

SB 977 (Monning) – Is Bigger Better?

Consolidation and Anti-Competitive Behavior in Health Care

Does bigger really mean better in health care? A robust academic literature demonstrates that health care consolidation in fact leads to higher costs without improving quality or maintaining access to care. SB 977 (Monning) would strengthen and extend the oversight of the California Attorney General over health care mergers, acquisitions and other transactions and give the Attorney General additional authority to counter the anti-competitive effects of health care consolidation.

Extending & Strengthening Oversight of Health Transactions

SB 977 as amended would extend and strengthen the Attorney General's oversight of health care transactions when a large hospital system, private equity fund, or hedge fund acquires another health facility or physician group through a change of governance or control. This would apply to all types of large hospital systems, including non-profit, for-profit, district hospitals and county hospitals. "Large hospital system" is defined as three or more hospitals. Within 30 days or 60 days, depending on the nature of the transaction, the Attorney General would either approve, deny, or approve a transaction with conditions. Amendments make clear that if the Attorney General fails to act, the transaction proceeds.

A recent analysis shows that about half of California physicians now practice in groups affiliated with or controlled by health systems.¹ There is currently no comprehensive study on the degree of entry of private equity funds and hedge funds into purchasing or financing physician groups but evidence from around the country in the context of the federal fight over surprise medical bills suggests that this may be far more prevalent than previously understood.²

Given the financial strain faced by physician practices and hospitals due to the current COVID-19 pandemic, the pace of acquisitions is expected to accelerate. SB 977 will give the Attorney General the authority to scrutinize such transactions at a time when it is urgently needed.

SB 977 will strengthen the authority of the Attorney General to determine whether the transactions are in the public interest in terms of balancing anticompetitive effective with extending access to underserved populations, furthering clinical integration, or both.

¹ Scheffler, Arnold and Fulton, "The Sky is the Limit" <https://www.chcf.org/wp-content/uploads/2019/09/SkyLimitPricesMarketConsolidationBrief.pdf>

² House Energy and Commerce Committee, Investigation into Private Equity Firms Role in Surprise Medical Bills, <https://energycommerce.house.gov/newsroom/press-releases/pallone-and-walden-launch-bipartisan-investigation-into-private-equity-firms>

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Anticompetitive effects include raising prices, lowering quality, limiting choice, and diminishing access to care.

SB 977 would also curb anti-competitive behavior by proposing that if a health system has substantial market power, then that health system could not engage in practices such as “tying” or “exclusive dealing”, both of which are defined in the bill as “substantial market power.” These broad anti-trust concepts are intended to give the Attorney General the ability to pursue anti-competitive market behavior as that behavior evolves.

California’s Attorney General: Almost Thirty Years of Non-Profit Hospital Transactions, A Century of Anti-Trust Action

Hospital Transactions: Thirty Years of AG Oversight of Non-Profit Hospitals

For almost the last thirty years, the California Attorney General has had the ability to approve, deny or approve with conditions health care transactions involving nonprofit hospitals and other nonprofit health facilities. This power developed from the broad authority of state Attorneys General to oversee charitable trusts, including those of non-profit health facilities.

Over the decades since the Attorney General was granted this authority, numerous transactions have been reviewed and approved, most within the 60-day timeframe set by California law. Some transactions have been controversial, depending in part on the community affected, the hospital or hospitals involved, and the nature of the transaction, but many have proceeded without much controversy or public attention. Hospitals that might otherwise have closed remain open to this day because of the oversight of the Attorney General.

In a first-in-the-nation innovation, California law requires an analysis of the impact on the health of the community. From these community health impact assessments, Attorneys General of both parties have imposed conditions intended to protect the community’s access to health care, from maintaining charity care efforts and emergency room capacity to continuing labor and delivery services and many other specialized services. In other instances, the assessment found adequate capacity from other proximate hospitals, and no such conditions were imposed.

Consolidation Leads to Higher Costs, Little or No Increase in Quality or Access: Building on a Century of Attorney General Authority of Anti-Trust

There is now a robust academic literature as well as a newly developing set of case law that demonstrates that consolidation in the health care sector is strongly correlated with higher prices and not correlated with improved quality. Research by Richard Scheffler, UC Berkeley, and Jaime King, UC Hastings School of Law and other economists and legal experts has shown that the higher the degree of consolidation of health systems, the higher the premiums paid and the higher

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the cost of various procedures. Despite protestations to the contrary by those entities seeking to merge, the academic literature has not found that consolidation improves health outcomes or other quality measures.

Since consolidation often leads to reorganization of service delivery, looking at the likelihood of reduced choice and diminished access to care is also important. For example, in the recent proposed joint venture between Adventist Health and St. Joseph's along California's North Coast, the joint venture would have resulted in women in labor being forced to travel long distances in order to have a hospital delivery because the joint venture proposed to close some existing labor and delivery capacity. Similarly, other transactions have resulted in limiting choice of hospitals in various geographic areas or limiting choice of available services such as labor and delivery, which remains the single most common reason for hospitalization. SB 977 accounts for balancing these impacts in rural areas.

Considerable consolidation of hospitals, health systems and physician organizations has already occurred in California. This has been well documented in a number of recent studies.³ Rather than un-ringing the bell of those transactions, SB 977 takes steps to curb anti-competitive practices that some health systems have allegedly engaged in as a result of their market power.

While California law includes express anti-trust statutes that date back more than a century, much of the evolution of the law rests in case law. SB 977 is an effort to update anti-trust law for the 21st Century, informed by what the Attorney General has learned in the process of recent litigation and merger oversight activity and what a resurgence of academic literature has demonstrated. When it is not possible to undo consolidation, curbing the anti-competitive behavior that drives up health care costs is the next best thing.

Conclusion

For thirty years, California Attorneys General of both parties have overseen transactions involving non-profit hospitals to protect consumers and to ensure such deals benefit the community, not simply to enrich whatever entity is purchasing the hospital. Because of the actions of these Attorneys General, starting with Republican Dan Lungren in the early 1990s, many hospitals remain open, emergency rooms still see patients and important services from reproductive health to labor and delivery to cardiac and cancer care have been preserved. SB 977 extends this role to all types of hospitals, not just for nonprofits. It builds on the existing role of the Attorney General in giving a voice to patients and the public in hospital transactions.

³ Scheffler et al, CHCF, 2019: <https://www.chcf.org/wp-content/uploads/2019/09/SkysLimitPricesMarketConsolidationBrief.pdf>; Scheffler, Arnold and Whaley, Health Affairs, 2018, <https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2018.0472>