

New Jersey Hospitals Launch a 5th Amendment Constitutional Takings Challenge against the Medicaid and Charity Care DSH Programs

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On June 30, 2017, 14 New Jersey acute care hospitals filed suit in the Superior Court of New Jersey, Law Division, Mercer County, against the State of New Jersey, the New Jersey Department of Health, the New Jersey Department of Human Services, the Division of Medical Assistance and Health Services and the Commissioners/Directors of those agencies in their professional capacities. The suit alleges that the State has “taken” the hospitals’ property without just compensation in violation of the Takings Clauses of the United States and New Jersey Constitutions.

The hospitals commenced the state court action after prolonged efforts by the hospitals to obtain administrative relief for the constitutional violations. After repeatedly being thwarted by the state agencies on procedural grounds, the hospitals’ claims received appellate court review in 2016, which led to a directive from the Appellate Division that the hospitals should bring their constitutional claims for full and final adjudication in the trial court.

The Hospitals’ Constitutional Claim

The hospitals claim that *N.J.S.A. 26:2H-18.64* (the “Take All Comers Statute”), which requires New Jersey hospitals to provide medical treatment to all patients who enter their doors, regardless of the patients’ ability to pay, results in an unconstitutional “taking” of the hospitals’ property. The hospitals focus their claims on the impact of the Take All Comers Statute on their individual institutions, arguing that the statute “as applied” to them has resulted in the “taking” of their private property -- both real and personal property -- for a public use without adequate compensation.

The Fifth and Fourteenth Amendments of the United

States Constitution, as well as Article I, Paragraph 20 of the New Jersey Constitution of 1947, prohibit the government from taking private property without just and adequate compensation. The Take All Comers Statute requires hospitals to treat each and every patient who enters their doors, including Medicaid and charity care patients, whether or not those patients can pay for such treatment. As such, the treatment of Medicaid and charity care patients is not voluntary, but rather, compulsory and subjects hospitals to a \$10,000 civil penalty for each violation.

To comply with the Take All Comers Statute, hospitals are required to permit all patients, including Medicaid and charity care patients, to have continuing access to hospital property and treatment facilities, which have been used and occupied by these patients for the duration of their hospital stay to the exclusion of other patients. While physically on the hospitals’ property, these patients also use and consume the hospitals’ personal property in the form of medications, equipment, food, linens, treatment staff time and other services, all provided in connection with



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their treatment, and depriving hospitals of the economic benefit that could otherwise be derived from the deployment of such medications, equipment, and services for the benefit of the paying public.

The only reimbursement received for the state-mandated treatment of these Medicaid and charity care patients comes from Medicaid DRG and DSH payments, including the state charity care subsidy. However, for the hospitals bringing the lawsuit, such payments cover only a fraction of the costs associated with providing this statutorily mandated care.

Hospitals' Legal Argument

While the hospitals' constitutional claims appear unique because a New Jersey court has not yet decided the specific issue, their claims fit neatly into several specific constitutional Taking doctrines which have been developed by the Supreme Court of the United States ("SCOTUS") over many years. The hospitals argue that the scope of the property taken through the mandate of the Take All Comers Statute, including not only the hospitals' real property, but also their personal property and services provided by their physicians and staff, constitutes a "physical invasion and appropriation of property" resulting in what SCOTUS has called a *per se* unconstitutional Taking.

For example, in a 1982 case entitled *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), SCOTUS found that a *per se* taking occurs when there is a permanent physical invasion of property no matter how minor. The permanent physical invasion there was New York's requirement that landlords install a cable box on landlords' apartment roof tops. While the intrusion on the landlords' property was minor – consisting of the small physical space taken up by the cable box and the wiring leading to the box – SCOTUS still held that intrusion to be unconstitutional. Similarly, while the physical occupation of a hospital bed by a Medicaid or charity care patient is minor compared to the total number of licensed beds a hospital may have, it is no less a physical invasion of the hospital property.

Likewise, in another case during that same decade, *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), SCOTUS expanded the concept of a physical invasion finding that an easement permitting the public to traverse the owner's property to access a public beach constitutes a permanent physical invasion despite the fact that no specific individual or object would continuously occupy the property. Rather, SCOTUS focused on the limitation placed on the property owner's ability to exclude others from physically being on his property. In such a case, the property owner is not permitted to use his property as he sees fit -- a right that "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." By analogy, the continuing and aggregate stream of Medicaid and charity care inpatients results

in a permanent physical invasion of the hospitals' property, even though no single patient is permanently using hospital property. Simply stated, by virtue of the Take All Comers Statute, a hospital cannot exclude that patient from physically occupying one of its hospital beds.

Finally, in its most recent interpretation of the Takings Clause, *Horne v. Dept. of Agriculture*, 135 S. Ct. 2419 (2015), SCOTUS made clear that the government's obligation to pay just compensation not only applies to the "taking" of real property, but also includes the "taking" of personal property. Therefore, the government's requirement that California raisin growers set aside a portion of their crop in order to stabilize crop prices constitutes a *per se* taking, requiring the government to pay fair market value for the portion of the raisin crop that they were required to set aside. Similarly, a patient's consumption of medication presents a "taking" circumstance.

In the same way the government's actions in the *Loretto*, *Nollan*, and *Horne* cases appropriated property from one private party to either the government itself or another private party, so too does the Take All Comers Statute's requirement that a hospital's beds, medications, equipment, supplies and services are to be used to treat Medicaid and charity care patients constitute an *affirmative appropriation* of that property for a public purpose, entitling the hospitals to receive just compensation from the state. The burden of providing health care to New Jersey's indigent population – acknowledged to be an obligation of the state – cannot be imposed on the hospital, but should be borne by the public as a whole.

Most Recent Developments

In December 2017, the Honorable Mary C. Jacobson, A.J.S.C. denied the State's motion to dismiss the hospitals' complaint, finding that the State is not immune from suit, the hospitals had asserted a viable 5th Amendment Takings claim, and the case should proceed to discovery. Given the nature of the claims asserted and the potential damages to be awarded, the hospitals expect the state to vigorously defend the case. Trial will most likely be scheduled for some time in 2019.

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