STATE ATTORNEYS GENERAL'S LEGAL AUTHORITY TO POLICE THE SALE OF NONPROFIT HOSPITALS AND HMOs[1]

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I. Introduction

Nonprofit community hospitals have traditionally been the backbone of the American hospital system, accounting for substantially more than half of the nation's hospital capacity. However, over the past several years, powerful market forces reshaping the health care system have stimulated the rapid growth of large for-profit hospital chains.

While their initial growth was fueled largely by the consolidation of existing for-profit hospital companies, more recently the large for-profit chains have turned to acquiring significant numbers of nonprofit hospitals. Most of these transactions are structured as asset sales, however, a significant minority are structured as joint ventures in which the nonprofit transfers its hospital assets to a for-profit joint venture, receives cash equal to a portion of the value of these assets, and retains a passive investment interest in the for-profit joint venture.

Nonprofit acquisition is a publicly announced strategy of the largest for-profit chain, and industry experts agree that the rate of for-profit acquisition of nonprofit hospitals and HMOs will continue to accelerate. These transactions promise to result in by far the largest redeployment of charitable assets in history, potentially involving tens of billions of dollars.

Given the sheer magnitude of these transactions and the obvious risks they entail for misuse or mismanagement of charitable funds, the case for aggressive regulation is clear and

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compelling. While the IRS has some authority in this area -- particularly in preventing private inurement and ensuring the adequacy of the purchase price -- it does not have the authority to require advance approval. Further, the resources it can devote even to *ex poste* review are quite limited relative to the magnitude of the task. Accordingly, the principal burden of protecting the public's interest when nonprofit hospitals go up for sale will necessarily fall to state charity regulators.

This memorandum examines the legal basis for, and scope of, state attorneys general's legal authority to oversee these transactions.[2]

II. Summary of Conclusions

Advance court approval required. The directors of a nonprofit charitable corporation -- like the trustees of a charitable trust -- must obtain prior court approval in a *cy pres*-type proceeding for any fundamental change in corporate purposes. This advance approval requirement clearly applies where a nonprofit corporation whose dominant purpose has been the operation of a hospital proposes to sell its hospital operation and devote the sales proceeds to a fundamentally different use.[3]

While the courts traditionally afford a nonprofit's directors broad discretion in managing day-to-day operations, directors receive no such deference when the issue is a fundamental

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2 Although the memorandum refers only to attorneys general, the legal arguments developed here should generally be equally applicable to other state officials assigned the duty of regulating charities.

3 While the following analysis refers only to nonprofit hospitals, as a general matter it is equally applicable to nonprofit HMOs.

change in corporate purpose. Rather, the court reviewing a proposed nonprofit hospital sale or joint venture will make its own independent judgment about the appropriateness of the proposed change in use of the charity's assets. As the representative of the public interest, the attorney general is automatically a party to any such court proceeding, and thus, has clear legal authority to undertake an independent review of the reasonableness and appropriateness of nonprofit hospital and HMO conversion transactions.

Where a nonprofit hospital corporation or holding company proceeds, without court approval, with a sale or joint venture transaction that will terminate the nonprofit's hospital operations and redeploy its assets, state courts have the authority both to enjoin the transaction and to hold the nonprofit's directors liable for breach of fiduciary duty.

<u>Directors' duty of care.</u> The directors of a nonprofit hospital corporation or holding company also have a duty to exercise reasonable care in reviewing and approving a sale or joint venture transaction. This duty of care requires the directors to employ a reasonable decision-making process directed toward ensuring that the transaction is in the best interest of the corporation. The nonprofit board's decision-making process will presumptively fail to meet this duty of care if the directors fail to obtain the assistance of competent experts and/or fail to consider competing offers. Nonprofit directors are entitled to the protection of the business judgment rule -- under which a court will decline to second-guess the objective reasonableness of the directors' decisions -- only if the directors can show that they have meet the process requirements imposed by the duty of care.

<u>The attorney general's authority to require advance review and approval.</u> The requirement that a nonprofit hospital corporation obtain advance court approval for a sale or

transfer of its hospital operation, combined with director's personal exposure to suit for breach of their duty of care, give state charity regulators the practical leverage to require nonprofits to submit such transactions for advance review and approval. Proposed Guidelines for this review process are included under Tab 4. Faced with the prospect of a potentially protracted challenge by the attorney general to its petition for an authorization of new use, or a breach of duty action if it proceeds without court approval, nonprofit hospital corporations will almost certainly opt to comply with reasonable requirements for advance review and approval.

