

# Religious Hospitals, Mergers, & Refusal Clauses

## Religious Hospitals

- Nearly one in every five hospital beds in the United States is now under the control of a religious entity and 10 of the 20 largest health systems in the country are religiously-owned.<sup>1</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. As of 2005, there were 60 Catholic healthcare systems, totaling 13% of all community hospitals.<sup>2</sup>
- A huge surge in hospital sales and mergers during the 1990s has made the Catholic healthcare system more influential.
  - 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 can be provided to a woman with an extra-uterine pregnancy that could be construed as abortion.<sup>3</sup>
  - It is also difficult to obtain emergency contraception in Catholic hospitals – even for rape/sexual assault victims.<sup>4</sup>
  - Medicare and Medicaid account for one-half of the funding to religiously affiliated hospitals.<sup>5</sup> 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>6</sup>

## Hospital Mergers and Sales

- Between 1990 and 2001 there were 171 mergers between Catholic hospitals and secular systems.<sup>7</sup>
- In 2004, four of the 10 largest hospital systems in the U.S. were Catholic-controlled, including the largest. And of the 10 largest religiously-owned healthcare systems, 9 were Catholic controlled.<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. This results in reduced (or elimination of) access to reproductive healthcare for many women.<sup>9</sup>

<sup>1</sup> Lois Uttley, Ronnie Pawelko, No Stings Attached Public Funding of Religiously-Sponsored Hospitals in the United States, *Merger Watch*, 3-4 (2002), available at [http://www.mergerwatch.org/pdfs/bp\\_no\\_strings.pdf](http://www.mergerwatch.org/pdfs/bp_no_strings.pdf) (last visited July 14, 2008).

<sup>2</sup> *Id.* at 4; The Facts about Catholic Health Care in the United States, *Catholics for a Free Choice*, 24 (2005), available at <http://www.catholicsforchoice.org/topics/healthcare/documents/2005factsaboutcatholichealthcare.pdf> (last visited July 14, 2008).

<sup>3</sup> *Id.* at 6, 23; Rachel Benson Gold, *Hierarchy Crackdown Clouds Future of Sterilization, EC Provision at Catholic Hospitals*, 5 *The Guttmacher Report on Public Policy* 2, (2002), available at <http://www.guttmacher.org/pubs/tgr/05/2/gr050211.html> (last visited July 14, 2008).

<sup>4</sup> *Id.* at 27-28.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> Lois Uttley, Ronnie Pawelko, No Stings Attached Public Funding of Religiously-Sponsored Hospitals in the United States, *Merger Watch*, 2 (2002), available at [http://www.mergerwatch.org/pdfs/bp\\_no\\_strings.pdf](http://www.mergerwatch.org/pdfs/bp_no_strings.pdf) (last visited July 14, 2008).

<sup>7</sup> Rachel Benson Gold, *Hierarchy Crackdown Clouds Future of Sterilization, EC Provision at Catholic Hospitals*, 5 *The Guttmacher Report on Public Policy* 2, (2002) available at <http://www.guttmacher.org/pubs/tgr/05/2/gr050211.html> (last visited July 14, 2008).

<sup>8</sup> The Facts about Catholic Health Care in the United States, *Catholics for a Free Choice*, 1-2 (2005), available at <http://www.catholicsforchoice.org/topics/healthcare/documents/2005factsaboutcatholichealthcare.pdf> (last visited July 14, 2008).

<sup>9</sup> The Facts about Catholic Health Care in the United States, *Catholics for a Free Choice*, 3 (2005), available at <http://www.catholicsforchoice.org/topics/healthcare/documents/2005factsaboutcatholichealthcare.pdf> (last visited July 14, 2008).

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- 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>
- A merger can be challenged legally on several grounds. Additionally, there may be some legal recourse for women who have lost access to reproductive healthcare after a merger has already begun. Anti-trust laws have been used to protest hospital mergers. Also, one can allege violations of Charitable Trust Laws or of the First Amendment for violation of the Establishment Clause.<sup>11</sup> If the merger has already occurred, there is the potential for malpractice suits if the hospital completely denies access to certain medically necessary procedures.<sup>12</sup>

### Refusal/Conscience Clauses

- In 1973, Congress passed the Church Amendment to allow healthcare providers to cite religious grounds in order to refuse to provide abortions or sterilization.<sup>13</sup>
  - By the end of the decade, the majority of states adopted similar refusal clauses.<sup>14</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 beliefs.<sup>15</sup>
- A refusal clause was built into the Balanced Budget Act of 1997, which created uniform standards for Medicare managed care.<sup>16</sup>
  - Despite patients’ needs, many states and professional organizations have enacted refusal clauses allowing healthcare providers to refuse to provide medically needed treatments on the grounds that they conflict with the provider’s religious beliefs.<sup>17</sup>
- 46 states have some sort of refusal clause, all of which allow individual health providers to refuse to provide abortion services.<sup>18</sup>
  - 43 states allow healthcare institutions to refuse to provide abortion services. 15 states allow only private institutions to deny abortion services, and 1 state allows for only religious institutions to deny services.<sup>19</sup>
  - In 34 states, the refusal clauses apply only to abortion.<sup>20</sup>
  - In 13 states, the law allows for refusal of contraception services.<sup>21</sup>
  - 17 states allow for refusal of sterilization services.<sup>22</sup>

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July 14, 2008); Hospitals and Religious Restrictions, Merger Watch, [http://www.mergerwatch.org/hospital\\_mergers.html](http://www.mergerwatch.org/hospital_mergers.html) (last visited July 14, 2008).

