BuchalterNemer
A Professional Law Corporation

Client Alert

September 2014

A Coming Threat to Hospital Health?

Donald P. Wagner, Esq.

Gov. Brown will likely soon sign a bill granting new and far-reaching powers to the Attorney General to review and undo non-profit hospital mergers. Proponents of the bill argue for this expanded power on the grounds that such mergers might reduce the availability of reproductive services—meaning abortion, of course—in the communities served by the merging hospitals. Opponents contended, as the bill made its way through the legislature, that the increased powers threaten the financial health of hospital merger partners as it will discourage those sometimes financially critical mergers.

Whichever view proves correct, the practice and underlying economics of non-profit hospital mergers will soon change dramatically in California.

Under existing law, the Attorney General's office already has significant power over proposed hospital mergers. Currently, any non-profit corporation that operates or controls a health facility, broadly defined in statute and including more than just hospitals, must provide written notice to the Attorney General's office, and get written consent from that office, prior to entering into specific structural and operations agreements. Specifically covered by existing law are any agreements or transactions to sell, transfer, lease, exchange, option, convey, or otherwise dispose of, the health facilities assets to a for-profit corporation or entity, or another non-profit corporation. Notice and advanced written consent is also needed prior to the transfer of control, responsibility, or governance of a material amount of the assets or operations of the non-profit corporation to any for-profit corporation or entity, or another non-profit corporation.

The Attorney General's office has 60 days from receipt of a written notice of a proposed transaction to notify the non-profit corporation in writing of its decision with respect to the agreement. It has three options: give consent, give conditional consent, or not consent to the proposed deal. Finally, the 60-day review and decision period can be extended an additional 45 days under certain conditions.

The Attorney General's office has considerable discretion with respect to granting or withholding consent. In fact, under existing law, the Attorney General can give consideration to any factors that the Attorney General deems relevant, including whether the agreement is at fair market value. But most notably, the Attorney General has complete flexibility to determine whether the proposed transaction has a significant effect on the availability of "health care services" in the local community. A transaction that would reduce available services—be they heart surgeries or abortions—can be vetoed. Finally, the Attorney General may monitor compliance by the parties to the transaction with the terms and conditions of the deal.

While those powers are quite broad under existing law, the legislature has granted the Attorney General even more power. Under SB 1094 by Sen. Ricardo Lara, the Attorney General may amend the parties' agreement, *i.e.,* to impose new conditions or change existing ones, well after the transaction has closed. In short, the Attorney General can re-write the transaction years after it has closed. Moreover, SB 1094 states that, once the transaction has closed the parties are conclusively held to have consented to each condition of the Attorney General's consent, and also to waive any right to seek judicial relief of any of the conditions imposed by the Attorney General.

Curiously, support for Sen. Lara's grant of additional power to the Attorney General came not from the doctors or hospitals in the business of providing medical care, but instead came from organized labor. The list of supporters included AFSCME, AFL-CIO, and SEIU, California State Council. Somehow, these organizations saw expanded power in the hands of the Attorney General as a good thing for the public employees' unions.

On the other hand, a broad coalition of hospital organizations, including the California Hospital Association, Adventist Health, Alliance of Catholic Health Care, Loma Linda University Medical Center, Scripps Health, and Sutter Health, all opposed the bill. The main point of contention was with the broad sweeping nature of the new authority in the Attorney General to undo already closed transactions.

According to a statement provided by these hospital organizations, Sen. Lara's bill "eliminates certainty in transactions involving the sale or transfer of non-profit hospitals by giving the Attorney General virtually unlimited discretion to impose post-transaction conditions. This authority to unilaterally change the terms of the transaction will mean that organizations will avoid many transactions that are in the community's interest because there is no certainty regarding the terms of 'the deal.'"

The statement continues, "The provisions in the bill are undefined and so broadly written and ambiguous that there is essentially an unlimited grant of discretionary authority. . . Finally, this bill requires the parties to the transaction to waive their constitutional rights and due process protections. We believe the rule of law should continue to apply to these transactions. Existing law provides the Attorney General with broad authority to approve, reject and impose broad conditions on non-profit hospitals transactions. It is against the public interest to create perpetual uncertainty and eliminate constitutional protections and due process."

If non-profit hospitals and other health facilities in fact avoid mergers, their financial health can be put at risk. Basic business principles assure nothing less. If the government can undo key terms of a deal well after it has been completed, financing arranged, and the transaction closed, fewer of those often business-saving deals will be done. That may not prove healthy for the health facilities, and for the communities they are to serve. But that will shortly be the law in California.

Mr. Wagner is Of Counsel to Buchalter Nemer and a member of the California Legislature representing Central Orange County's 68th Assembly District. He can be reached at 949.224.6218 or dwagner@buchalter.com