Leveraging state regulators' oversight capacity. It will be difficult within existing resource constraints for attorneys general and other state regulators to provide effective oversight for the increasing number of nonprofit hospital and HMO conversion transactions. Accordingly, regulators need to consider strategies to augment their existing regulatory capacity. In this regard, state regulators should consider requiring the parties to nonprofit hospital sale and joint venture transactions to fund the cost of an independent review of the fairness of the proposed transaction.

In addition, in appropriate circumstances, state attorneys general should consider authorizing private parties to bring relator actions challenging the terms of proposed transactions. Where state law permits such relator actions, the attorney general can exercise ultimate control over the action while requiring the private relator to bear the costs of the action.

III. Legal Analysis

A. The Requirement for Prior Court Approval of a Nonprofit Hospital Corporation's Sale of Its Hospital Operations

The directors of a charitable nonprofit corporation whose dominant purpose is the operation of a hospital must obtain prior court approval before selling the corporation's hospital operations and using the sale proceeds for other purposes. This obligation derives from the courts' application to charitable corporations of fundamental trust law principles concerning changes in use of charitable assets.

The trustees of a charitable trust seeking to use trust assets for a purpose other than the stated purpose of the trust must, of course, obtain prior court approval in a *cy pres* proceeding.[4] In such a proceeding, to which the attorney general is automatically a party, the trustee must establish that (1) it has become impossible, or at least impracticable, to accomplish the stated purpose of the trust, and (2) the proposed alternative use of trust assets comes as close as present circumstances permit to fulfilling the original intent of the donor. Consistent with trust law's strong emphasis on fidelity to the settlor's intent, courts historically have taken a quite strict and literal approach in applying these *cy pres* criteria in cases involving charitable trusts. However, the recent trend has been toward somewhat greater flexibility -- for example, courts have approved deviations from trust purposes without a showing of strict impossibility or impracticality where the trustee has made a credible argument that the settlor would have favored

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4 Cy pres is an equitable doctrine under which courts may authorize trustees to use charitable assets in a way different from that intended by the donor, if the donor's intended use has become impracticable. Restatement Second of Trusts § 399.

the proposed alternative use had he or she been able to take into account changed circumstances since the creation of the trust.[5]

While charitable corporations are not treated as trusts for all purposes,[6] courts and commentators have taken the position that the assets of a charitable corporation are impressed with a charitable trust limiting the purposes for which they can be used to the purposes of the corporation as those purposes were defined at the time the assets were given.[7] Thus, a

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5 Scott on Trusts, § 399.4.

6 For example, as discussed below, charitable directors are not subject to the same fiduciary standards as charitable trustees. See, e.g., Stern v. Lucy Webb, 381 F. Supp. at 1013.

7 See, e.g., Queen of Angels Hosp. v. Younger, 66 Cal. App. 3rd 359 (1977); Holt v. College of Osteopathic Physicians and Surgeons, 61 Cal.2d at 750, 754 (1964); Att'y Gen. v. Hahnemann Hosp., 494 N.E.2d at 1018 (Mass. 1985); Greil Mem. Hosp. v. First Alabama Bank of Montgomery, 387 So.2d 778, 781 (Ala 1980); Riverton Area Fire Protection Dist. v. Riverton Volunteer Fire Dept., 566 N.E.2d 1015 (Ill App. 1991); Bossen v. Women's Christian National Library Assoc., 225 S.W.2d 336 (Ark. 1949), Stevens Brothers Foundation v. CIR, 324 F.2d 633 (Eighth Cir. 1963)(applying Delaware law); The National Foundation v. First National Bank of Catawba Co., 288 F.2d 831, 836 (Fourth Cir. 1961)(applying North Carolina law); 15 Am Jur 2d Charities § 81 ("a gift or bequest to a corporation or unincorporated association engaged solely in charitable work will usually be construed as held in trust for that purpose"). Scott on Trusts § 348.1 notes that, although there is diversity of opinion in the cases, "[i]t is probably more misleading to say that a charitable corporation is not a trustee than to say that it is . . .").

The Superior Court of New Jersey addressed the issue of whether the law of charitable corporations included strict trust law limitations on permissible changes in use in City of Paterson v. Paterson Gen. Hosp., 97 N.J. 514 (1967). The transaction under review in Paterson involved the relocation of a hospital a short distance outside the city it was incorporated to serve in violation of the literal language of the organization's corporate charter. Although the court held that a charitable corporation -- like a business corporation and unlike a true trust -- has the authority to make reasonable amendments to its charter, it noted that this authority is not unlimited. The court stated explicitly that the ability to amend corporate purposes did not extend to transactions that "constitute a substantial departure from the purposes of the charter." Id. at 491.

