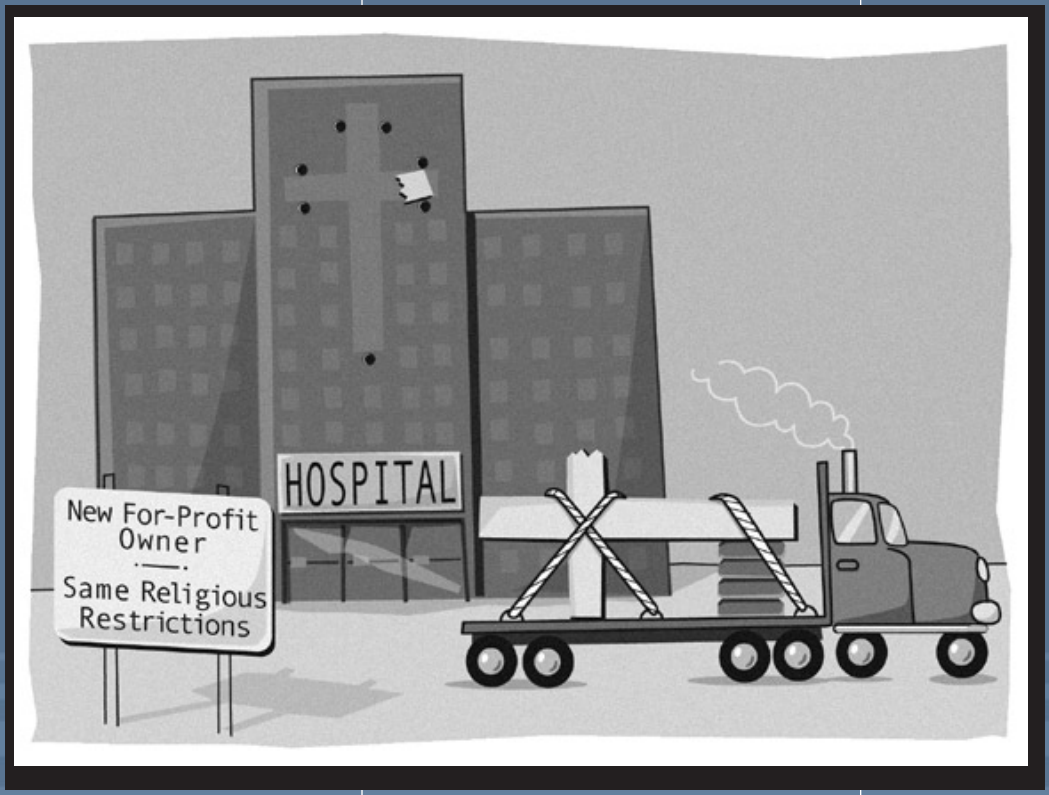
FIGHTING RELIGIOUS HEALTH RESTRICTIONS

Preventing the Continuation of Restrictions When Religious Hospitals Are Sold



MergerWATCH

The MergerWatch Project

The MergerWatch Project was founded in 1996 at the Education Fund of Family Planning Advocates of NYS in Albany, NY, after a religious/secular hospital merger caused the loss of patients' access to contraceptive services at a hospital outpatient clinic in Troy, NY.

MergerWatch staff work directly with community coalitions across the nation to protect hospital-based services that are threatened by proposed business partnerships between secular community hospitals and religiously-sponsored health systems. We seek to preserve patients' access to threatened services at the historically-secular facilities through such means as public education, community organizing and regulatory intervention.

Project staff have undertaken research, policy analysis and strategic work at the state and national levels to provide new tools and information that can be utilized by local hospital merger coalitions. The project co-coordinates, with the National Health Law Program, a National Advisory Board on religious restrictions to health care. Member organizations have specific areas of expertise that can be brought to bear on the problem, or represent those constituencies most affected by the spread of religious health restrictions (such as low-income women, women of color and residents of medically-underserved rural and urban areas).

The Emerging Issues Briefing Paper Series

This paper is one of five developed in 2004 by the MergerWatch Project to inform communities, advocacy groups and medical providers about emerging threats to health care services from religiously-based restrictions.

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I

Introduction

Restrictions maintained at hospitals that are no longer Catholic

By Susan Berke Fogel, JD

Over the past decade, consumers across the country have been faced with the loss of access to reproductive and other health services when religious hospitals have taken over local health resources and have imposed religious health care restrictions. A new phenomenon — secular for-profit systems purchasing religiously-controlled hospitals — is compounding the burdens on community health because these systems are agreeing to perpetuate religious restrictions, even when the hospitals are no longer Catholic.

When a Catholic hospital is sold to a secular for-profit hospital system, community residents expect that religious restrictions on services will be lifted and previously prohibited services, such as contraception, will be available. Surprisingly, this has not been the case in a number of recent transactions. Instead, religiously-controlled health systems are selling off low-performing hospitals to for-profit corporations such as Tenet Healthcare, Star Healthcare, Ardent Health Services, Triad, and Community Health Services, but requiring that the new owners continue to restrict health care services according to religious doctrine.

Communities are denied vital health services long after the religious authorities have relinquished control of the hospital.

