

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: (603) 642-5256
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**Wilbur A. Glahn, III
McLane Graf Raulerson & Middleton PA
900 Elm Street
PO Box 326
Manchester NH 03105-0326**

Case Name: **Foundation for Seacoast Health vs. Hospital Corp of America**
Case Number: **218-2006-EQ-00583**

Enclosed please find a copy of the court's order of September 15, 2011 relative to:

Final Order

September 15, 2011

Raymond W. Taylor
Clerk of Court

(507)

C: George R. Moore, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

FOUNDATION FOR SEACOAST HEALTH

v.

HOSPITAL CORPORATION OF AMERICA, ET AL

Docket No.: 06-E-583

FINAL ORDER

The Court will begin the within Order by briefly summarizing both the factual history and litigation posture that this case has taken since originally being filed in October of 2006.

The parties' relationship goes back to 1983. At that time, a locally-owned health care facility known as the Portsmouth Hospital was in a crisis mode. It had been servicing the Portsmouth community for approximately 100 years. It had done so with a group of dedicated professionals, but due to the changes in the health care environment nationally and locally, as well as the positive steps taken by the hospital's competitors to upgrade their facilities and staff, Portsmouth Hospital had to make important decisions in order to remain competitive. The hospital did not have the resources to implement necessary improvements in its facility and therefore had to partner with someone else or sell the hospital outright. After considering the former, the directors concluded that only the latter was feasible.

Portsmouth Hospital had been a not-for-profit facility; however in considering an appropriate buyer, the hospital did have to look at possible purchasers who would in fact transform the hospital into a for-profit enterprise. HCA turned out to be the suitor that

could offer the commitments necessary so as to assure the directors that the goals that they had set and achieved while operating the hospital themselves for many years would not only be equaled but exceeded by the new owner. After several meetings with the leaders of HCA, the Portsmouth Hospital directors felt comfortable in doing business with that entity.

The key document regarding the acquisition of the hospital by HCA and indeed this litigation, was a 30-page proviso entitled Asset Purchase Agreement (hereinafter referred to as the APA). The sale proceeds were used to create the plaintiff, a non-profit entity, whose function was, in part, to observe the operation of the hospital to make sure it was being run in accordance with the terms of the APA. Two prestigious law firms representing each of the parties spent many hours, days, weeks, and months establishing all of the language of that document. Multiple drafts reflecting additions and subtractions were exchanged between the law firms. The parties agree that at the center of this litigation is the meaning of one section of the APA, to wit, Section 5.2.11(a). That section provides for a right on the part of the plaintiff to re-purchase the hospital under certain conditions. Each of these parties has dissected the language of that section, literally word by word, which runs only approximately one page of this 30-page contract. They have a fundamental disagreement as to what the words in that section mean.

The APA is an unusual document in that it committed HCA to maintain many of the existing hospital policies and procedures. As this Court has alluded to in past Orders, generally when one company sells out to another in an arms length transaction the seller receives monies only and loses all control of the entity. Here the plaintiff was to a limited extent given an indirect voice in how the hospital was to be operated in the future. It had input in who was to sit on the hospital's governing board, as well as setting forth what

medical services would be offered at the hospital and limiting the amount of profit that HCA could earn. Insisting on these concessions on the part of HCA meant that the transfer represented something more than just money to the plaintiff. For the right to own this facility, HCA was required to do more than pay the asking price, which was approximately \$6.5 million. It was required to spend an additional \$26 million to build a new facility and it could not terminate certain services, even if those services proved to be unprofitable as time went on. It appears that HCA did not have similar limits placed upon it by other hospitals it acquired. The plaintiff argues that trust in these commitments was the cornerstone of the decision to sell to HCA in 1983, and indeed the evidence does support that contention.

Over the next fifteen years, the relationship between the parties was nearly flawless. The APA gave the plaintiff the right to repurchase the hospital in 1988 and again in 1993 at its option based upon different formulas. The plaintiff declined purchase in those years, largely because the association between the parties was excellent, and neither the plaintiff nor the hospital administrators or physicians saw the need to reacquire the facility.

In addition to the plaintiff's right to repurchase the hospital after five and ten years, which it declined, the parties did negotiate for certain changes in the APA. For example in 1994, the parties executed a so-called Modification Agreement, which removed some of the restrictive covenants in the APA, including a right to repurchase under certain conditions. The defendant paid \$20 million to the plaintiff for this Modification Agreement.