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charitable corporation's directors cannot authorize a fundamental deviation from those purposes without obtaining prior court approval in a *cy pres*-type proceeding.[8]

The Supreme Judicial Court of Massachusetts, for example, has ruled that, although a charitable corporation has the power to amend purposes, it is not free to unilaterally apply pre-existing assets to the new purposes. In the court's view, such action would be a violation of the board's fiduciary duties to donors, and would potentially undermine the attorney general's "power and responsibility to 'enforce the due application of [charitable] funds.'"[9] Thus, while the corporation in Hahnemann was authorized to sell its hospital facility, its use of the sale proceeds was limited to the purposes defined in its earlier governing instruments.

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It is well settled that charitable corporations as well as charitable trusts are subject to the Attorney General's authority to bring suit charging the misapplication of charitable assets. Scott on Trusts § 348.1.

8 See The National Foundation v. First National Bank of Catawba Co., 288 F.2d at 836 (Fourth Cir. 1961). See also Stevens Bothers Foundation v. CIR, 324 F.2d at 644 (Eighth Cir. 1963). In determining whether to approve a proposed change in use in the assets of a nonprofit hospital corporation, a court would presumably apply the basic trust law criteria outlined above, but probably with somewhat greater flexibility than in trust cases since rather than interpreting the clearly stated intent of a single settlor, the court would be interpreting the collective intent of all past donors to the hospital corporation.

9 Hahnemann Hospital, 494 N.E.2d at 1021. Although Hahnemann Hospital dealt with an organization that had incorporated the terms of a trust into its bylaws, the opinion is clear that the board's fiduciary duties ran not only to the original settlor but also to the public because of its contributions to the hospital prior to the amendment of purpose. The court stated explicitly its concern that, if a charitable corporation could freely redirect the use of its assets, then "[t]he public could not be assured that funds it donated would be used for similar purposes." Id.

The clearest exposition of these principles can be found in Queen of Angels v. Younger, an important case in which a California Court of Appeals held that a nonprofit hospital corporation did not have the legal authority to lease its facilities to a for-profit concern and use the proceeds for other health-related activities. The court's analysis began with the proposition that:

> the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes, and not withstanding the absence of any express declaration by those who contribute such assets as to the purposes for which the contributions are made.[10]

To determine the terms of that trust -- and hence the extent of the board's authority to authorize new activities -- the court looked not only to the corporation's articles of incorporation but also to the way it had held itself out to donors and the community at large. While the court recognized that the corporation's articles explicitly empowered it to engage in a range of health-related activities, it found that all of those activities were predicated on the organization's running a hospital. The court went on to stress that the corporation had represented itself to donors, the public, and to state and federal tax authorities as a hospital. Thus, the opinion concludes that leasing the hospital to another organization constituted the abandonment of the organization's corporate purposes and violated the trust imposed on its assets.[11]

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10 Queen of Angels v. Younger, 66 Cal. App. 3d at 364.

11 See also Holt v. College of Osteopathic Physicians & Surgeons, 394 P.2d 932 (Cal. 1964), in which the California Supreme Court enjoined an action by the board of a charitable corporation to modify the nature of its activities because the modification was inconsistent with the way the organization had held itself out to the public and grant makers.

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In this regard, it is important to note that while the courts traditionally afford directors of a charitable corporation broad discretion in managing day-to-day operations, directors receive no such deference when the issue is a fundamental change in corporate purpose. The Supreme Court of Missouri has articulated this principle as follows in Taylor v. Baldwin:

> "The point of demarcation at which the courts will interfere with the discretion of those governing a public charity reasonably is the point of substantial departure by the governors (or Board) from the dominant purpose of the charity."[12]

In Taylor, the court considered a contractual affiliation between a nonprofit hospital and university medical center which involved selling the hospital's existing facility and buying a new one on the medical center campus. Although the court upheld the board's decision to affiliate with the medical center, it did so only in light of several express findings indicating that the affiliation was not a substantial departure from the corporation's dominant charitable purpose. Indeed, the court found that, under the affiliation agreement, the corporation would maintain its

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The issue of how to determine the limits imposed on the use of funds donated to a charitable corporation was also addressed by the Supreme Court of Alabama in Greil Mem. Hosp. v. First Alabama Bank of Montgomery, 387 So.2d 778 (Ala 1980). Greil posed the question of whether a bequest to a charitable corporation originally organized for the purposes of treating tuberculous lapsed when the corporation converted to a grant- making foundation funding a variety of projects. In answering this question, the court reasoned that "[a] bequest to a charitable corporation, formed for a single charitable purpose, is a gift in trust for that purpose . . . ." Id. at 781. Thus, when the recipient organization abandoned "its sole corporate purpose" by ceasing to be a tuberculosis hospital and becoming a grant-making foundation, the bequest lapsed.