For these for-profits, the transaction is simply a business deal: they are willing to continue service restrictions in order to buy the hospitals they want - often at bargain prices. The sale agreement of a Catholic hospital to a secular system generally requires that the Catholic teachings be followed for a substantial period of time — from 20 years to forever — and also binds subsequent owners. As a result, communities are denied vital health services long after the religiously-controlled systems have been paid in full and have relinquished control of the hospital.

The nation is engaged in a serious debate about the role of religion in health care delivery. Religious restrictions seriously undermine patient access and quality of care, yet there are statutes in effect that create "refusal clauses" (also known as religious exemptions or conscience clauses) permitting institutions to "opt out" of providing various health services to which they have a moral or religious objection.[1] Public health and reproductive rights advocates argue that it is time for public policymakers to protect consumers' access to needed health services, by insisting that for-profit health care entities lift religiously-based restrictions when they purchase formerly religious hospitals.

II

The Ethical and Religious Directives for Catholic Health Care Services

Catholic hospitals operate under the direct control of the Catholic Church

Restrictions on the availability of health services based on religious doctrine exist at hospitals owned by several different denominations. For example, most Adventist and Baptist hospitals refuse to perform "elective" abortions.[2] Catholic hospitals comprise the largest segment of the religiously-controlled health care market and have the broadest and most clearly defined system of health care restrictions.

Catholic hospitals operate under the direct control of the Catholic Church. They are answerable to local bishops, the U.S. Conference of Catholic Bishops and ultimately to the Vatican. These hospitals are required to operate according to the *Ethical and Religious Directives for Catholic Health Care Services*[3] (the *Directives*), a set of rules promulgated by the United States Conference of Catholic Bishops and approved by the Vatican to govern the operations of Catholic-affiliated health care systems.

Health services forbidden at Catholic facilities include contraception, sterilization, abortion, most fertility treatments and instruction about and distribution of condoms to prevent the spread of HIV/AIDS. Often restricted are treatment options for ectopic pregnancy, certain consumer choices in end-of-life care (such as to refuse or remove a feeding tube) and emerging treatments derived from medical research using embryonic stem cells.

III

Catholic Hospitals in a Changing Health Care Market

Catholic systems sell off low-performing hospitals

In the late 1990s and early into the 2000s, the health care market changed considerably. The 1990s were a period of tremendous growth for religiously-controlled health care systems. Much of this growth was accomplished, not by construction of new hospitals, but by mergers of previously independent Catholic hospitals with each other and with secular non-profit hospitals. The independent community hospital became an endangered species, as most community hospitals were absorbed both by for-profit and non-profit systems. Between 1990 and 2001, there were 171 mergers between Catholic and secular systems.[4] In 2004, four of the 10 largest hospital systems in the U.S. were Catholic-controlled.[5]

In 1999, according to *Modern Healthcare* magazine, Catholic systems were growing while for-profit systems were shrinking.[6] However, the marketplace began to shift, and by the beginning of 2000, non-profit hospitals found their incomes diminishing, while for-profit systems saw their earnings grow.[7] From early 2000 to 2003, Moody's Investors Service downgraded its financial ratings on 121 nonprofit hospitals, but only upgraded 38.[8] Catholic systems also merged with each other, creating even larger religiously-controlled systems. The most recent of these mergers, between the Sisters of St. Joseph of Carondelet and Ascension, resulted in a system that is more profitable (Ascension saw a 94% increase in operating revenue for the fiscal year ending in June 2003),[9] and is the fourth largest healthcare system in the U.S., the largest non-profit system, and the largest Catholic system, with 67 acute care hospitals.[10]

In the face of diminished profits, Catholic health corporations behave no differently than other health care systems looking to improve their bottom line. *The Wall Street Journal* characterized the motto of Sister Irene Kraus, former President of the Daughters of Charity as, "No margin, no mission."[11] According to Sister Carol Keehan of Providence Hospital in Washington. D.C., "One half of my

brain is what's the right thing to do; one half is a clinking cash register."[12] Catholic systems are continuing to consolidate their holdings, selling off low performing hospitals. The *Directives* as revised in 2001 acknowledge that Catholic hospitals are entering into transactions with secular entities and facing what the Bishops call "the challenges to the viability of the Catholic identity"[13] from these relationships. The Bishops go on to warn against the risk of scandal, and therefore require that collaborations between Catholic institutions should be sought before other forms of partnerships (i.e. with secular entities).[14]

Nevertheless, Catholic health systems are corporate institutions and operate as such in the market. The years 2000 to 2003 saw a significant number of sales of Catholic hospitals to for-profit systems.

- In 2001 and 2002, the Sisters of St. Joseph of Carondelet, which is based in St. Louis, sold its three California hospitals to for-profit systems. All of these hospitals — Daniel Freeman Memorial, Daniel Freeman Marina, and Santa Marta Hospital — were losing money at the time of sale.[15] In 2004, Tenet announced the sale of the Daniel Freeman hospitals to the newly formed for-profit Centinela Freeman HealthSystems.
- Catholic Health Initiatives sold three hospitals in Albuquerque to Ardent Health Services.
- Tenet purchased St. Alexius Hospital in St. Louis and St. Mary's Medical Center in West Palm Beach.
- Community Health Systems purchased Mercy Health Center in Laredo, Texas; St. Clement Health Services in Red Bud, Illinois; and Gateway Regional Medical Center in Granite City, Illinois.[16]
- Mercy Health Care Center in Nanticoke, Pennsylvania, was sold to Guardian L.T.C. Management Inc.
- The St. Joseph's Health System in Texas was sold to Essent Healthcare. The hospital has been re-named Paris Regional Medical Center.

