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Deanna Walker  
Operator's Signature

10/22/03

Date

2003 SENATE HUMAN SERVICES

SB 2348

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10/22/03

Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2348

Senate Human Services Committee

☐ Conference Committee

Hearing Date February 5, 2003

Tape Number	Side A	Side B	Meter #
1	X		2025 - 4925
Committee Clerk Signature <i>Donna Kramer</i>			

Minutes:

SENATOR JUDY LEE opened the public hearing on SB 2348 relating to nonprofit corporations that operate or control hospitals, nursing homes, or other health care facilities. Senator Lee was one of the persons who had introduced the bill at the request of the Attorney General to be able address issues concerning entities such as health systems when they sold their many of facilities in North Dakota and moved out of state.

WAYNE STENEHJEM, Attorney General, testified in favor of the bill. (Copy of correspondence provided from the Attorney General regarding Banner Health System) Mr. Stenehjem stated this bill was here as he needed some assistance from the Legislature in augmenting what is already the authority of the Attorney General has on a particularly important public policy issue. What should we do when we have a non-profit organization that exists in the state of North Dakota. We see its tax exempt status, patronage from North Dakota consumers, donations from the public, and then decides (at some point) that they're going to sell their assets

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*Donna Kramer*  
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10/22/03  
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Senate Human Services Committee

Bill/Resolution Number SB 2348

Hearing Date February 5, 2003

here in the state of North Dakota, take them and leave the state and go elsewhere. Banner Health System brought the matter to a head. It was never thought that a non-profit agency would sell to another non-profit agency. Mr. Stenehjem said he viewed the legislation in 1999 and this bill as simply an augmentation of authority that the Attorney General's office already has under common law and constitutional principle. But a bill like this will help to set forth a specific process. State needs a public policy statement ... designed to address issue. Passed out copy of editorial from *Modern Healthcare* which sets some of public policies. (Meter # 2140 - 2630)

SENATOR BROWN: If you could use an example, what would you have liked to see different? Would you like to have attached some of those assets?

WAYNE STENEHJEM: Some of the money should been left here. Continued discussion regarding the common law authority. A bill like this would set forth a specific statutory scheme. Clarification of state law. (Meter #2730 - 3150)

PARRELL GROSSMAN, Director of Consumer Protection and Antitrust Division of the Attorney General's Office, testified in behalf of the bill. Mentioned that a number of other states have enacted similar statutes that codify the attorney general's role in protecting the public interests when there is a conversion from a non-profit corporation to another non-profit corporation, and what happens with the charitable trust that imposed on the assets or proceeds from that transfer. (Written testimony) (Meter #3250 - 3400)

CHRIS RUNGE, Executive Director of NDPEA and Sec.-Treas. of ND AFLCIO, indicated their support of SB 2348. They have tracked this on behalf of their members since 1999, so they are very supportive of what the Attorney General's office is doing. (Meter # 3475 - 3529)

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Senate Human Services Committee

Bill/Resolution Number SB 2348

Hearing Date February 5, 2003

ARNOLD THOMAS, President of North Dakota Healthcare Association, testified. He stated the North Dakota Healthcare Association were the primary architects in the legislation in 1999. He appeared in a neutral position as his board and other large facilities were to have a conference call in the afternoon to discuss the merits of this bill and determine what they may do to work with the Attorney General in terms of what to do with this measure. We would like to have the opportunity to visit with the Attorney General's office relative to that discussion to see where we may go and then come back and report back to the committee. ( Meter # 3568 - 3900)

SENATOR LEE: Fiscal note ... explain?