12 Taylor v. Baldwin, 247 S.W.2d 741, 750 (Mo. 1952).

independence and control over its hospital operations and would "continue to perform its present functions and render its present services without change."[13]

On the other hand, where a nonprofit corporation whose dominant purpose has been the operation of a hospital proposes to sell the hospital and use the sale proceeds for a fundamentally different purpose -- for example, to endow a grant-making foundation -- it finds itself clearly on the other side of the "point of demarcation" defined by the court in Taylor. In this situation, the nonprofit hospital corporation is not seeking merely to modify the circumstances under which it supplies hospital services, but rather is getting out of the hospital business all together.[14] As the foregoing authorities make clear, the directors do not have the authority to make such a change without court approval.

There are as yet no reported cases applying the foregoing analysis to the relatively recent phenomenon of so-called whole hospital joint ventures with for-profit hospital corporations. The terms of these joint venture transactions, including the degree to which the nonprofit will remain involved in managing the hospital once it is owned by the joint venture, vary greatly. However, the nonprofit typically gives up control of its hospital, transferring the hospital to the joint

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13 Id. at 752. The affiliation contract provided that the hospital's "Board of Directors retain all jurisdictional powers incident to separate ownership, including selection of the directing head or administrator of the hospital. . . ." Id. at 753. Moreover, the court found that the hospital board would retain "complete power and control over the professional policies of the hospital, and of all appointments to, and the government and supervision of the medical staff of the Hospital." Id. Thus, the court's refusal to treat the affiliation as a substantial departure from the corporation's dominant charitable purpose was well grounded in the facts of this particular case.

14 See Greil Mem. Hosp. v. First Alabama Bank of Montgomery, supra, note 7, in which the Supreme Court of Alabama found that conversion to a grant-making foundation constituted the total abandonment of the corporation's sole purpose.

venture in return for cash plus a passive investment interest in the joint venture. In such cases, the change in use of the charity's assets is usually substantially equivalent to that involved in a traditional asset sale. Hence, the authority discussed above requiring prior court approval for fundamental changes in corporate purpose should be applicable to these joint venture transactions as well.

In sum, the directors of a nonprofit hospital corporation or hospital holding company do not have the authority to consummate a sale or joint venture transaction through which the corporation disposes of its hospital operations without obtaining prior court approval in a *cy pres*-type proceeding. Where a nonprofit hospital corporation proceeds with such a transaction without prior court approval, state courts have the authority both to enjoin the transaction and to hold the nonprofit's directors liable for breach of fiduciary duty.

B. Directors' Duty of Care in Approving Nonprofit Hospital Sales

Wholly apart from the duty of fidelity to the donors' intent imposed on them by the law of charitable trusts, directors of charitable corporations must fulfill their duty of care to the corporation. The standards applicable to directors of nonprofit corporations in fulfilling this duty are generally said to be the same as those applied to directors of for-profit corporations. In virtually all states, the duty of care for both nonprofit and for-profit directors requires that the director act with the care an ordinarily prudent person would exercise in similar circumstances.[15]

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[15] See, e.g., Conn. Gen. Stat. § 33-447(d); NY Not-for-Profit Corp. Law § 717; Mass. Gen. Laws, Ch 180 § 6C; New Jersey Nonprofit Corp. Act § 15A:6-14; Mont. Non-Profit (continued...)

In the context of for-profit corporations, the courts have developed a strong policy -- known as the "business judgment rule" -- against second-guessing director's decisions. The business judgement rule raises a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company."[16] This presumption does not mean, however, that directors' actions are not subject to judicial review. Indeed, in the leading case on the application of the business judgement rule to major transactions involving the sale of an entire corporation or its assets, Smith v. Van Gorkom, the Supreme Court of Delaware held that the rule does not protect decisions by board members who have breached their duty of care by failing to obtain sufficient information to make an informed business judgment.[17] Thus, while the board's substantive decision is generally insulated from judicial scrutiny, the business judgement rule leaves room for the courts, and consequently attorneys general, to review the process by which those decisions are made.