> "Tenet is proud that it has been able to help preserve – and even enhance – the religious missions of the Catholic and other faith-based hospitals it has purchased."
>
> **-Tenet Healthcare**

When a Catholic hospital is sold to one of these secular systems, the Catholic seller generally requires as a condition of sale that the buyer continue to follow the *Directives*, even though the buyer has no independent objections to the prohibited health services, and may offer those services at its other hospitals.

Tenet Healthcare, the second largest for-profit system in the U.S., markets itself to Catholic health systems as a potential purchaser of troubled Catholic hospitals. In its bid to purchase the Catholic-owned Daniel Freeman hospitals, Tenet prepared a marketing piece entitled, "Tenet's Commitment to the Catholic Health Care Mission," in which it claims that, "Tenet is proud that it has been able to help preserve – and even enhance – the religious missions of the Catholic and other faith-based hospitals it has purchased."[17] Tenet owns nine formerly-Catholic

hospitals in Los Angeles, St. Louis, Memphis, Omaha, New Orleans, and Worcester, Massachusetts; and has agreed to abide by the *Directives* at all of them.[18]

Catholic health system operators argue that requiring new owners to adhere to the *Directives* is a way of continuing their mission. Father Michael Place, President of the Catholic Health Association, claims that these sales agreements speak "to a continuing commitment to care for the poor."[19] His argument is undercut, however, by the Catholic health systems' frequent willingness to compromise on those portions of the *Directives* that pertain to services to the poor.

In several transactions, the Sisters of Carondelet have insisted only on the continued restrictions on reproductive health services.[20] Other *Directives* have been specifically exempted from these sales agreements, such as the mission to serve the poor and disadvantaged (expressed in *Directive 3*), which requires service to and advocacy for those at the margins of society and most vulnerable to discrimination; and *Directive 7,* which requires respect and justice for workers, as well as specific recognition of the rights of employees to organize and bargain collectively.[21] It appears that much of what Catholic health systems describe as their "mission" has been bargained away in the marketplace with the exception of the restrictions on reproductive health.

IV

Mechanisms that Continue Catholic Restrictions

Hidden agreements

For organizations seeking to expand community health services when Catholic hospitals are sold, the greatest challenges are getting information about a pending sale and finding a forum for the consumers' voices. Most of the negotiations between the Catholic system seller and the for-profit buyer are conducted behind closed doors long before the public is advised of the transaction. The for-profit system has no obligation to provide information to consumers at this stage, and, while the non-profit system must get its board to approve the proposed transaction, board members are often sworn to secrecy while negotiations are moving forward. It is often not until the agreement has been signed that any details are given to the public. Even then, the level of detail available varies according to state law.

Contracts and Deeds

The Asset Purchase Agreement (APA) is the contract of sale. Any restrictions on services and the requirements to abide by the *Directives* are written into the contract and can be enforced in court by the seller in the same way any other contract term can be enforced. If, for example, officials of Catholic Health Initiatives (CHI) were to discover that Ardent Health Care was allowing physicians to perform tubal ligations at the formerly Catholic hospitals CHI sold to Ardent, they could ask a court to force Ardent to stop the practice.

When Tenet purchased the Queen of Angels/Hollywood Presbyterian Medical Center in Los Angeles in 1998, Tenet agreed to abide by the reproductive health restrictions in the *Directives* for 20 years. In addition, any subsequent owners must also abide by the *Directives* until 2018. But when Tenet purchased the Daniel Freeman Hospitals in 2000, the APA required that the *Directives* apply in perpetuity as long as there is a healthcare facility on the property. The APA states that the restrictions "run with the land," and are recorded in the deed to the property. According to Richard Fiske of Tenet Healthcare, most of the Tenet agreements with Catholic hospitals continue the *Directives* in perpetuity.[22]

As a result, despite changes in ownership, public needs, public demands or medical standards of care, these hospitals will never be able to provide comprehensive services without intervention by policymakers to end this practice.

Not only do the APAs require long term or perpetual adherence to the *Directives* as they exist at the time of sale, they may also require adherence to future changes in the *Directives*, whatever they may be. The Asset Purchase Agreement for Santa Marta Hospital required compliance with certain of the *Directives*, "as now approved by the National Conference of Catholic Bishops, and as interpreted by the local Bishop, together with all amendments thereto from time-to-time hereafter."[23]

A number of states now have statutes that require that the APAs and other relevant documents be available as public records.[24] In other states, consumer advocates are not always able to obtain copies of an APA. In fact, a request to Tenet Healthcare to provide copies of all of the APAs for the Catholic hospitals they own was denied.[25]

Boards of Directors

Another mechanism used to maintain Catholic doctrine is what canon law, the law that governs all Catholic entities, refers to as "the control mechanism."[26] The control mechanism is simply using the composition of the board of directors to perpetuate the *Directives*. Tenet generally keeps representatives from the church on the board of directors of its formerly-religious hospitals.[27] The Vatican developed this strategy during the sale of the St. Louis University Hospital. After the hospital's sale to Tenet in 1998, the Holy See demanded that the Missouri Province of the Society of Jesus be able to place a certain number of board members on the hospital's new board of directors, resulting in their ability to control hospital policy. These religious board members have reserved powers to ensure compliance with Catholic doctrine.[28]

