also requires the Director to make available a public statement regarding a transaction where a material amount of assets of a healthcare service plan is subject to purchase, acquisition, or control.

In summary, AB 2080 mirrors existing law, but would expand (1) the notification and AG's review authority beyond non-profit hospital mergers, and (2) the notification and DMHC Director's review authority to health plans acquiring another entity, i.e., notification and review is not limited to acquisition of health plans.

Prohibition on restrictive, anticompetitive contracting provisions

In addition to greater oversight over healthcare consolidation, the second component of AB 2080 would statutorily prohibit anticompetitive contracting terms, aligning the health industry with pro-consumer provisions outlined in the landmark Sutter settlement spearheaded by the Attorney General. Currently, California does not have any statutory prohibitions on anticompetitive contracting terms often used by healthcare entities. In 2018, California Attorney General Xavier Becerra used his authority to join a lawsuit against Sutter Health for anticompetitive practices that led to higher healthcare costs for consumers in Northern California compared to other areas in

the state.[7] Terms of the settlement included $575 million and prohibitions on certain anticompetitive practices Sutter used to establish its market power, such as a bar on all-or-nothing agreements and limitations on amounts Sutter can charge for out-of-network services. The prohibition on Sutter's anticompetitive behavior was the result of time-consuming litigation efforts that are often too resource-intensive and unpredictable to duplicate.[8] However, the case provided a blueprint for the types of bans on anticompetitive contracting terms that should apply for all providers in California in AB 2080.

AB 2080, if passed, would offer a more efficient, comprehensive, and all-encompassing statutory tool to address anticompetitive contracting in the healthcare market. Specifically, AB 2080 would prohibit a contract between a health care service plan or health insurer and a health care provider or health facility from containing terms that:

- Restricts the plan or insurer from directing or steering enrollees or insureds to other health care practitioners or facilities (i.e., prohibits anti-tiering or anti-steering clauses)
- Restricts the plan or insurer from offering incentives to encourage enrollees or insureds to utilize or avoid certain providers
- Requires the plan or insurer to enter into additional contracts with any or all affiliates of the provider or facility as a condition of the contract (i.e., prohibits all-or-nothing clauses)
- Requires the plan or insurer to agree to payment rates or terms for an affiliate of the provider or facility as a condition of the contract (i.e., prohibits most favored nation clauses)
- Requires the plan or insurer to agree to payment rates or terms for an affiliate or individual facility that is not

a party to the contract (i.e., prohibits most favored nation clauses)
- Restricts other plans or insurers not party to the contract from paying a lower rate than the rate the contracting plan or insurer would pay
- Prevents the plan or insurer from providing provider-specific cost or quality of care information (i.e., prohibits gag clauses).

If a contract contains any of the prohibited anticompetitive terms, the Attorney General or any other state entity charged with reviewing healthcare market competition would have the authority to review the contract and demand specific performance, injunctive relief, and other equitable remedies for each contracting violation.

The Opposition Argues Due Process and Coordination Concerns Not Supported by Existing Research

Though AB 2080 has support from a variety of pro-consumer, labor, and health equity advocacy groups, the proposal faces intense opposition from hospitals and health plan groups who argue concerns of due process while claiming coordination and integration efficiencies from consolidation and contracting practices.

The California Hospital Association, concerned that healthcare entities' transactional business decisions would become more expensive and time-consuming under the proposal,[9] primarily argues that the Attorney General's absolute authority and discretion over healthcare transactions undermines constitutional protections of due process.[10] However, this concern is significantly undermined by the decades-long history of the Attorney General's existing authority and experience

addressing this issue in the non-profit hospital context. Additionally, the Attorney General and its decisions are still subject to judicial review. Moreover, the Assembly Health Committee's recent amendment giving the aggrieved party an option of an administrative hearing to appeal the Attorney General's decision should alleviate the opposition's due process concerns.