In Smith v. Van Gorkom, the court found that the directors of a business corporation had breached their duty of care when they approved a cash sale of their corporation which the corporation's chairman/chief executive officer had negotiated. In reviewing the board's action, the court stressed that: (1) the board had not adequately informed itself about the CEO's role

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Corp. Act § 35-2-416; Revised Model Nonprofit Corporations Act § 8.30. See also Paterson Gen. Hosp., 235 A.2d at 494 (refusing to enjoin relocation of non-profit hospital, since directors' "reasonable" decision had not breached duties of care and loyalty).

16 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

17 488 A.2d 859, 873 (Del. 1985).

in framing the deal and suggesting the purchase price to the buyer, (2) they had not adequately informed themselves about the value of the corporation, and (3) their decision had been made too quickly.[18]

In later cases, the Delaware court has continued to give special scrutiny to directors' decisions involving transactions in which control of the company will change hands.[19] The reason for this heightened judicial concern is, of course, the fear that the management and directors of a selling corporation will evaluate competing offers more in terms of the treatment they expect to receive personally from new management than in terms of the corporation's best interest. The case law in this area is clear that in any transaction involving a change in control "the duty of the directors is to get the highest value reasonably attainable for the shareholders."[20] At a minimum, this duty would require considering all available offers.[21]

From these general principles flow a series of more specific obligations that nonprofit hospital directors must meet if they are to discharge their duty of care with regard to a sale or joint venture transaction. First, directors must determine whether the officers on whom they

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18 Id. at 874.

19 See Revlon v. MacAndrew & Forbes Holdings, 506 A.2d 173 (1986); Paramount v. QVC, 637 A.2d 34 (Del. 1993).

20 See Paramount at 46. In transactions involving a change in control of a charitable corporation, the beneficiary of the value maximization rule would necessarily be the corporation's charitable purposes -- since there are no shareholders. Given the very different nature of this "interest," it seems reasonable that the "value" maximized should be broadly defined to include considerations other than the purchase price. For example, it appears likely that a board could, consistent with its duty of care, accept a lower bid, provided it could show that its choice was based on the belief that the chosen bidder would provide a higher level of service to the community.

21 See id. at 51.

rely for information about the transaction have any conflict of interest -- for example, a promise of future employment from the prospective purchaser -- that might color their judgment in recommending the transaction. Further, the directors must carefully ascertain the value of the assets they intend to sell or contribute to a joint venture. Given the complexity of this task, ordinary prudence clearly requires the directors to obtain an independent evaluation by a competent expert.[22] Moreover, the requirement that the directors maximize the value the corporation receives requires directors carefully to consider all competing offers and to either accept the highest offer or be able to demonstrate a principled reason, rooted in the charitable purposes of the organization, for choosing another buyer. Finally, decisions as momentous for the organization as the decision to terminate its dominant activity require considerable deliberation, and directors need to be able to demonstrate that they have duly considered the ramifications of any such transaction.

Where directors fail to meet their duty of care, they may be held personally liable for breach of fiduciary duty. Attorneys general have both the authority and the duty to initiate such actions for breach of duty.

C. The Attorney General's Authority to Require Advance Review and Approval of Hospital Sale and Joint Venture Transactions.

Under the common law and by statute in many states, attorneys general are charged with the responsibility of overseeing the use of charitable assets. The authority vested in attorneys

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22 See Doyle v. Union Ins. Co., 277 N.W.2d 36, 41-44 (1979)(directors liable for breach of the duty of care for approving the sale of substantial corporate assets without obtaining an expert appraisal).

general to enforce charitable trusts and protect charitable assets is deeply rooted in the *parens patriae* power of the state to protect the public interest in assets pledged to public purposes. Thus, it is uniformly recognized that attorneys general have "an historic right and duty to supervise charitable trusts and to maintain such actions as may be appropriate to protect the public interest therein."[23] Indeed, in most states they are the only party authorized to fulfill this important role.[24]

As discussed in detail above, a nonprofit hospital corporation must obtain advance court approval for hospital sale or joint venture transactions, and the attorney general is automatically a party to such proceedings. Likewise, the attorney general has the authority to bring breach of duty actions against nonprofit hospital directors who fail to meet their duty of care in approving a sale or joint venture transaction.

The attorney general's legal authority to bring suit against nonprofit hospital directors who consummate a sale or joint venture transaction without court approval and/or without meeting their duty of care provides the attorney general with substantial leverage to require the

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23 Brown v. Memorial National Home Foundation, 329 P.2d 118, 132 (Cal. Ct. App. 1958).

