

# Religious Hospitals, Mergers, & Refusal Clauses

## Religious Hospitals

- One out of every six patients in the U.S. is cared for in a Catholic hospital,<sup>1</sup> and ten of the 20 largest health systems in the country are religiously-owned.<sup>2</sup>
- The Catholic healthcare system is the largest private non-profit provider of healthcare in the nation. In fact, 70% of religiously affiliated hospitals identify as Catholic.<sup>3</sup> As of 2009, there were 60 Catholic healthcare systems.<sup>4</sup>
  - Under the Religious and Ethical Directives for Catholic Health Care Services, Catholic hospitals will not provide contraception, sterilization, most infertility treatments, condom distribution for AIDS prevention, or abortion services. Directive 48 goes so far as to say no medical care that could be construed as abortion can be provided to a woman with an ectopic pregnancy.<sup>5</sup>
  - It is also difficult to obtain emergency contraception in Catholic hospitals—even as treatment for rape or sexual assault.<sup>6</sup> Since emergency contraception is most effective in the first 72 hours, religious hospitals' refusal to provide comprehensive treatment can further traumatize survivors of rape and sexual assault by forcing them to leave the hospital to search for the drug while dealing with the anxiety of not knowing whether the delay in getting the medication will result in a pregnancy.
  - Medicare and Medicaid account for 50% of the funding to religiously affiliated hospitals. Religious hospitals also enjoy certain benefits like tax exempt status, low-cost financing through government bond programs, and in some areas, use of municipal buildings.<sup>7</sup>

## Hospital Mergers and Sales

- Between 1990 and 2001, there were 171 mergers between Catholic and secular hospitals.<sup>8</sup>
- Usually, when Catholic and secular hospitals merge or sell, the new entity is forced to follow the Religious and Ethical Directives for Catholic Health Care, even if the new entity has no particular religious affiliation.<sup>9</sup> The result is a reduction (or elimination) of access to reproductive healthcare for many women.
- The people most affected by hospital mergers are low-income women and women of color, particularly in rural areas. In some cases, religious hospitals are the only healthcare option available in the region.<sup>10</sup>

## Federal Refusal Clauses

Refusal clauses allow healthcare providers to refuse to provide medically needed treatments when that treatment conflicts with the provider's religious beliefs.<sup>11</sup>

- In 1973, Congress passed the Church Amendment by a vote of 92-1,<sup>12</sup> which allows healthcare providers to cite religious grounds in order to refuse to provide abortions or sterilization.<sup>13</sup>
  - Refusal clauses were supported by the majority of Senators and Congresspersons, even those who otherwise supported abortion rights. Even Justice Blackmun, who wrote the majority opinion in *Roe v. Wade*, called refusal clauses an “appropriate protection” of a person's religious belief.<sup>14</sup>
- A refusal clause was built into the Balanced Budget Act of 1997, which created uniform standards for Medicare managed care.<sup>15</sup>
- The Weldon Amendment is a 104-word rider that Representative Dave Weldon (R-FL) tacked onto a 3000-page, \$388 billion omnibus spending bill in 2004. The Amendment effectively accomplishes the goals of the Abortion Non-Discrimination Act,<sup>16</sup> which was not passed by Congress, without going through the same legislative procedures as a normal bill.<sup>17</sup>

## Religious Hospitals, Mergers, & Refusal Clauses

The bill narrowly passed in the Senate and was signed into law at the end of 2004 by President Bush. The Amendment prevents:

- Federal, state, and local governments from mandating that healthcare providers, including Title X and Medicaid funded providers and insurers, pay for, provide, or refer patients for abortion or other reproductive related health services if the refusal is on religious grounds.
- States from requiring that Title X funded clinics and Medicare funded hospitals make abortion referrals when they cannot provide care due to religious restrictions.
- States from enforcing provisions that provide indigent women with Medicare funded abortions.<sup>18</sup>
- States from taking action to prevent hospital mergers that will reduce or remove access to reproductive healthcare in a community.<sup>19</sup>
- State and local governments could be punished with loss of federal funding if they insist that merging hospitals find a way to preserve patients' access to abortion services or even that the hospitals provide patients with referrals to alternative providers. Such action could be termed "discrimination" against the merging hospitals.<sup>20</sup>
- The amendment contains no exceptions to protect a woman's life or health.<sup>21</sup>