The opposition also pointed to integration and coordination efficiencies that they claim would be stifled by AB 2080. The hospital industry often claims that consolidation improves efficiencies and care coordination. However, extensive research has consistently shown few benefits from horizontal consolidation (e.g., hospital merging with another hospital) and that it often results in lower quality of care. Furthermore, vertical consolidation (e.g., hospital acquiring a physician group) yields similar results, as many studies find that vertical consolidation leads to the same or worse quality of care with modest coordination and efficiency improvements.[11] The opposition also cited concerns that the prohibition of anticompetitive contracting provisions would of integrated health systems to offer seamless, efficient systems of care and ability to enter into value-based contracts.[12] This argument, however, fails to acknowledge that the AG already has broad authority over market conduct, including the authority to review anticompetitive behaviors such as the use of anticompetitive contracting terms prohibited in AB 2080.[13]

The Next Steps: What to Expect

Though the proposal passed the Assembly Health and Judiciary committees late last month, it still has a long way to go in the legislative process. AB 2080 is still in its house of origin,

currently the Assembly Appropriations Committee. The next hurdle for AB 2080 after passing the policy health committee is to be heard in the Assembly Appropriations Committee. Then, AB 2080 must pass the Assembly by May 27. Following a passage in the Assembly, the Senate must then go through the same legislative process and pass the bill by August 31, 2022. Finally, if AB 2080 passes both houses this session, the Governor must sign the bill into law by September 30. Stay tuned to the California Legislative Beat for updates on AB 2080's legislative progression.

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[1] Jaime S. King et al., Preventing Anticompetitive Healthcare Consolidation: Lessons from Five States, The Source on Healthcare Price and Competition, at 4 (June 2020), https://2zele1bn0sl2i91io41niae1-wpengine.netdna-ssl.com/wp-content/uploads/2020/06/PreventingAnticompetitiveHealthcareConsolidation.pdf.

[2] Fact Sheet: AB 2080 (Wood), Health Access California, https://health-access.org/wp-content/uploads/2022/03/AB-2080-Wood-Fact-Sheet.pdf (last visited May 13, 2022).

[3] Press Release, Assemblymember Jim Wood Releases Health Care Priorities for 2022 (Feb, 18, 2022), https://a02.asmdc.org/press-releases/20220215-asm-jim-wood-releases-health-care-priorities-2022.

[4] Bill Analysis, Assemb. Health Committee Analysis of Assemb. Bill No. 2080, 2021-2022 Reg. Sess. at p. 9 (Ca. 2021) (as amended April 6, 2022).

[5] Id. Similarly, another study found that mergers of two

hospitals in the same state led to price increases of 7% to 9% for the acquiring hospital. Research has also established that these increases in prices are not temporary—an analysis of all hospital mergers over a five-year period found that mergers of two hospitals within five miles of one another lead to an average 6.2% price increase, which also continued two years post-merger. Id.

[6] See 11 CCR § 999.5 (Attorney General Review of Proposals to Transfer Health Facilities Under Corporations Code Sections 5914 et seq. and 5920 et seq.).

[7] See Bill Analysis, Assemb. Judiciary Committee Analysis of Assemb. Bill No. 2080, 2021-2022 Reg. Sess. at p. 11 (Ca. 2021) (as amended April 6, 2022). Specifically, Sutter's anticompetitive practices led to a significant price disparity between northern and southern California, average hospital inpatient procedure cost $131,586 in Southern California and $223,278 in Northern California. Id. at 11-12.

[8] See id. at 9.

[9] Letter from California Hospital Association et al., to Assemblymember Wood, Letter: AB 2080 (Wood) – OPPOSE (April 8, 2022), https://calhospital.org/wp-content/uploads/2022/04/AB-2080-Asm-Health-FINAL-4.8.22.pdf.

[10] See supra note 9, at p. 11.

[11] See supra note 4, at 10.

[12] See supra note 11.

[13] See supra note 4, at 13.