Turning now to the crux of this case, in 2006 HCA engaged in an inter-company transfer of assets, including ultimately the Portsmouth Hospital. The defendant notified the plaintiff of the specifics of this inter-company transfer. HCA concluded, however, that the

transfer was not of the magnitude so as to give the plaintiff the contractual right to reacquire the hospital pursuant to Section 5.2.11(a) of the APA. Conversely, the plaintiff believed that the particular transfer engaged in did in fact give it that right. Thus, this litigation began. Specifically the plaintiff asked this Court to permit it to purchase the hospital because of the alleged breach of the APA by HCA.

In the course of discovery, the plaintiff learned of another inter-company transfer completed by HCA in 1999, seven years earlier. It was the defendant's position that because that transfer did not give the plaintiff the right to reacquire the hospital, it did not have to provide timely notice that the transfer had in fact taken place. Consistent with its belief that the 2006 transfer allowed the plaintiff the right to repurchase the hospital, the plaintiff took the same position with respect to the 1999 transaction. Ultimately, our Supreme Court found that although the 2006 transfer did not trigger the plaintiff's right to reacquire the hospital, the 1999 transfer might have. Thus, the case was remanded to this Court for resolution of the effect of the 1999 transfer. See Foundation For Seacoast Health v. HCA 157 N.H. 487 (2008).

The defendant's position on this issue was simple and straightforward. The 1999 inter-company was not a prohibited event, and therefore the terms of the APA were not violated. If, however, a court deemed that a technical violation did occur, then the defendant would simply void the inter-company transfer that year and put the various corporations back in the same place that they were in prior to 1999. The transfer itself, the defendant argued, did not provide the plaintiff with a contractual right to re-acquire the hospital pursuant to Section 5.2.11(a). Since this is an equitable proceeding, and since the hospital experienced no change in either policy or procedure as a result of the 1999

inter-company transfer, the defendant concluded that rescission of that transfer was the only reasonable and equitable remedy.

HCA also took the position that even if the plaintiff had a contractual right to reacquire the hospital in 1999, it would not have exercised that right based upon not only past dealings, but also based upon the positive relationship that existed between the parties in and before that year. Moreover, the defendant concluded that in 1999 the plaintiff did not have the monies to purchase nor the experience to run the hospital. HCA also asserted that even if the plaintiff had the financial ability to re-acquire the hospital, the purchase price would have to be the fair market value, not the book value of the hospital's "tangible assets," as suggested by the plaintiff. The defendant would, it claimed, never have knowingly agreed to such an unfair provision in the APA.

The plaintiff's position was that there was a contractual right to re-acquire the hospital in the case of an inter-company transfer such as the one completed by HCA in 1999. As far as price is concerned, the plaintiff noted that the APA used the phrase "tangible assets," which is a defined legal phrase in business acquisition. It is limited to the independent value of the building, equipment, and personal property of the hospital, not its goodwill. The plaintiff argued that the value should be determined as of the date of the prohibited transfer, to wit, 1999. It conceded that a purchase for said sum would be less than the hospital's fair market value, however HCA should be held to the contract language of "tangible assets" even though in actuality it forced the defendant to accept an arguably unreasonably low amount for the facility.

By agreement of the parties, the Court bifurcated the trial of this case. The liability phase was conducted first, after which the Court issued an Order dated December 15, 2009. Its decision was in favor of the plaintiff. The Court found that the 1999

intercompany transfer was a prohibited transfer under the APA. Thus a trial on the appropriate remedy for the defendant's breach of the APA was required and in fact held in May of this year.

Prior to the remedy phase of this trial, the Court by Order dated January 18, 2011, alerted the parties that despite what could be considered to be conflicting language in some of its past Orders, the only binding conclusion reached by the Court after the liability phase of this case was that the 1999 transfer was a prohibited transfer. The issue of appropriate remedy would in fact be litigated, and the Court had no preconceived notion as to what remedy should be implemented. Thus, said Order made it clear to the plaintiff that the Court had not definitively determined in the liability phase of this case that the plaintiff had a contractual right to re-acquire the hospital as a result of the prohibited transfer in 1999.

The evidence during the remedy phase of this case was extensive. Fifteen trial days were consumed and the Court heard from over 30 witnesses. Hundreds of exhibits were introduced. Counsel were allowed to summarize their arguments in a hearing held on July 21, 2011. The Court will first concentrate on whether or not Section 5.2.11(a) provided the plaintiff with a contractual right to repurchase as a result of the prohibited transfer in 1999 by HCA. If the Court deems no such contractual right existed, then the plaintiff must convince it that repurchase is a remedy that the facts and circumstances of this case justify under the general law of equity.