### Department of Health and Human Services Provider Refusal Rule

Despite the opposition of the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Hospital Association,<sup>22</sup> on December 19, 2008 the Bush administration published a new Health and Human Services regulation.<sup>23</sup> While purporting to merely educate and inform about currently existing refusal laws, the language of the HHS rule actually expands existing law in four ways.

- It leaves open the possibility that providers could define contraception as abortion, and therefore refuse to prescribe or dispense birth control.<sup>24</sup>
- It expands the type of individuals and organizations that are afforded refusal rights.<sup>25</sup>
- It allows individuals to refuse to provide information or referrals to patients seeking care the individual refuses to provide.<sup>26</sup>
- It fails to consider laws that protect patients' rights to information and services.<sup>27</sup>

On March 6, 2009, President Obama proposed to rescind this HHS regulation.<sup>28</sup>

### State Refusal Clauses

- Forty-six states have some sort of refusal clause, all of which allow individual health providers to refuse to provide abortion services.<sup>29</sup>
  - Forty-three states allow healthcare institutions to refuse to provide abortion services. Fourteen states allow only private institutions to deny abortion services, and one state allows for only religious institutions to deny services.<sup>30</sup>
  - In 13 states, the law allows for refusal of contraception services.<sup>31</sup>
  - Seventeen states allow for refusal of sterilization services.<sup>32</sup>
- Refusal clauses can apply to both medical and non-medical individuals and institutions including physicians, pharmacists, nurses, hospitals, clinics, universities, and insurance companies.<sup>33</sup>
- Refusal clauses can cover a broad range of services including abortion, contraception, and family planning services.<sup>34</sup>
- According to professional organizations, refusal clauses that allow an expression of religious beliefs may be considered acceptable if they provide an adequate plan for referral.<sup>35</sup>
- Religious restrictions can act to effectively "gag" physicians from describing treatment options that aren't offered by the hospital.<sup>36</sup>