24 Kirby v. Kirby, 1989 WL 110541 at 1 (Del. Ch. 1989); Sarkeys v. Independent School District No. 40, Cleveland County, 592 P.2d 529, 533-34 (Okl. 1979); Nacol v. State, 792 S.W.2d 810 (Tex. Ct. App. 1990).

In a few cases, however, courts have granted standing to challenge actions by directors of nonprofit hospitals to parties who benefit or might benefit from the hospital's services on the grounds that they have a "special interest" in the operation of the hospital. City of Paterson v. Paterson General Hospital, 235 A.2d 487 (N.J. 1967); Town of Cinnaminson v. First Nat'l Bank and Trust Co., 238 A.2d 701 (N.J. Super. 1968); Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries, 367 F. Supp. 536 (D.D.C. 1974).

parties to proposed hospital conversions to submit such transactions to the attorney general for advance review and approval. Faced with the prospect of a potentially protracted challenge by the attorney general to its petition for an authorization of new use, or a breach of duty action if it proceeds without court approval, nonprofit hospital corporations will almost certainly opt to comply with reasonable requirements for advance review and approval.

Consistent with the attorney general's broad *parens patriae* power to protect the public interest, the attorney general's advance review of proposed hospital sale and joint venture transactions need not be limited to a review of whether the directors have met their duty of care or whether the technical requirements for *cy pres* approval of a change in use are present. On the contrary, the attorney general has both the duty and the bargaining leverage to require the parties to submit to a comprehensive advance determination of whether the proposed transaction is in the public interest.

The central objectives of this advance review should be to: (1) safeguard the value of the charitable assets, (2) safeguard the community from loss of essential health care services, and (3) ensure that the proceeds of the transaction are used for appropriate charitable purposes. A set of proposed Guidelines for this advance review process is attached under Tab 4.

D. <u>Leveraging the Attorney General's Oversight Capacity</u>

In many states, charity regulators will have to deal simultaneously with multiple hospital sale and joint venture transactions. In most states it will be difficult, if not impossible, for regulators to effectively police these complex transactions within existing budget constraints. Accordingly, regulators need to consider strategies to augment their existing regulatory capacity.

First, as suggested in the proposed Guidelines, the attorney general should consider requiring the parties to a proposed hospital sale or joint venture transaction to fund an independent expert, to be selected by the attorney general, to review the overall fairness of the transaction from the nonprofit's perspective. The cost of such a review, while substantial, will not be unduly burdensome relative to the overall transaction costs borne by the parties.

Second, where state law permits, the attorney general should also consider the use of relator actions to augment the attorney general's limited enforcement capacity. A relator is a private party authorized to bring suit in the name of the state or the attorney general when the right to sue is vested exclusively in the attorney general.[25] Although the rule appears to be that the ability to authorize relator actions exists only by statute, at least one leading case indicates that the attorney general can consent to a suit in the name of the people by a private party even in the absence of statutory authority and that such consent may be informal.[26]

From the perspective of an attorney general seeking a means of prosecuting charitable enforcement cases without depleting his or her litigation budget, the advantage of relator actions is that the relator bears the cost of the suit while the attorney general retains ultimate control of the litigation.[27]

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25 Brown v. Memorial National Home Foundation, 329 P.2d 118, 133 (Cal. Ct. App. 1958). See also James J. Fishman, The development of Nonprofit Corporation Law and an Agenda for Reform, 34 Emory Law Journal 617, 671 (1985).

26 Id.

27 Sarkeys v. Independent School District No. 40, Cleveland County, 592 P.2d 529, 533-34 (Okl.. 1979)

IV. Conclusion

As a large and increasing number of nonprofit hospitals and HMOs enter into various types of sale, joint venture, and conversion transactions, state attorneys general face the challenge of policing the largest redeployment of charitable assets in history. The clear legal authority of state attorneys general to bring suit against nonprofit hospital directors who proceed with a sale or joint venture transaction without court approval -- combined with the parties' presumptive desire to avoid a prolonged legal challenge -- translates into substantial leverage for the attorney general to require that the parties submit proposed transactions for advance review and approval and to impose a variety of requirements as conditions for granting that approval. The goals of this review should be to safeguard the value of the charitable assets, protect the community from loss of essential health care services, and ensure that the proceeds of the transaction are used for appropriate charitable purposes. The attached Guidelines outline a process for achieving these important goals.