V

Public Policy Concerns

Access to reproductive health care is vitally important

One Catholic health administrator disputed the claim that the *Directives* were being imposed on the hospital buyers, and instead described the buyers as "groups who agree with us and wish to continue the type of care and types of policies" set by Catholic health care.[29] But Harry Anderson of Tenet Healthcare gets right to the bottom line and admits that buyers simply have no choice but to accept the *Directives* before they can even make an offer.[30]

So, why shouldn't Catholic owners be able to impose these restrictions on their buyers? After all, it's their property. Shouldn't they be able to do what they want with it? The Catholic Health Association argues that imposing the Catholic teachings on the new hospital operators is the way the Catholic Church continues to fulfill its mission.[31]

Policymakers and courts have recognized that access to reproductive health services is vitally important, and deserving of legal protection. It runs against public policy for these services to be routinely denied or obstructed. Court decisions from *Roe v. Wade* to decisions requiring state funding of abortions for low-income women, and also recent decisions requiring employers to provide

contraceptive coverage as part of an employee prescription drug benefit,[34] have protected access to reproductive health services. The Medicaid program protects access to family planning services for low-income women and men.[35] Moreover, many state laws require that insurance companies and managed care organizations cover services such as family planning, sterilization, and fertility services; require employers to provide contraceptive coverage;[36] and require hospital emergency rooms to offer emergency contraceptives to survivors of sexual assault.[37]

At the same time, refusal clauses are sometimes also enacted to grant permission for individuals and institutions to "opt out" of compliance with laws intended to protect access to reproductive and other health care services when the provider has a moral or religious objection to the service.[38]

These restrictions are often in conflict with medical guidelines for quality care. Services that, according to generally accepted medical guidelines, should be provided concurrently ("linked-services") are fragmented, with potential serious health consequences. For example, the American College of Obstetricians and Gynecologists (ACOG) recognizes that unless counter-indicated in individual cases, an appropriate time to provide voluntary sterilizations is usually at the time of labor and delivery. But when religious restrictions prohibit sterilization, women who choose sterilization after the birth of their babies must leave the hospital and have a tubal ligation at a later time at another facility. This subjects women to an unnecessary second procedure with attendant risks of infection, side effects of anesthesia, additional costs, and risk of pregnancy – assuming that there is another facility that is accessible and that the second procedure is affordable and can be accessed in a timely manner.[39]

Restrictions may conflict with medical guidelines for quality care.

The American College of Obstetricians and Gynecologists and the American Medical Association have adopted medical guidelines calling for hospitals to offer emergency contraception to women who are survivors of rape and want to prevent pregnancy from rape.[40] Condoms, which are prohibited by the *Directives* as artificial contraception, are recognized by public health experts as the standard of care to prevent the transmission of HIV/AIDS and sexually-transmitted infections.

While a small percentage of abortions are provided in hospitals,[41] they generally are done there out of necessity for women who are medically fragile and at risk of complications, as well as for women further in their pregnancies who may need the medical back-up systems that a hospital provides. Lack of access to these services subjects women to the difficulty and expense involved in obtaining services out of their areas, as well as exposing them to the risk of harm.

More often than not, however, there are no statutory requirements to provide many of these services, and religiously-controlled health care entities are allowed through policy and practice not to provide what would otherwise be considered routine and normal healthcare services. State Medicaid agencies enter into contracts with religiously-controlled hospitals that do not provide a full range of

Medicaid-covered reproductive health services. Private managed care organizations enter into contracts with health providers that exclude services that would otherwise be covered by the managed care plan. Making matters worse, quality assurance oversight agencies (both public and private) fail to insist that these services be available to patients. The federal government has announced that for the first time, the Federal Employees Health Benefits Plan will offer a "faith-based" health plan that will be based on the tenets of the Catholic Church and specifically exclude coverage for contraceptives, abortion, sterilization, and artificial insemination.[42]

While many health advocates question whether any health system should be allowed to undermine quality of care for patients based on moral or religious objections,[43] there is no justification for tolerating a secular for-profit hospital's refusal to offer these services. Public policy and reasonable consumer expectations strongly suggest that the services should be available, particularly at secular hospitals.

In fact, even some of the most ardent advocates for extremely broad refusal clauses have promulgated a definition of moral or religious objection that would exclude for-profit systems from using it. According to the Protection of Conscience Project, refusal clauses should be based on religious or moral convictions which are "the religious or moral mandates sincerely believed by an individual, and the policies adopted by the governing body of a health care institution that are based on sincerely held religious or moral mandates."[44] None of the for-profit healthcare systems fall within this definition.

VI

The Impact on Consumers

Low-income women are the most affected

The burdens imposed on the community by the continuation of religious restrictions are significant. The Catholic hospitals for sale are generally in poor financial shape either because of market forces or inefficient management. In order for the for-profit hospitals to turn them around, they generally engage in some form of consolidation of services.

In Los Angeles, when Tenet purchased the Daniel Freeman hospitals, they began to consolidate services with their other Los Angeles area hospitals. Despite their promises that they would ensure that reproductive health services would remain available in the community,[45] Tenet proceeded to undermine that promise by creating a Center of Excellence in Obstetrics at Daniel Freeman Memorial in Inglewood – the hospital that retained the religious restrictions. Memorial's patients are predominantly Latino and African American, and the hospital serves a large Medicaid population. Women who want sterilizations at the time of delivery will have to choose between delivering at the Center of Excellence – the site that promises the best care – or traveling out of their communities to obtain the health services they want and need.

