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RE: AN ACT to amend the public health law, in relation to requirements for collective negotiations by health care providers with certain health benefit plans

S.3663 (Hannon)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The Blue Cross and Blue Shield Plans of New York strongly oppose enactment of this bill, which would authorize "collective negotiation" by physicians, hospitals and Accountable Care Organizations (ACOs). Specifically, this legislation exempts physician practices and hospitals from those New York antitrust laws which are expressly designed to prevent monopolistic practices and anticompetitive behavior. The purpose of this Bill is simply to allow unrelated physicians and hospitals to join together in order to increase their revenues. By increasing their profits, the physicians and hospitals will also be increasing costs for consumers. **This is the exact conclusion reached by the Federal Trade Commission when it concluded that this identical legislation "poses a significant risk of consumer harm by increasing costs, impeding innovation, and decreasing access to health care**".

1. ESSENTIAL CONSUMER PROTECTIONS ARE WEAKENED BY THIS BILL

This bill would eviscerate current laws designed to protect consumers from unfair collaboration between health care providers. For example:

- ***No quality control.*** Under existing antitrust law, health care providers may bargain collectively if there is sufficient "clinical integration" – which can take the form of uniform quality improvement controls or a single quality assurance program. This bill includes no such restriction, permitting health care providers to collaborate for one purpose: to increase their revenue.

- ***No controls over price-fixing.*** This bill would essentially permit health care providers to determine their own levels of reimbursement, and a health plan faced with a multi-discipline negotiating coalition would have little choice but to accept its terms. The bill provides no protection against exorbitant price-setting by providers.

- ***No protection against anti-competitive "spillover."*** Existing law prohibits communication between competitors regarding prices. This bill would alter such protections, permitting competing providers to communicate with each other regarding reimbursement. Even if an agreement between providers is disapproved, there is no way to "undo" the anti-competitive impact of these communications.

2. THE FTC EXPLICITLY STATES THAT THIS LEGISLATION WILL HARM CONSUMERS AND INCREASE HEALTH CARE COSTS

In an October 2011 letter to Senator John Bonacic regarding this specific bill, the Federal Trade Commission ("FTC") concluded that this legislation would be harmful to consumers, would increase costs, and could potentially violate federal antitrust laws. The FTC finds no countervailing benefits that would offset these negative consequences. (Letter from FTC to Sen. John J. Bonacic (October 20, 2011)). The letter highlights the critical importance of competition among providers in keeping health care costs down, and explains that this bill will thwart that objective. The FTC urged a rejection of this dangerous legislation, as it will "allow coordinated activity among competitors beyond what the antitrust laws permit, and therefore poses a substantial risk of consumer harm by increasing costs, impeding innovation, and decreasing access to health care."

The bill is also completely contrary to a report by the Department of Justice ("DOJ") and FTC which flatly states that "[g]overnments should not enact legislation to permit independent physicians to bargain collectively." The Report predicts that "physician collective bargaining will harm consumers financially and is unlikely to result in quality improvements." *See* Improving Health Care: A Dose of Competition, A Report by the Federal Trade Commission and the Department of Justice, July 2004, Executive Summary at 23. The proposed legislation ignores this report's recommendations.

The Report states that this legislation will "decrease the incentives of health care providers to compete on price and quality, and would make it more difficult for health plans to resist provider pressure for higher fees." It also notes that the bill will allow anticompetitive conduct to escape antitrust scrutiny and "it would be difficult to undo the consumer harm that is likely to occur once competitors have shared sensitive fee-and non-fee-related information in anticipation of collective negotiations." *Id*. at 3, 4 (emphasis added). The Report found "no credible economic theory . . . and no evidence demonstrating that collective negotiations among providers will do anything other than raise prices for consumers." *Id*. at 4. Finally, the agency expresses its concern that the bill will encourage "anticompetitive conduct that is inconsistent with federal antitrust law and policy," conduct that is very likely to harm New York's health care consumers. *Id*. at 7.