On the issue of whether or not Section 5.2.11(a) provides a contractual right to repurchase in the event of a prohibited transfer, both parties point to the testimony of the lead attorney that drafted the language ultimately found in the APA. The attorney in question is J. Bradford Malt, who in 1983 represented the plaintiff. He testified in both

phases of this case as well as by deposition. Interestingly enough, both parties were able to cull from his testimony answers that he gave to specific questions that suggested that each of them was entitled to prevail on this issue. Indeed, if his testimony is fragmented, one can argue that he has concluded both that a right of contractual repurchase did exist for prohibited transfers under Section 5.2.II (a) and conversely that a right of repurchase for prohibited transfers did not exist under said section. However, when one looks at his testimony as a whole, the Court is convinced that Attorney Malt believed, and the parties intended in 1983, that the right to repurchase was available only in the event of a third-party sale.

To reach this conclusion it is important to understand the mindset of the parties in 1983. While this was a reluctant sale of the hospital, it was a sale none the less. The hospital was not leased to HCA; it was sold to that entity. Immediately upon the sale the plaintiff received millions of dollars from HCA and a commitment to expend millions more on building a new hospital. The fact that there was an outright sale is a concept seemingly lost on many of the plaintiff's witnesses during both phases of the trial. The tone of their testimony was that while HCA may have owned the hospital, the Foundation had ultimate decision making authority on matters such as how much money to invest, what equipment was necessary, what corporate deductions (management fee) were reasonable and how hospital profits should be disbursed. The APA did require the defendant to maintain some existing policies and procedures; it did not vest the plaintiff with control of any phase of the operation of the hospital. It allowed HCA to earn a profit which was initially capped but later, through negotiation, unfettered.

The clear purpose for the inclusion of Section 5.2.II (a) in the APA in 1983 was to protect the plaintiff in the event of a third-party sale. As the owner, HCA could sell the

hospital and such a sale would not give the plaintiff any input in determining who its new informal partner regarding hospital policies and procedures would be. Therefore the plaintiff demanded a clause in the APA guaranteeing that if it did not approve of any third-party purchaser, it could elect to reacquire the hospital by matching the third-party offer. This type of language is common in the sale of a business. Not only does it protect the seller, it avoids the necessity of establishing a re-acquisition cost as the price would be set by what the third party offered.

Conceptually, an inter-company transfer would not raise the same level of concern for the plaintiff. The APA did mandate certain restraints on the operation of the hospital by the defendant. Any HCA company, in the event of a transfer, would be bound by those same restraints. Therefore there would not be a complete loss of control if HCA conducted an inter-corporate transfer. One could also argue that the trust factor, which the plaintiff claims was paramount in the 1983 sale of the hospital to HCA, would still be in place should an inter-company transfer occur as HCA and any member corporation would in all likelihood, be controlled by the same individuals.

The evidence revealed that the 1999 transfer involved in part the creation of paper corporations to provide HCA with some tax relief. They were corporations that were by and large faceless entities. The same people were running the hospital both before and after the 1999 transaction. There were no policy changes.

During the liability stage of this litigation, the evidence clearly showed that the overriding purpose of Section 5.2.11(a) was to protect against third party sales. The topic of inter-company transfers was a last-minute consideration after numerous drafts had been circulated. No evidence was introduced at either portion of the trial of this case in the form of plaintiff's minutes of meetings, letters, or any other document, that would suggest

that the plaintiff believed that an inter-company transfer would give it the right to repurchase the hospital, the same right that it would have in the case of a third party sale. The only conclusion that the Court can reach, after having heard all of the evidence in this case, is that the 1999 transaction was not intended to nor did it give the plaintiff the right to purchase the hospital under Section 5.2.11(a), and the right of first refusal under said section was not the prescribed remedy for the breach of a prohibited transfer.

With respect to the right to repurchase, only two sections of the 30-page APA addressed it. Those sections were 5.2.11(a) and Section 6. The Court has already discussed why Section 5.2.11(a) repurchase right pertained only to third-party offers. Arguably Section 6 did provide a repurchase remedy for a breach of prohibition on transfers. Thus, if Section 6 were still in place in 1999, the plaintiff would be in a position to claim that the prohibited transfer in this case triggered a right to repurchase. However, as a result of a Modification Agreement executed in 1994 by the parties, Section 6 was limited to a purchase remedy only if Sections 5.2.3 or 5.2.9 were breached. Therefore, the contractual purchase remedy for breaches of the prohibition on transfer, which the Court has found did occur in this case, was not available to the plaintiff in 1999 under Section 6 because of the 1994 Modification.

The defendant in its Post-Trial Brief has succinctly set out what the Court finds the evidence has demonstrated in this case:

- . The contractual right to purchase the Hospital pursuant to the right of the first refusal is only triggered when two conditions are met: (1) a bona fide arm's length written offer for the Hospital is made, and (2) HCA intends to accept that offer.
- . The 1999 transaction did not involve a bona fide, third-party offer for the Hospital or HCA's intent to accept any such offer. Therefore, the right of first refusal was not triggered by the breach found by the Court in the first phase of this case.