PARRELL GROSSMAN: Some of it depends on the amendments because as the bill is drafted, I think it's probably physically neutral. Difficult to give estimate. (Meter #3930 - 4165)

SHELLY PETERSON, from Long Term Care Association. In a neutral position, because as the bill is written they do have some issues with it. Their legal counsel has been working with the Attorney General. Spoke about 84 nursing home facilities in North Dakota, of which 79 are non-profit corporations. Stated laws currently in place that address nursing homes changing hands isn't the best. (Meter # 4175 - 4607)

CHRISTOPHER DODSON, of the North Dakota Catholic Conference, testified in a neutral position. Their concern is the trend in other states. The intent of this bill is not a problem. It is where it could go in the future. (Meter #4613 - 4893)

SENATOR LEE: Closed the public hearing on SB 2348. (Meter # 4925)

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10/22/03

Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2348

Senate Human Services Committee

☐ Conference Committee

Hearing Date February 17, 2003

Tape Number	Side A	Side B	Meter #
2	X		768 - 1680
Committee Clerk Signature <i>Donna Kramer</i>			

Minutes:

SENATOR JUDY LEE opened the committee discussion on SB 2348 pertaining to nonprofit corporations that operate or control hospitals, nursing homes, or other health care facilities, and to provide an appropriation.

WAYNE STENEHEM, Attorney General, appeared to present amendments to SB 2348 in cooperation with the ND Healthcare Association, the ND Long Term Care Association and other interested healthcare facilities in North Dakota. (Written testimony and proposed amendments provided) (Meter # 809 - 1174)

SENATOR POLOVITZ: In section 3, you said "when necessary", what does that mean?

WAYNE STENEHEM: That has to do with the hearings. (Meter # 1207 - 1287)

SENATOR BROWN: Is this going to give you what you need now?

WAYNE STENEHEM: I think so. What we didn't have before was a structural road map of what to do. ... (Meter # 1311 - 1337)

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*10/22/03*  
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Senate Human Services Committee

Bill/Resolution Number SB 2348

Hearing Date February 17, 2003

ARNOLD THOMAS, President of Healthcare Association, stated they were in support of the amendments. This does provide a road map. ... Language here will provide specific clarity.

(Meter # 1349 - 1445)

SHELLY PETERSON, ND Long Term Care, stating they would like to go on record supporting the amendments. (Meter # 1455 - 1467)

Committee discussion - none:

SENATOR FISCHER made a motion to approve the amendments.

SENATOR POLOVITZ seconded the motion.

Roll call was read. 6 yeas 0 nays.

SENATOR FISCHER move do pass as amended.

SENATOR POLOVITZ seconded the motion.

Roll call was read. 6 yeas 0 nays.

SENATOR LEE will be the carrier.

The meeting was closed. (Meter # 1680)

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**FISCAL NOTE**  
Requested by Legislative Council  
02/20/2003

Amendment to: SB 2348

**1A. State fiscal effect:** Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

**1B. County, city, and school district fiscal effect:** Identify the fiscal effect on the appropriate political subdivision.

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

**2. Narrative:** Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

This legislation provides the Attorney General authority over the conversion of nonprofit healthcare facilities (i.e., hospitals and nursing homes) to for-profit or nonprofit corporations.

The parties to the proposed agreement or transaction must notify the Attorney General of the proposed agreement or transaction. The Attorney General must within 90 days notify the parties of the Attorney General's decision whether to approve, deny, or take other action on the proposed transaction. (The review period may then be extended by agreement.)

The Attorney General may review all of the information provided by the parties including the experts and consultants involved in reviewing the proposed agreement upon behalf of the parties. The Attorney General may hold public hearings regarding the proposed agreement.

The Attorney General considers a number of factors in deciding whether to approve, deny, or take other action on the proposed agreement or transaction.

For this purpose the Attorney General may retain such experts and consultants as necessary to review the proposed agreement or transaction. The Attorney General is entitled to reimbursement of those review costs.

If necessary, the Attorney General may initiate an investigation in connection with the public hearing. The Attorney General is entitled to reimbursement of those review costs.

The Attorney General may bring proceedings in district court to secure compliance with this legislation. If the Attorney General prevails the Attorney General is entitled to reimbursement of attorney's fees.

**3. State fiscal effect detail:** For information shown under state fiscal effect in 1A, please:

A. **Revenues:** Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

Due to the infrequency of occurrence and unknown impact of this bill, a fiscal impact estimate is unavailable.

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**B. Expenditures:** Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

The legislation requires the parties to pay the Attorney General's attorney's fees and costs in the event of litigation. Due to the infrequency of occurrence and unknown impact of this bill, a fiscal impact estimate is unavailable.

