

2023 California Healthcare Bills Part 1: Healthcare Consolidation and Competition

In the 2023-2024 legislative term, the California legislature has introduced a multitude of legislation targeting consolidation and competition in health care, system reform and price and quality transparency. In a two-part series, we highlight some of the noteworthy legislation proposed this session. Part 1 focuses specifically on the State's efforts to promote a more competitive healthcare market by targeting restraints of trade and consolidation. In Part 2, the focus will shift to proposed bills targeting system reform, price and quality transparency, and prescription drug prices.

Health Care Consolidation

California has been active in attempts to manage health care consolidation to ensure that patients have access to high-quality and affordable care while improving health outcomes. Existing law provides that most healthcare transactions in California are subject to the review authority of the Department of Managed Health Care (DMHC) or the Attorney General (AG), depending on the entities involved in the transaction. The DMHC reviews health care service plans, while the AG reviews nonprofit health care provider transactions. Broadly, both examine transactions for consolidation effect that would negatively impact health care price and competition. This session, California has introduced new bills that would modify the review authority of both agencies.

▪ Expanding DMHC's Oversight of Health Care Service Plan Transactions

Currently, health care service plans that intend to enter into an agreement that *results in its purchase, acquisition, or change of control* by another entity must provide pre-transaction notice and receive prior approval from the Director of the Department of Managed Health Care (DMHC). The Director may disapprove a proposed transaction if it finds the transaction would substantially decrease competition or create a monopoly within the state. However, these requirements do not apply to transactions in which the health care service plan intends to acquire or obtain control of another entity (unless that entity is a health care service plan regulated by DMHC).

[AB 1092](#) would expand DMHC's oversight authority to require proposed transactions that intend to acquire or obtain control of an entity through a change of governance or control of a material amount of an entity's access to give notice and secure prior approval from the Director. Acquiring and obtaining control of an entity is defined based upon a transfer of a material amount of assets or operations of a health plan. The Director must review all relevant information including information from federal agencies and other state agencies and may disapprove the transaction if it substantially decreases competition or conditionally approve based on the health plan's agreement to control costs to subscribers and enrollees. The Director must also provide information on competition to the AG for further review and enforcement.

▪ Expanding AG's Oversight of Health Care Provider Transactions

Another safeguard against an increasing anticompetitive health care market is the AG's pre-merger notice and review authority for transactions involving a non-profit corporation that

operates or controls a health facility. Notably, the AG does not currently receive the same notice from for-profit entities. While the AG can challenge to block any merger or acquisition when it could substantially less competition or create a monopoly, identifying and challenging a transaction can cost a significant amount of time and resources.

[AB 1091](#) or “Health Care Consolidation and Contracting Fairness Act of 2023” focuses on empowering the AG to receive pre-transaction notice of all proposed health care transactions, not just those involving nonprofit entities. This bill is a reintroduction of AB 2080 or the “Health Care Consolidation and Contracting Fairness Act of 2022, which failed to garner enough traction last legislative term (see California Legislative Beat on [AB 2080](#)). Echoing the language of AB 2080, AB 1091 would give the AG authority to review “any transaction of assets or change in governance worth \$15 million or more and that involve hospitals, health systems, health plans, health insurers, medical groups, or pharmacy benefit managers.” Specifically, AB 1091 would require all proposed transactions to give the AG notice 90 days before the transaction would take effect for a review based on market competition, quality of care, and access to care. The AG could then either approve, give conditional consent, or deny consent to the transaction based on the proposed transaction’s impact on these considerations. However, the AG is subject to accountability and transparency measures. This is a substantial expansion of the types of transactions that the AG can review, which would provide an alternative means to costly litigation for preventing an anticompetitive transaction.

▪ *Limiting the AG’s Authority to Impose Conditions on Transactions*

On the other hand, some legislators are concerned that the AG’s

powers are too expansive and, in reality, are forcing hospitals to close instead of being acquired by new management. After years of financial struggles that were exasperated by the COVID-19 pandemic, Madera Community Hospital (MCH) completely shut down in January 2023. As the only general hospital and provider of adult emergency services in the San Joaquin Valley, MCH served a crucial role in the community. Trinity Health originally proposed acquiring the hospital but backed out of the deal in December 2022 citing the AG's imposed conditions prevented the hospital's sale. Some of the conditions included price caps on all hospital services for 5 years and maintaining language services, charity programs and privileges for existing staff. The California Hospital Association has publicly rebuked the AG's conditions as being designed to protect consumers, yet ultimately led to the hospital's complete financial collapse and ending all services in the area.

In response to MCH's failed merger and ultimate shut down, State Senators introduced [SB 774](#), the "Save Our Hospitals" bill, focusing on restricting the AG's ability to impose conditions on the sale of nonprofit community hospitals. The proposed legislation would require the AG's conditions, individually or aggregated, to not be unique to nonprofit corporations or be distinct to this specific nonprofit corporation. Further, the conditions could not impact the normal operations of the hospital, adversely affect the financial condition of the hospital, or be different from those applied to similar transactions in the past. The bill's authors intend for this bill to ensure the AG's conditions would not force a hospital to close when it could remain open through being acquired, in order to ensure that patients continue to have access to care.

Anti-competitive Contracting

On both a local and national level, policymakers are becoming increasingly concerned about the individual contracts used by various health care entities. Although focus remains on the larger merger and acquisition agreements, the day-to-day contracts are also being heavily scrutinized for their effects on health care cost and access. Like AB 2080 from last session, [AB 1091](#) also targets restrictive contracting terms that are often used by healthcare entities. It would prohibit a contract between a health care service plan or health insurer and a health care provider or health facility from containing terms such as, anti-tiering or anti-steering clauses, all-or-nothing clauses, most favored nation clauses, and gag clauses. While the federal Consolidated Appropriation Act of 2021 requires attestations that a health plan does not have gag clauses, AB 1091 would allow for specific performance, injunctive relief, and other equitable remedies for healthcare contracts that contain a prohibited clause.

Non-Compete Agreements

As many states are proposing legislation this session to limit or prohibit noncompete agreements, California has introduced two bills reaffirming its commitment to an unrestrained workforce that is able to freely work at any company that will hire them. [AB 1076](#) proposes to codify the landmark holding of *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937 into Business and Professions Code Section 16600. Any restraint of trade through contracting clauses like non-compete or non-solicitation agreements are outlawed in California; the bill is declaratory of existing law.

[SB 699](#) goes even further and would void any contract with a non-compete clause under California law to further the state's

public policy in favor of freedom of trade. It reaches all contracts regardless of where the contract was signed or where the employment is maintained, even if outside of the state of California. Employers that include a non-compete clause and knows, or reasonably should have known, its prohibited by law and may even face civil penalties from actions brought by the Attorney General or a private action by the employee.

Although neither of these bills are specifically designed for health care providers, the benefits to patients are clear. A limited health care provider market would inevitably lead to inadequate provider networks and decrease access to care.

Conclusion

The proposed changes to DMHC and the AG's merger oversight and the proposed prohibition of anti-competitive contracting terms are aimed at ensuring a competitive health care market and affordability of health care. While there are concerns about the impact of the AG's conditions on the sale of nonprofit community hospitals, legislators are working on legislation to address these concerns. Overall, the proposed changes have the potential to improve access to quality health care for all Californians.