3. **THIS BILL WILL DRAMATICALLY INCREASE THE COST OF HEALTH INSURANCE COVERAGE**

A Health Insurers Association of America study analyzed similar federal legislation and determined that it would cause a 6 to 11% hike in premium rates. These costs would be borne health care consumers. From 2001-2005 there was a steady decline in employment-based health coverage throughout New York as a result of rising premiums (2.2% upstate and 1.3% statewide). Allowing collective bargaining will devastate the already falling percentage of employer-based coverage in the state. It will lead to sharp premium increases, forcing employers to increase employee contributions or to drop employee coverage altogether. Employees would have to choose between paying substantially increased premiums or joining the ranks of the millions of uninsured New Yorkers

4. **PREVIOUS NEW YORK ATTORNEY GENERALS FOUND THAT THIS VIOLATED FEDERAL ANTITRUST LAWS.**

In 2000, New York's Attorney General also opposed this legislation in a letter dated June 14, 2000. Its opinion is that this proposed legislation fails **both** prongs of the Supreme Court's State Action doctrine test. (Letter from Assistant A.G. Kathy Bennett, Bureau Chief Legislative Bureau, to Assemblyman Canestrari June 14, 2000). The letter concludes that two things are clear: (1) the bill is designed to serve the financial interests of providers; and (2) there are no specific provisions which would afford state officials the power to review **particular anticompetitive acts** that would rise to the level of "active supervision" as defined by the Supreme Court.

5. **THIS BILL IS UNNECESSARY IN LIGHT OF EXISTING NEW YORK AND FEDERAL ANTITRUST LAW.**

The FTC's recent letter on this exact Bill notes that "federal antitrust law already permits many joint activities by health care providers when such activities are procompetitive and likely to benefit consumers. . . . [L]egislation allowing collective negotiations by providers . . . would result in substantial harm to consumers rather than procompetitive benefits." *Id.* at 3.

Significantly, current New York law permits health care providers to organize for many purposes including collective negotiation with insurers, health maintenance organizations, and other payors. These organizations are commonly known as independent practice associations, or IPAs. IPAs can negotiate collectively with payors on behalf of all members, and can also negotiate to perform certain administrative functions on behalf of the payor such as claims processing or credentialing. In cases where IPA models are not permitted (i.e. contractual arrangements with indemnity insurers), a "messenger model" could be used to negotiate essential contract elements, or the providers could form a joint venture with sufficient clinical and financial integration to justify collaboration on fees. Existing collective bargaining models afford sufficient avenues for providers and include important consumer protection provisions this bill would remove.

6. SIMILAR LEGISLATION IN OTHER STATES HAS PROVEN HARMFUL TO CONSUMERS

The FTC has intervened repeatedly in situations where independent contractor physicians practiced collective negotiation tactics similar to those proposed by this legislation in order to curb the dangerous effects they had on the health care community. A recent report by the FTC's Bureau of Competition details dozens of examples of such activity and identifies significant increases in health care costs as a result. (Overview of FTC Antitrust Actions in Health Care Services and Products (Mar. 2010)). In the case of Southeastern New Mexico Physician's IPA, the FTC found that physician reimbursement in New Mexico for various services was typically between 120% and 140% of Medicare's Resource Based Relative Value System ("RBRVS"). However, due to the price fixing tactics employed by the groups in question, which are precisely what this bill would permit, rates in this particular part of New Mexico were typically over 200% RBRVS and at times topped 250% RBRVS. The FTC found that the group's "joint negotiation of fees and other competitively significant contract terms has not been, and is not, reasonably related to any efficiency-enhancing integration" and therefore is unjustified. 138 F.T.C. 281 (2003). The FTC repeatedly takes a similar position with respect to price-fixing for no purpose other than to increase physicians' reimbursement at the expense of consumers.

For these reasons, we strongly oppose enactment of this bill.

Respectfully submitted,

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