**C. Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Not applicable

<b>Name:</b>	Parrell Grossman/Kathy Roll	<b>Agency:</b>	Office of Attorney General
<b>Phone Number:</b>	701-328-3404/328-3622	<b>Date Prepared:</b>	02/21/2003

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**FISCAL NOTE**  
Requested by Legislative Council  
01/28/2003

Bill/Resolution No.: SB 2348

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

This legislation provides the Attorney General authority over the conversion of nonprofit healthcare facilities (i.e., hospitals and nursing homes) to for-profit or nonprofit corporations.

The parties to the proposed agreement or transaction must notify the Attorney General of the proposed agreement or transaction. The Attorney General must within 90 days notify the parties of the Attorney General's decision whether to consent to, give conditional consent to, or not consent to the proposed transaction. (The review period may then be extended by agreement.)

The Attorney General may review all of the information provided by the parties including the experts and consultants involved in reviewing the proposed agreement upon behalf of the parties. The Attorney General may hold public hearings regarding the proposed agreement.

The Attorney General considers a number of factors and such other information the Attorney General deems relevant in deciding whether to consent or not consent to the proposed agreement or transaction. One of the most significant aspects of the review will be the determination on how the parties will use the charitable trust proceeds from the transactions.

For this purpose the Attorney General may retain such experts and consultants as necessary to review the proposed agreement or transaction. As the legislation is drafted at this time, the parties would be responsible for paying all public hearing costs and review costs including the experts, etc.

If necessary, the Attorney General may initiate an investigation in connection with the public hearing.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Due to the infrequency of occurrence and unknown impact of this bill, a fiscal impact estimate is unavailable.

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**B. Expenditures:** Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

The legislation requires the parties to pay the Attorney General's attorney's fees and costs in the event of litigation. Due to the infrequency of occurrence and unknown impact of this bill, a fiscal impact estimate is unavailable.

**C. Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Not applicable

<b>Name:</b>	Parrell Grossman/Kathy Roll	<b>Agency:</b>	Office of Attorney General
<b>Phone Number:</b>	701-328-3404/328-3622	<b>Date Prepared:</b>	02/03/2003

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2-18-03  
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PROPOSED AMENDMENTS TO SENATE BILL NO. 2348

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact sections 10-33-148 and 10-33-149 and a new subsection to section 50-24.4-15 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals and nursing homes and property-related costs for nursing homes; to amend and reenact sections 10-33-144, 10-33-145, 10-33-146, and 10-33-147 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals or nursing homes; and to provide a continuing appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 10-33-144 of the North Dakota Century Code is amended and reenacted as follows:

10-33-144. Transaction by a nonprofit corporation doing business as operating or controlling a hospital or nursing home - Notice to attorney general - Waiting period.

1. A nonprofit corporation doing business as operating or controlling a hospital or nursing home shall notify the attorney general in writing before closing an agreement or a transaction that will:
  - a. Sell, lease, transfer, exchange, option, convey, mortgage, create a security interest in, or otherwise dispose of to a for-profit organization corporation or entity or a nonprofit corporation or entity if fifty percent or more of the assets or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization of the selling corporation are involved in the agreement or transaction;
  - b. Sell, lease, transfer, exchange, option, convey, mortgage, create a security interest in, or otherwise dispose of any of the assets or operations of the corporation doing business as a hospital or any of the assets or operations of a related organization if the transaction or agreement will result in any for-profit organization owning or controlling fifty percent or more of the assets or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization. Transfer control, responsibility, or governance of fifty percent or more of the assets or operations of the nonprofit corporation to a for-profit corporation or entity or another nonprofit corporation or entity; or
  - c. Result in any for-profit organization corporation or entity or another nonprofit corporation or entity having control of, governance of, or the power to direct management and policies of the nonprofit corporation doing business as operating or controlling a hospital, nursing home, or a related organization.
2. The substitution of a new corporate member that transfers the control of, responsibility for, or governance of the nonprofit corporation, the substitution of a member of the governing body, or any arrangement.