<sup>10</sup> Susan Berke Fogel, Lourdes A. Rivera, *Saving Roe is Not Enough: When Religion Controls Healthcare*, 31 *FORDHAM URBAN LAW JOURNAL* 141 (2004).

<sup>11</sup> *Id.* at 148-151.

<sup>12</sup> *Id.* at 151-153.

<sup>13</sup> Lois Uttley, Ronnie Pawelko, *No Stings Attached Public Funding of Religiously-Sponsored Hospitals in the United States*, Merger Watch, 35-36 (2002), available at [http://www.mergerwatch.org/pdfs/bp\\_no\\_strings.pdf](http://www.mergerwatch.org/pdfs/bp_no_strings.pdf) (last visited July 14, 2008).

<sup>14</sup> Jacob M. Appel, ‘Conscience’ vs. Care: How Refusal Clauses are Reshaping the Rights Revolution, *Medicine and Health Rhode Island*, Aug., 2005, at 1, available at [http://findarticles.com/p/articles/mi\\_qa4100/is\\_200508/ai\\_n14898588](http://findarticles.com/p/articles/mi_qa4100/is_200508/ai_n14898588) (last visited Aug. 17, 2008).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Refusing to Provide Health Services*, Guttmacher Institute State Policies in Brief, July 1, 2008, [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (last visited July 14, 2008).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

## Religious Hospitals, Mergers, & Refusal Clauses

- Refusal clauses can apply to both medical and non-medical individuals and institutions including: physicians, pharmacists, nurses, hospitals, clinics, universities, and insurance companies.<sup>23</sup>
- Refusal clauses can cover a broad range of services including abortion, contraception, and family planning services.<sup>24</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>25</sup>
- Religious restrictions can act to effectively “gag” physicians from describing treatment options that aren’t offered by the hospital.<sup>26</sup>

### The Weldon Amendment

- The Weldon Amendment is a 104-word rider that was tacked onto a 3000-page, \$388 billion omnibus spending bill by Representative Dave Weldon (R-FL) in 2004. The Amendment effectively accomplishes the goals of the Abortion Non-Discrimination Act, which was not passed by Congress, without going through the same legislative procedures as a normal bill.<sup>27</sup> The bill narrowly passed 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 for abortion or other reproductive related health services if they refuse to do so on religious grounds.
  - states from requiring that Title X funded clinics and Medicare funded hospitals make abortion referrals when they were prevented from providing care due to religious restrictions.
  - states from enforcing provisions that provide indigent women with Medicare funded abortions.<sup>28</sup>
  - states from taking action to prevent hospital mergers that will reduce or remove access to reproductive healthcare in a community.<sup>29</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>30</sup>
- The amendment contains no exceptions to protect a woman’s life or health.<sup>31</sup>

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<sup>22</sup> Id.

<sup>23</sup> Lois Uttley, Ronnie Pawelko, No Stings Attached Public Funding of Religiously-Sponsored Hospitals in the United States, *Merger Watch*, 32 (2002), available at [http://www.mergerwatch.org/pdfs/bp\\_no\\_strings.pdf](http://www.mergerwatch.org/pdfs/bp_no_strings.pdf) (last visited July 14, 2008).

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</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> (last visited July 14, 2008).

<sup>28</sup> Jacob M. Appel, ‘Conscience’ vs. Care: How Refusal Clauses are Reshaping the Rights Revolution, *Medicine and Health Rhode Island*, Aug., 2005, at 2, available at [http://findarticles.com/p/articles/mi\\_qa4100/is\\_200508/ai\\_n14898588](http://findarticles.com/p/articles/mi_qa4100/is_200508/ai_n14898588) (last visited Aug. 17, 2008).

<sup>29</sup> *Lawsuits Filed to Enjoin Federal Refusal Clause*, *Guttmacher Institute Media Center*, Dec. 20, 2004, <http://www.guttmacher.org/media/inthenews/2004/12/20/> (last visited July 14, 2008).

<sup>30</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> (last visited July 14, 2008).

<sup>31</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, available at



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- Two legal challenges to the provision were filed in federal court. The National Family Planning and Reproductive Health Association filed *NFPRHA v. Gonzales* in December 2004, and the State of California filed *Health Assoc., Inc. v. Ashcroft* in January 2005. In September 2005, a judge for the District Court of D.C. denied NFPRHA's motion for a preliminary injunction on the basis that NFPRHA did not sufficiently prove that the Amendment was void for vagueness or exceeded the permissible boundaries of legislative delegation.<sup>32</sup>

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<http://ag.ca.gov/newsalerts/release.php?id=895&year=2004&month=12&PHPSESSID=5d5320608e1af33b6ab42dca5...&PHPSESSID=5d5320608e1af33b6ab42dca5> (last visited July 14, 2008).

<sup>32</sup> Janice Hopkins Tanne, *New US "abortion non-discrimination act" faces legal challenges*, *BMJ* (2005), available at <http://www.bmj.com/cgi/content/full/330/7481/9-a> (last visited July 14, 2008); John P. Fortuno, *The Weldon Amendment: The Ongoing Restrictions on a Women's Right to Choose*, *bepress Legal Series, Paper 1243*, 32-34 (2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=5914&context=expresso> (last visited July 14, 2008).