# Religious Hospitals, Mergers, & Refusal Clauses

- <sup>1</sup> Catholic Health Care in the United States, CHA (The Catholic Health Ass'n of the U.S., Washington, D.C.), Jan. 2009, at 1, available at <http://www.chausa.org/NR/rdonlyres/68B7C0E5-F9AA-4106-B182-7DF0FC30A1CA/0/FACTSHEET.pdf> [hereinafter CHA].
- <sup>2</sup> LOIS UTTLEY & RONNIE PAWELKO, NO STRINGS ATTACHED: PUBLIC FUNDING OF RELIGIOUSLY-SPONSORED HOSPITALS IN THE UNITED STATES 11 (2002), available at [http://www.mergerwatch.org/pdfs/bp\\_no\\_strings.pdf](http://www.mergerwatch.org/pdfs/bp_no_strings.pdf).
- <sup>3</sup> UTTLEY & PAWELKO, *supra* note 2, at 4.
- <sup>4</sup> CHA, *supra* note 1, at 1; CATHOLICS FOR A FREE CHOICE, CATHOLIC HEALTH CARE UPDATE: THE FACTS ABOUT CATHOLIC HEALTH CARE IN THE UNITED STATES, 24 (2005), available at [http://www.catholicsforchoice.org/topics/healthcare/documents/2005factsaboutcatholichealthcare\\_000.pdf](http://www.catholicsforchoice.org/topics/healthcare/documents/2005factsaboutcatholichealthcare_000.pdf) [hereinafter Catholics for Choice].
- <sup>5</sup> UTTLEY & PAWELKO, *supra* note 2 at 6, 23; Rachel Benson Gold, Hierarchy Crackdown Clouds Future of Sterilization, EC Provision at Catholic Hospitals, in THE GUTTMACHER REP. ON PUB. POL'Y 11 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/2/gr050211.pdf>.
- <sup>6</sup> UTTLEY & PAWELKO, *supra* note 2, at 27-28.
- <sup>7</sup> *Id.* at 2, 4.
- <sup>8</sup> Gold, *supra* note 5, at 11.
- <sup>9</sup> Susan Berke Fogel & Lourdes A. Rivera, Saving Roe is Not Enough: When Religion Controls Healthcare, 31 *FORDHAM URB. L.J.* 725, 731 (2004).
- <sup>10</sup> Fogel & Rivera, *supra* note 9, at 733.
- <sup>11</sup> GUTTMACHER INST., GUTTMACHER INST. STATE POL'IES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 1 (2009), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf).
- <sup>12</sup> Jacob M. Appel, 'Conscience' vs. Care: How Refusal Clauses are Reshaping the Rights Revolution, 88 *MED. & HEALTH R.I.* 279, 279 (2005), available at [http://findarticles.com/p/articles/mi\\_qa4100/is\\_200508/ai\\_n14898588](http://findarticles.com/p/articles/mi_qa4100/is_200508/ai_n14898588).
- <sup>13</sup> UTTLEY & PAWELKO, *supra* note 2, at 35-36.
- <sup>14</sup> *Id.*
- <sup>15</sup> Appel, *supra* note 12, at 280.
- <sup>16</sup> Abortion Non-Discrimination Act of 2003, H.R. 3664, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.3664>.
- <sup>17</sup> Cynthia L. Cooper, U.S. Gag Rule Included in Emergency Spending Bill, *WOMEN'S ENEWS*, Dec. 6, 2004, available at <http://www.womensenews.org/article.cfm/dyn/aid/2098/context/archive>.
- <sup>18</sup> Appel, *supra* note 12, at 280.
- <sup>19</sup> Lawsuits Filed to Enjoin Federal Refusal Clause, Guttmacher Institute Media Center, Dec. 20, 2004, <http://www.guttmacher.org/media/inthenews/2004/12/20/>.
- <sup>20</sup> Rebecca Vesely, California Sues U.S. Over Budget's Abortion Ban, *WOMEN'S ENEWS*, Feb. 7, 2005, available at <http://www.womensenews.org/article.cfm/dyn/aid/2176>.
- <sup>21</sup> Attorney General Lockyer Readies Court Challenge to Fight Federal Attack on Women's Right to Choose, Office of the Attorney General News Release, Dec. 8, 2004, <http://ag.ca.gov/newsalerts/release.php?id=895&year=2004&month=12&PHPSESSID=5d5320608e1af33b6ab42dca5...&PHPSESSID=5d5320608e1af33b6ab42dca5>.
- <sup>22</sup> Nancy Pelosi, The Gavel, Dec. 18, 2008, available at <http://speaker.house.gov/blog/?p=1620>.
- <sup>23</sup> NARAL Pro-Choice America, The Federal Refusal Clause, <http://www.prochoiceamerica.org/issues/abortion/access-to-abortion/refusal-clauses-and-counseling-bans/federal-refusal-clause.html> (last visited June 8, 2009).
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.*
- <sup>27</sup> *Id.*
- <sup>28</sup> Center for Reproductive Rights, Obama Administration Proposes to Repeal Bush HHS Rule in its Entirety, <http://reproductiverights.org/en/press-room/obama-administration-proposes-to-repeal-bush-hhs-rule-in-its-entirety> (last visited June 8, 2009).
- <sup>29</sup> *Id.*
- <sup>30</sup> *Id.*
- <sup>31</sup> *Id.*
- <sup>32</sup> *Id.*
- <sup>33</sup> Appel, *supra* note 12, at 280.
- <sup>34</sup> *Id.*
- <sup>35</sup> *Id.*
- <sup>36</sup> *Id.*