Deanna Wallin  
Operator's Signature

10/22/03  
Date



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written or oral, that would transfer voting control of the entity, is a transfer for purposes of this section.

3. This section applies to a foreign nonprofit corporation that operates or controls a hospital or nursing home within this state.
4. This section does not apply to the following transactions:
  - a. An action involving the enforcement or foreclosure of a security interest, lien, mortgage, judgment, or other creditor rights.
  - b. Agreements or transactions in the usual and regular course of the nonprofit corporation's business and activities.
5. The notice must be provided to the attorney general not less than ninety days before the closing date of the proposed agreement or transaction, and must include:
  - a. The names and addresses of the corporation doing business as a hospital, the for-profit organization, and all other parties to the proposed agreement or transaction;
  - b. The terms of the proposed agreement or transaction, including the proposed sale price;
  - c. A copy of the proposed agreement or transaction; and
  - d. Information regarding whether a Any financial or economic analysis by an expert or independent consultant has been prepared concerning the degree to which the proposed agreement or transaction will serve the public interest, or concerning the fair market value of the corporation doing business as a hospital retained by the nonprofit corporation which addresses the criteria set forth in section 10-33-145.
6. A nonprofit corporation doing business as a hospital or nursing home may neither transfer nor convey any assets or control through an agreement or transaction described in this section until ninety days after the corporation gives the attorney general notice required under this section, unless the attorney general waives all or part of the waiting period. Before the end of the waiting period, the attorney general may extend the period up to sixty additional days by providing written notice of the extension to the corporation. The waiting period may be extended for one or more additional sixty-day periods upon agreement between the corporation and the attorney general, or pursuant to a court order.
4. The notice requirements of this section do not apply to a proposed agreement or transaction between related organizations serving the same or similar charitable purposes and are in addition to any notice requirements that may apply under section 10-33-122.

**SECTION 2. AMENDMENT.** Section 10-33-145 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-145. Transaction by a nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home - Attorney general's powers and duties - Experts - Continuing appropriation.**

1. Upon receipt of a notice under section 10-33-144, the attorney general may review and investigate the proposed agreement or transaction and may

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require the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home and the for-profit organization other parties to the agreement or transaction to provide to the attorney general any additional information relevant to the review or investigation of the proposed agreement or transaction.

2. Upon receipt of a notice under section 10-33-144, the attorney general may review the proposed agreement or transaction to determine whether consummation of the proposed agreement or transaction by the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home is consistent with the purposes of the nonprofit corporation or entity operating or controlling a hospital or nursing home and the fiduciary obligations of the corporation doing business as a hospital and the obligations of the officers and directors of the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home and is in accordance with law. The attorney general shall consider the following factors in reviewing and evaluating a proposed agreement or transaction:
  - a. Whether appropriate steps were taken by the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home to safeguard restricted assets transferred to the for-profit organization acquiring entity;
  - b. Whether appropriate steps were taken by the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home to ensure that any proceeds of the proposed agreement or transaction are used for charitable purposes consistent with restrictions placed on assets of and with the charitable purposes of the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home;
  - c. Whether the terms and conditions of the proposed agreement or transaction are fair and reasonable to the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home, including whether the nonprofit corporation doing business as or entity operating or controlling the hospital or nursing home will receive fair market value for the its assets of the corporation and, in a proposed agreement or transaction involving a nursing home, whether the proposed agreement or transaction constitutes a bona fide transaction;
  - d. Whether any conflict of interest or breach of fiduciary duty, as determined by the attorney general, exists and or was disclosed, including any conflict of interest or breach of fiduciary duty related to directors and officers of, executives of, and experts retained by the nonprofit corporation doing business as or entity operating or controlling a hospital, the for-profit organization, or nursing home and any other party to the agreement or transaction; and
  - e. Whether the agreement or transaction will result in inurement, pecuniary gain, or excess benefit to any person associated with the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home or to any other person;
  - f. Whether the transaction is in the best interests of the nonprofit corporation or entity operating or controlling a hospital or nursing home; and