- . The right of first refusal exception in § 5.2.11 (a) was *never* intended by parties to provide a *remedy* for a breach of the prohibition on transfers.
- . In 1983, the *only* contractual repurchase remedy for a breach of prohibition on transfers was in § 6 of the APA.
- . The § 6 right to purchase for breach of the prohibition on transfers was removed in the 1994 Modification Agreement.
- . Accordingly, the contract as it existed in 1999 and exists today does not contain a repurchase remedy for the breach that occurred.

Having now concluded that the plaintiff does not have a contractual right of repurchase because of the prohibited transfer, the Court is left with determining the appropriate remedy for the defendant's breach of the APA. Simply stated, no evidence supported the plaintiff's contention that an equitable remedy for the defendant's breach was the allowance of the plaintiffs the right to purchase the hospital now. Rather, the evidence conclusively proved: (1) that even if there was a contractual right to repurchase in 1999, the plaintiff would not have exercised it due to the excellent relationship that it maintained with the defendant at that point in time; (2) that the plaintiff, more probably than not, would not have had the ability to raise the necessary capital to purchase the hospital in 1999; (3) that the plaintiff, both in 1999 and today, did not have the manpower or expertise to operate the hospital and therefore would most likely have had to establish some type of partnership with a big healthcare entity like HCA; (4) that it would have been unlikely that the plaintiff or a different entity would have operated the hospital better than HCA has over the years; (5) that the plaintiff, based upon its financial dealings since 1999, probably would not have made the profit which the defendant has made in running the hospital since that date; and (6) that the trust factor, which the plaintiff has always claimed was at the heart of its relationship with the defendant, was not in a state of total disrepair in 1999.

The sad truth is that the one overriding event that severely damaged the trust factor between the parties is this litigation. It also appears that the decision to file this lawsuit was primarily the plaintiff's, not the physicians or persons who worked at the hospital. The Court reaches that conclusion because many of these individuals who testified at trial did not exhibit the degree of disillusionment with HCA that the Foundation's Board of Trustees did.

Virtually all of the plaintiff's remedy witnesses testified that its damages flowed from its alleged lost opportunity to buy the hospital in 1999. It stands to reason, therefore, that because the Court has found that it had no contractual right to purchase the hospital in that year, the plaintiff has suffered no appreciable damages. Yet the plaintiff argues that even if the Court concludes, as it has, that the plaintiff had no right under Section 5.2. II (a) of the APA to reacquire the hospital as a result of the 1999 inter-company transfer, repurchase is the only meaningful remedy that the Court can implement in this case.

That conclusion is largely based upon the premise that the breaching party to a contract should not have the opportunity to choose the remedy to which the non-breaching party is entitled. The Court agrees with that premise. However, it also finds that in equity the non-breaching party does not always have the right to determine the remedy it wants. Rather it is general equitable principles that dictate the appropriate remedy. Here those principles mandate recession as the sole remedy to which the plaintiff is entitled. When the unintended wrong consisted of an improper largely paper transfer, the defendant should have the opportunity to undo it and place the parties back in the same position they were when it occurred in 1999. Admittedly in the usual case a 12 year lapse of time between the breach

and correction practically prohibits such a remedy, but not under the facts of this case. The defendant is ordered to take whatever steps are necessary to put the hospital back in the same direct corporate chain that it was before the 1999 transfer.

For all practical purposes, that is the end of this case. However, given the fact that so much of the evidence in the remedy phase of the trial revolved around whether or not the plaintiff would or could buy back the hospital and what the purchase price should be if it did so, and given the likelihood of an appeal of the within Order, the Court will briefly address those issues.

Simply stated, the Court finds that the plaintiff would not have elected to purchase the hospital in 1999 if it had the option to do so. Remember, the operative date is 1999. The plaintiff made a concerted effort to emphasize the recent disputes it has had with the defendant in the hope perhaps that the Court would conclude that its current announced lack of trust of HCA was the same in 1999. Nothing could be further from the truth.

Admittedly, prior to 1999 HCA had gone through a difficult time. The parties referred to this period as the "Columbia Years". They ran from approximately 1995 through 1997. The company was mismanaged for those two years as a result of which it received much negative national publicity. None of it was lost on either the plaintiff or the hospital's Board of Directors. They read and kept in their files many of the newspaper articles predicting doom and gloom for HCA. This subject was prominent in the minutes of meetings held during this time frame by both Boards of Trustees.