Suburban Hospital Alliance of New York State, LLC

OPPOSITION MEMO

Date: February 22, 2022
To: Members, Hudson Valley and Long Island Senate Delegations
From: Wendy Darwell, President and CEO
Re: S.933A – 1/19/22 Advanced to Third Reading

The Suburban Hospital Alliance of New York State, representing hospitals and health systems on Long Island and in the Hudson Valley, strongly opposes S.933A, the Twenty-First Century Anti-Trust Act. This legislation would harm patients by reducing access to care, driving up healthcare costs, diminishing quality, and stifling research and innovation. It will cause significant disruption in the healthcare market and across the state's economy.

Expanded Definition of Anti-Competitive Behavior
S. 933A would significantly expand the scope of prohibited anti-trust conduct. It would amend the Donnelly Act to redefine monopolies as any business with a 40 percent or greater share of the market, and would prohibit monopsonies, defined here as sellers that hold a 30 percent or greater share of the market. Most significantly, it would expansively prohibit any entity with a dominant position in the market from abusing that dominant position. This "abuse of dominant position" standard is adopted from the European Union and far exceeds the scope of any previous federal or state anti-trust standard.

Establishment of a Dominant Position
The legislation goes on to define what constitutes a dominant position, including direct and indirect evidence thereof. Included in these definitions is the use of non-compete and no-poach clauses in employment agreements. S. 933A would deem any entity that employs such clauses to be proof that it holds a dominant position.

These clauses are essential and widely used in the healthcare and research fields to protect an institution's investment in development. Establishing this standard in state statute would have a chilling effect on medical advances, scientific research and development of technology, would drive start-up businesses out of the state, weaken the ability of academic institutions to secure donors to fund their research programs and inhibit the ability to attract top-tier talent to New York. It would cause serious harm to New York's healthcare institutions and deprive their patients of the latest innovations in care.

Abuse of a Dominant Position
The broad definition of what constitutes abuse of a dominant position, when applied to healthcare, would prohibit hospitals and health systems from employing commonly accepted practices such as establishing criteria for medical privileges, selectively contracting for medical services or establishing provider networks, all of which are necessary for management to ensure the quality and efficiency of care provided in their institutions.

This shift to an "any willing provider" standard undermines a generation of healthcare policy at the state and federal levels. The result will be inconsistent quality of care, which will result in worse clinical outcomes, higher out-of-pocket costs for consumers and more expensive public insurance programs, including Medicaid. Because many reimbursement rules are tied to quality and efficiency metrics, this will have a direct impact on hospital finances.

Ignores Pro-Consumer Benefits
S.933A explicitly states that the pro-consumer benefits of an existing arrangement are not an allowable defense of that arrangement in circumstances where an entity has a dominant position in the market.

This provision would subject health systems to scrutiny in cases where, for example, a larger system has taken over a struggling facility. It would not be an allowable defense to demonstrate that the struggling facility otherwise would have closed and patients in that market would have lost access to care. Providers also would be prohibited from defending the benefits to consumers of restricting medical privileges or network participation to only high-quality providers.

Pre-Merger Notification
Notification to the state Attorney General would be required for any proposed merger or acquisition valued at $9.2 million or more, or for any merger or acquisition between businesses with assets or net sales of $9.2 million or more – one-tenth of the federal thresholds.

The volume of pre-merger notifications this will create likely will overwhelm the AG's office and lead to substantial delays in transactions. In the healthcare context, a pre-merger notification and approval could be required for any entity seeking to acquire an entity as small as a sole physician's practice, for example. The thresholds are so low that they would impact many small and medium-sized businesses, placing on unreasonable and costly burden on those entities to secure anti-trust counsel.

Certificate of Public Advantage
It has been suggested that the state's Certificate of Public Advantage (COPA) process would provide protection for healthcare institutions from many provisions of this law. We disagree. Given the retroactive nature of the legislation, it would require that providers request COPAs for all existing contractual arrangements that would fall under the expanded anti-trust parameters. We are concerned that the Department of Health would be overwhelmed and would lack the resources to adjudicate what assuredly would be tens of thousands of requests. Furthermore, the rules require that the Department of Health provide active and ongoing supervision of any approved COPAs, which the Department also would need substantially increased resources to do.

By applying these new anti-trust standards to all existing contractual arrangements and business practices while also creating a private right of action, S.933A will lead to a sharp rise in litigation in addition to overburdening regulatory agencies. It will drive businesses and innovation out of the state, create new burdens for the small businesses it purports to help and for non-profit institutions like hospitals, and does not take into consideration the needs and preferences of consumers.

For these reasons, the Suburban Hospital Alliance urges you to reject S. 933A.