Many other Catholic hospitals are located in low-income communities where women have fewer resources in time or money to travel to alternative sources of care, if alternatives even exist. Religious restrictions impose additional burdens on their ability to access quality healthcare. The failure to lift the restrictions when the hospital is no longer owned by a Catholic entity is a missed opportunity to improve the health status of those communities.

VII

Strategies: Breaking the Hold of the Directives

Lessons from California

Disclosure to Consumers (AB 525)

The first statute in the country to specifically require that consumers be informed about the range of reproductive health services that may be restricted by religious health systems was California's AB 525.[46] The bill, as introduced in 1999 by then-Assembly Member (now State Senator), Sheila J. Kuehl, was a comprehensive attempt to ensure that religious restrictions would not burden patients seeking care. This bill addressed consumer information, restrictions on bond funding for entities that did not arrange for comprehensive reproductive health services, and would have required the Attorney General to assess the impact of conversions on reproductive health access (virtually identical to the regulation currently in place). This bill attracted enormous, organized opposition from the Catholic Health Association and from the Catholic Church itself which lobbied from the pulpit against the bill. The consumer education portions of the bill were enacted, after other portions of the bill were deleted.[47]

AB 525 went into effect on July 1, 2000. The law requires that health insurers, including managed care organizations and Medi-Cal (the California Medicaid program), inform consumers through their websites, provider directories and evidence of coverage that some providers do not offer a full range of reproductive health services even though the services are covered by the plan, and to offer a toll-free number where consumers can call to get more information. In addition, the statute is the first in the country to require notice of a list of the specific services that might be restricted.[48]

Conversion Statutes and Regulations

When a non-profit hospital is sold to a for-profit system, the transaction is generally known as a "conversion" because the non-profit entity is being converted into a for-profit entity. While the hospital operated as a non-profit entity, it enjoyed public benefits such as special tax exemptions and public bond funding, and it had particular obligations to serve the public. When the non-profit entity is sold to a for-profit, the public has a continued interest in the non-profit assets (essentially whatever is left of the sales price after debts are paid off). Conversions require some level of governmental review or oversight by the state Attorney General or other designated agencies in order to protect the community's interest.[49]

Twenty-two states now have specific statutes that govern non-profit to for-profit hospital conversions, and require Attorney General review and consent in order for the transaction to be completed.[50] These statutes generally require notice to the community, a public hearing, and a health impact study or other independent assessment of the transaction.[51] This process allows an opportunity for community advocates to bring attention to the perpetuation of the religious restrictions, and to bring their concerns before the Attorney General and the parties to the transaction. The review and consent process also empowers the Attorney General to impose conditions on the transaction that must be met in order to obtain his or her consent. The types of conditions imposed include requiring that the new owners provide a certain level of charity care, keep an emergency room open, serve a certain percentage of Medicaid patients, or offer other benefits to the community.

Even in states that do not have specific conversion statutes in place, there is a process under which the Attorney General or other designated agencies must approve the conversion of a non-profit entity to a for-profit entity before the transaction can be completed.[52] The goal of government oversight in these states is the same as under conversion statutes: to protect the public interest.

Conversions in California

California enacted its conversion law effective January 1, 1997, requiring that when a non-profit health facility is sold to a for-profit entity, the seller must apply to the Attorney General for review and consent.[53] The law was amended in 1999 to also apply to transactions between two non-profit entities, as well as to close some gaps in the law.[54] Moreover, regulations were adopted that require that the Attorney General, as part of his or her review, consider the impact of the transaction on access to reproductive health services.[55] Since the enactment of California's conversion law, there have been four conversions of Catholic hospitals to for-profit status. Over the seven years that the law has been in effect, there has been a significant evolution in the application of the law to become significantly more protective of reproductive health services. There is no doubt that the role that the Attorney General plays makes a difference in the extent to which reproductive health services are protected, and there is a significant difference in how the law was applied in 1998 and how it is being applied in 2003.

The hospital "conversion" process allows advocates to bring attention to the perpetuation of religious restrictions.

The first Catholic hospital conversion in California under the new law was the sale of Queen of Angels/Hollywood Presbyterian Hospital to Tenet Healthcare in 1998. Advocates for women's health provided testimony and data to illustrate the harm that would be caused to the community by the continued application of the *Directives*. The Attorney General at the time, Dan Lungren, was unwilling to consider any conditions to restore reproductive health services to the community.

By the time Tenet in 2001 again negotiated to purchase Catholic hospitals — the two Daniel Freeman hospitals from the Sisters of St. Joseph of Carondelet (Carondelet) - the environment had changed.

