

Portsmouth Regional Hospital ownership now in the hands of the state Supreme Court

Ownership, quality of care main concerns

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CONCORD — The future ownership of Portsmouth Regional Hospital — and perhaps its ability to continue to meet the medical needs of the community — is now in the hands of the state Supreme Court.

The initial 2007 Rockingham County Superior Court fight between the Foundation for Seacoast Health and Hospital Corporation of America was over whether a 1983 agreement that allowed HCA to purchase the old city-owned hospital was violated in a \$33 billion leveraged buyout of HCA in 2006.

The 1983 agreement mandated, among other things, that the foundation had the right of first refusal to buy the hospital if its assets were sold or transferred. The Superior Court ruled in favor of HCA, which continues to contend that the buyout did not trigger that provision.

The foundation is an oversight board formed after the 1983 sale to ensure the community's health care needs would continue to be met. The foundation has indicated its intent to buy back the hospital if the Superior Court decision is overturned by the Supreme Court, according to Dan Hoefle, chairman of the foundation.

Arguments at Thursday's hearing on the foundation's appeal of the Superior Court decision bring into question whether any provisions of the 1983 agreement are enforceable.

"It can't be right that one entity goes into another corporate entity and it doesn't trigger the right of first refusal," foundation attorney George Moore told the three justices who will decide the case. Chief Justice John Broderick and Justice Richard Galway recused themselves from the case.

"What controls (how the agreement should be interpreted) is the words used and the intent," argued Moore, of the Manchester law firm Devine, Millimet & Branch. "Otherwise, the agreement would be illusory."

Moore said the 1983 agreement was written to protect the community from the hospital being taken over by parties interested simply in profits and not in patient care, and include such things as the percentage of indigent care that must be given, the maintenance of the physical facility and equipment, and the standard of care patients receive.

Attorney Everett "Kip" Johnson Jr., representing HCA, argued, as he had before Superior Court Judge Kenneth McHugh in April of last year, that Portsmouth Regional Hospital has not been sold, but remains under the control of HCA.

"You will not find a change in indirect ownership (as a requirement for offering the foundation the right of first refusal) in the (1983) Asset Purchase Agreement," Johnson told the justices Thursday.

Johnson also contended that, as a corporate entity, HCA did nothing to facilitate the buyout.

"In the leveraged buyout, the CEO of HCA did not change; the CEO of the hospital did not change," Johnson argued. "Public shareholders of HCA decided to sell their shares. That's all that happened."

Moore disagreed.

"This was an orchestrated action to take the company public," Moore told the justices. "That's what happened here."

There is also a discrepancy between the two sides over the power of the holding company established by HCA in 1994 to manage the local hospital, HCA-NH, to enforce the remaining provisions of the 1983 agreement.

The foundation sees HCA-NH as a shell and contends that monthly payments from Portsmouth Regional go to the company formed by those involved in the leveraged buyout. Johnson contended that nothing, in terms of the immediate corporate leadership of the local hospital, has changed and the continued operation of the hospital need not be a concern.

Last year, after the buyout, the local hospital announced a \$63 million expansion project that would give every patient admitted his or her own room, add operating facilities and establish a single entrance way into the facility.

Moore expected the high court to make its decision within 60 to 120 days. That ruling could involve overturning the Superior Court decision, upholding it or sending the case back to Superior Court for additional clarification.