The new Attorney General, Bill Lockyer, had convened a working group composed of a broad spectrum of stakeholders to draft regulations to implement both non-profit to for-profit conversions, and non-profit to non-profit transactions. As a result of having women's health advocates at the table and an Attorney General who supports access to a full range of health services, the regulations require that the impact on reproductive health services be considered in every transaction.[56]

Consumer and health advocates were also better educated about the religious restrictions and the reasons that a for-profit hospital should not be allowed to provide less than comprehensive care based on another entity's religious objections. At the public hearings, women's organizations, consumer groups, grassroots advocacy organizations, health advocates and labor unions provided

compelling arguments to restore reproductive health services. The Sisters of Carondelet, however, threatened that they would close the hospital that serves a large Latino and African American population, many of whom are poor and depend on charity care or Medicaid-funded care, if Tenet was not bound by the *Directives* that restrict reproductive health services in perpetuity. The Attorney General ultimately consented to the sale but reserved the right to challenge the provision that the *Directives* were a covenant that ran with the land in Court.

The most recent Catholic hospital conversion was the sale of Santa Marta Hospital by the Sisters of Carondelet to Star Healthcare Group, a small for-profit system. Again, Carondelet insisted on adherence to the *Directives* for 30 years. This time, however, Attorney General Lockyer stated, "I will not allow Catholic health systems to impose their ethical principles on secular, for-profit businesses."[57] In his consent to the transaction, he required that the relevant restrictive sections of the APA "shall not be implemented, complied with, or enforced by any party to the Asset Purchase Agreement or their successors in interest."[58] The Sisters did not close down the hospital and the sale was completed. The new owner was required to change the name of the hospital, but was allowed to restore reproductive health services.

> "I will not allow Catholic health systems to impose their ethical principles on secular, for-profit businesses."
>
> **-California Attorney General**

The sale of Santa Marta Hospital illustrates that Catholic hospital sellers have both financial and doctrinal concerns. Santa Marta was a situation where ultimately the financial concerns (the decision to sell off a low-performing hospital) of the seller outweighed their doctrinal concerns. Community involvement and a strong Attorney General can create opportunities to restore reproductive health services.[59]

In 2004, Tenet Healthcare announced the sale of 26 hospitals nationwide, including the two Daniel Freeman Hospitals and Queen of Angels/Hollywood Presbyterian, all formerly Catholic hospitals at which Tenet was adhering to the *Directives*. As discussed below, the Attorney General is engaged in litigation to prevent the *Directives* from being imposed on the new owners of the Daniel Freeman hospitals. It is unknown what will happen when and if a buyer is found for Queen of Angels.

New Legislation

Strong regulations and the Attorney General (AG) review process are very important tools to restore reproductive health services. The Attorney General review process, however, also grants substantial discretion to the AG. Legislation is another important tool that also provides more certainty should an Attorney General not support access to reproductive health services.

In direct reaction to the Attorney General's consent to the Tenet purchase of the Daniel Freeman hospitals, State Senator Debra Bowen introduced SB 932. As the history of California's conversion laws indicate, the laws give the Attorney General a great deal of discretion in whether to consent or not consent to a transaction. SB 932 is the first law of its kind in the nation to remove some of that discretion and require that the AG shall not consent to a transaction in which the seller restricts the services the buyer can provide.[60] Effective

January 1, 2004, the new law will prevent a Catholic seller from imposing the *Directives* on a secular buyer, and will ensure that reproductive health services can be restored. Opposition to this bill was not nearly as vociferous as that against AB 525. Arguably, it was difficult to make the case that (1) we don't own the hospital anymore (2) we got paid for it, but (3) we still want to make the rules. Nevertheless, Father Michael Place, CEO of the Catholic Health Association, assailed the bill as an "interference in property rights and part of a larger coordinated effort to restrict Catholic health care (facilities) from carrying on their mission."[61] Overlooked in this statement, however, is that the sellers were willing to give up other parts of their "mission" in the transaction.

SB 932 is the first law of its kind in the nation to require that the AG shall not consent to a transaction in which the seller restricts the services the buyer can provide.

Catholic Healthcare West (CHW) entered into an agreement on July 6, 2004, to sell its St. Dominic Hospital in Manteca, California to Kaiser Foundation Hospitals. This transaction will be the first application of SB932 preventing CHW from imposing the *Directives* on Kaiser. The Asset Purchase Agreement specifically requires the Holy See's written consent to the transaction.[62]

Litigation

On October 10, 2003, before the passage of SB 932, the California Attorney General filed suit against Tenet Healthcare and the Sisters of Carondelet to invalidate the Asset Purchase Agreement provision that the *Directives* are a covenant that runs with the land of the Daniel Freeman facilities.[63]

Under California statutes and common law, covenants that run with the land are generally allowed when they bring some benefit to the land. Examples would be a covenant to pay taxes, or to develop mineral resources, or to maintain a dam, because they increase the value of the land or protect it. On the other hand, restrictions that burden the land — prohibitions on what can be built on the land or who can live there (outside of municipal zoning regulations) — are generally viewed as contracts between the two parties to an agreement (although they can bind future owners in some circumstances), but are not found to run with the land forever.[64] The Attorney General's suit argues that the requirement that Tenet adhere by the *Directives* is only a provision of the contract between Tenet and Carondelet, but cannot be a covenant that runs with the land binding future owners, and it should be removed from the deed.

Such litigation can be a model for suits in other states to prevent perpetual restrictions on healthcare.

States' ability to lift restrictions on the provision of abortion may be threatened by a provision contained in a 2005 appropriations bill passed by Congress. The provision, titled the Weldon Amendment, would prohibit state and local governments from "discriminating" against health providers who refuse to provide or refer for abortion. It is unclear how the provision will be interpreted or whether it will withstand a court challenge.

VIII

Conclusion

Opportunities for lifting restrictions are growing

Advocates for access to comprehensive healthcare are raising awareness and public concern about the perpetuation of religious restrictions at secular institutions. On the other side of these transactions, some inside the Church hierarchy are also concerned about these Catholic-to-secular transactions, precisely because they see the inconsistency of imposing religious obligations on a for-profit secular institution.

Nevertheless, it is likely that when faced with the choice of running unprofitable hospitals or improving their financial outlook by selling hospitals to for-profits, Catholic systems will continue to unload their low-performing facilities and to require perpetual restrictions on patient care. As the market continues to shift in favor of the buying power of for-profit hospital systems, the opportunities to lift oppressive restrictions on health services are growing. Moreover, as broad coalitions of consumers, health professionals, government officials, and other advocates join together to challenge the power of for-profit health systems, new tools are being developed to expand health access and quality.

Strategies for advocates of comprehensive health care should include:

- Getting to the table before a conversion is announced to negotiate for the restoration of lost services
- Raising awareness about community health needs through public hearings and comment
- Advocating for strong conversion laws where they do not yet exist, and for an open public process that allows consumers access to documents and information and sufficient time for public review and input
- Ensuring consideration to maintain and expand reproductive health services in the conversion process, and prohibiting restrictions that prevent future owners from providing more comprehensive services
- Educating communities and decision-makers that objections based on profit motives should never be tolerated when healthcare is at stake.

Progress made in California serves as an important model for advocacy in other parts of the country.

Additional Resources

Organizations

MergerWatch Project
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Additional Resources

Publications

A Model Conversion Act, *Community Catalyst*, 2003.

Compendium of State Conversion Laws, *Community Catalyst*, 2002.

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Endnotes

1. See e.g. Pub. L. No. 93-45 (known as the Church amendment, receipt of federal funds cannot be predicated on requirement to provide abortion or sterilization); 42 USC 1396u – 2(b)(3)(B) (Medicaid managed care organizations are exempt from counseling, referring, providing or paying for services to which they have a moral or religious objection).
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3. Ethical and Religious Directives for Catholic Health Care Services, United States Conference of Catholic Bishops, Revised June 15, 2001, http://www.usccb.org/bishops/directives.htm.
4. Catholics for a Free Choice, Facts About Catholic Healthcare (2003).
5. Vince Gallaro, Patrick Reilly, Trickling Down, *Modern Health Care Magazine*, 2004 survey of hospitals systems in the U.S., posted at http://www.modernhealthcare.com
6. Deanna Bellandi, Barbarba Kirchheimer, and Ann Saphir, Profitability a Matter of Ownership Status; For-Profit Systems See Earnings Rise, While Not-for-Profits Lag, *Modern Healthcare* (June 12, 2000).
7. Deanna Bellandi, B. Kirchheimer, A. Saphir, Profitability a Matter of Ownership Status; For-Profit Systems See Earnings Rise, While Not-for-Profits Lag, *Modern Healthcare* (June 12, 2000).
8. Reed Abelson, Demand, But No Capital, at Nonprofit Hospitals, *New York Times* (June 21, 2002).
9. Patrick Reilly, A Match Made in Heaven, *Modern Healthcare* (October 13, 2003).
10. Vince Gallaro, Patrick Reilly, Trickling Down, *Modern Health Care Magazine*, 2004 survey of hospitals systems in the U.S., posted at http://www.modernhealthcare.com
11. Monica Langley, Nun's Zeal for Profits Shapes Hospital Chain, Wins Wall Street Fans, *Wall Street Journal* (January 7, 1998).
12. Id.
13. *Directives* at 11.
14. *Directives* at 11.
15. In 2004, Tenet announced the sale of the Daniel Freeman hospitals to the newly formed for-profit Centinela Freeman HealthSystems.
16. Jennifer Saxton, New Hospital Owners Promise $3 Million Renovation, *Belleville News-Democrat* (June 13, 2002)
17. Marketing materials presented to the California Attorney General as part of the Sisters of St. Joseph of Carondolet's application to sell the Daniel Freeman Hospitals to Tenet.
18. On January 27, 2004, Tenet announced it intends to sell 27 hospitals, including some of its former-Catholic facilities. Lisa Girion and Don Lee, Tenet to Sell 19 Hospitals in State, *Los Angeles Times* (January 28, 2004). The purchaser of two St. Louis hospitals has agreed to preserve Tenet's adherence to the Directives. Judith Vandewates, Tenet Sells Two Community Hospitals, *St. Louis Post-Dispatch* (November 30, 2004).
19. California Law Bans Linking Sale of Hospitals to ERD Compliance, *Catholic Health World* (August 4, 2003).
20. See e.g., Asset Purchase Agreement for Daniel Freeman Hospitals, §10.6(c) incorporating all of the *Directives* that restrict reproductive health services.
21. Asset Purchase Agreement, sale of Daniel Freeman Hospitals, Inc to Tenet Health Systems as submitted to the California Attorney General in the application dated August 24, 2001.

22. Ibid.
23. Asset Purchase Agreement, Santa Marta Hospital, Section 9.5, Exhibit 9.5(A)(i)
24. 11 Cal. Code Regs. 999.5(c)(3). The Attorney General has the authority to withhold certain documents that he or she determines to be confidential.
25. Email from Richard Fiske to Brooke McConnell (June 17, 2003).
26. Bernard Huger, Canon Law Issues of Sponsorship, Governance Control and Alienation as They Relate to Catholic Church Entities in the U.S., *Catholic Lawyer* (Summer 2001).
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28. Bernard Huger, Canon Law Issues of Sponsorship, Governance Control and Alienation as They Relate to Catholic Church Entities in the U.S, *Catholic Lawyer* (Summer 2001).
29. Karen Brandon, Ex-Catholic Hospitals Retain Restrictions, *Chicago Tribune* (September 17, 2002).
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31. California Law Bans Linking Sale of Hospitals to ERD Compliance, *Catholic Health World* (August 4, 2003).
32. 410 U.S. 113 (1973).
33. Revisiting Public Funding of Abortion for Low Income Women, Alan Guttmacher Institute (2000), http://www.agi-usa.org/pubs/ib_funding00.html
34. Erickson v. The Bartell Drug Company, WL 649651 (W.D. Wash) (2001).
35. 42 U.S.C. 1396d(a)(4)(C); 42 C.F.R. 441.20.
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39. Nadya Labi, Holy Owned: Is It Fair for a Catholic Hospital to Impose Its Morals on Patients?, *Time* (November 15, 1999).
40. American Medical Association, Access to Emergency Contraception, "Policy of the House of Delegates, H-75, 985; American College of Obstetricians and Gynecologists, ACOG Practice Bulletin No. 25, Emergency Oral Contraception (1996).
41. The Alan Guttmacher Institute, Facts in Brief: Induced Abortion (March 2001).
42. Milt Freudenheim, U.S. Health Plans Include One with Catholic Tenets, *New York Times*, September 25, 2004.
43. The focus of this paper is the consequences for community health when secular for-profit systems perpetuate restrictions based on religious doctrine, and the important issue of an individual provider's objection to particular health services is beyond the scope of this paper.
44. Lynn D. Wardle, J.D., A Proposal for Comprehensive Conscience Clause Legislation, §2g, http://www.consciencelaws.org/Proposed-Conscience-Laws/USA/PLUSA02.html
45. Asset Purchase Agreement, Sale of Daniel Freeman Hospitals, Inc.
46. ABA 525 (Kuehl) introduced February 18, 1999; http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0501-0550/ab_525_bill_20000908_chaptered.html
47. AB 525 (Kuehl), Chapter 347 (Sept. 8, 2000) codified at Health & Safety §§1363.02, 1339.80; Insur. §10604.1; Welf. & Inst. §14016.8.

48. Id. The bill requires the following notice to be displayed prominently, "Some hospitals and other providers do not provide one or more of the following services that may be covered under your plan contract and that you or your family member might need: family planning; contraceptive services, including emergency contraception; sterilization, including tubal ligation at the time of labor and delivery; infertility treatments; or abortion. You should obtain more information before you enroll. Call your prospective doctor, medical group, independent practice association, or clinic, or call the health plan at (insert the health plan's membership services number or other appropriate number that individuals can call for assistance) to ensure that you can obtain the health care services that you need." For a broader discussion of tools and strategies to require better notice and disclosure to consumers, see Elena Cohen and Alison Sclater, Truth or Consequences: Using Consumer Protection Laws to Expose Institutional Restrictions on Reproductive and Other Health Care, *National Women's Law Center,* October 2003.
49. Other governmental processes include Certificate of Need (CON), Certificate of Public Advantage (COPA), and/or review by the state Department of Health Services. See generally Consumers Union of U.S. Inc. and Community Catalyst, Inc., Selling Out? How to Protect Charitable Health Dollars and Services, October 1998; Elena N. Cohen and Jill C. Morrison, Hospital Mergers and the Threat to Women's Reproductive Health Services: Using Charitable Assets Laws to Fight Back, *National Women's Law Center* (June 2001).
50. Community Catalyst, Protecting Health, Preserving Assets, (updated August 2002); http://www.communitycat.org/index.php3?fldID=23.
51. See generally, Community Catalyst http://www.communitycat.org.
52. Many states, for example, have a Certificate of Need (CON) process to evaluate whether a transaction is in the public's interest.
53. See generally, Cal. Corp. Code § 5914 et. seq.
54. AB 254 amended Cal. Corp. Code §§ 5913, 5914, 5915, 5916, 5919 and added Cal. Corp. Code §§ 5920, 5921, 5922, 5923, 5924, and 5925.
55. 11 Cal. Code Regs. §999.5 et. seq.
56. 11 Cal. Code. Regs §999.5(e)(6)(A).
57. Karen Brandon, Ex-Catholic Hospitals Retain Restrictions, *Chicago Tribune* (September 17, 2002).
58. Attorney General consent to the sale of Santa Marta Hospital, Conditions (July 26, 2002).
59. Elastar closed in 2004 when the new owners were not able to make the hospital profitable.
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61. Joyce Carr, Catholic Leaders Oppose California Law Limiting Sales of Hospitals, *Catholic News Service* (August 13, 2003).
62. Asset Purchase Agreement between Catholic Healthcare West and Kaiser Foundation Hospitals, §9.2.
63. People of California v. Daniel Freeman Hospitals, Inc. et. al., Los Angeles Superior Court, filed October 10, 2003.
64. Cal Civil Code § 1457 et. seq.