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- g. Whether the transaction is authorized by the nonprofit corporation's governing documents.
3. For the purpose of reviewing and evaluating the factors identified in subsection 2, the attorney general may retain experts if necessary and reasonable and ~~shall~~ may obtain public comment regarding the proposed agreement or transaction. A contract entered by the attorney general with an expert under this section does not require a bid and is exempt from chapters 44-08 and 54-44.4. If the attorney general intends to seek payment from the ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ for the cost of any expert retained under this subsection, at least five days before retaining that expert, the attorney general shall notify the ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ of the expert cost projected to be incurred. A ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ which receives notice under this subsection shall pay the reasonable cost of any retained expert. If the ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ objects to paying the costs of an expert, the corporation ~~or entity~~ may seek a district court order limiting the corporation's ~~or entity's~~ liability for the costs. In determining whether to issue an order, the court shall consider whether the expert is necessary and reasonable and the cost of the expert relative to the value of the proposed agreement or transaction.
4. Section 44-04-18.4 applies to any information provided to the attorney general under sections 10-33-144 through 10-33-147.
5. All costs, fees, and other moneys received under sections 10-33-144 through 10-33-149 must be deposited into the attorney general's operating fund. The moneys in the fund are appropriated to pay the costs incurred in the attorney general's performance of responsibilities pursuant to sections 10-33-144 through 10-33-149.

**SECTION 3. AMENDMENT.** Section 10-33-146 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-146. Transaction by a nonprofit corporation ~~doing business as or entity operating or controlling a hospital or nursing home~~ - Notice of decision - Public meeting - Meeting notice.** ~~Before the attorney general approves, denies, or takes any other action on a proposed agreement or transaction under section 10-33-144 or 10-33-145~~ Within ninety days of receipt of the written notice required under section 10-33-144, and such other additional extension of time permitted or provided under section 10-33-144, the attorney general shall notify, in writing, the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home of the attorney general's decision to approve, deny, or take any other action on the proposed agreement or transaction. Before issuing a written decision under this section, the attorney general ~~shall~~ may conduct ~~at least one or more~~ public hearing ~~hearings~~, one of which must be held in the county where the ~~corporation doing business as a hospital or nursing home~~ is located. At a public hearing under this section, the attorney general shall request and receive comments from any interested person regarding the proposed agreement or transaction. At least fourteen days before a public hearing under this section, the attorney general shall provide notice of the meeting by publication in the official newspaper of the city in which the ~~corporation doing business as a hospital or nursing home~~ is located. The attorney general shall also provide notice of the meeting to the governing body of the county in which the ~~corporation doing business as a hospital or nursing home~~ is located, if applicable, and to the governing body of the city in which the ~~corporation doing business as a hospital or nursing home~~ is located, if applicable. Any party to the agreement may institute legal proceedings in the district court of the county in which the hospital or nursing home is

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located to review the attorney general's decision. In a district court action brought under this section, the attorney general's decision is subject to de novo review by the court. In a proceeding under this section, the attorney general must be served with notice and is entitled to be heard. If the attorney general substantially prevails in a proceeding under this section, the attorney general is entitled to an award of attorney's fees, investigation fees, costs, and expenses of any investigation and proceeding under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under this section as a limitation on an award of attorney's fees to the attorney general under any other section.

**SECTION 4. AMENDMENT.** Section 10-33-147 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-147. Transaction by a nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home - Attorney general decision.** The attorney general may bring proceedings to secure compliance with ~~section~~ sections 10-33-144 through 10-33-149 in the district court of the county in which the hospital or nursing home is located. If the attorney general determines consummation of the proposed transaction or agreement is not consistent with the fiduciary obligations of the nonprofit corporation ~~doing business as or entity operating or controlling a hospital or nursing home~~ and the corporation's officers and directors, or is not in accordance with law, the attorney general may bring proceedings in the district court of the county in which the hospital or nursing home is located to enjoin the consummation of the proposed transaction or agreement or to secure any other relief available under the law. In a district court action brought under this section, the attorney general's decision is subject to de novo review by the court. If the attorney general substantially prevails in an action brought under this section, the attorney general is entitled to an award of attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under this section as a limitation on an award of attorney's fees to the attorney general under any other section. Failure of the attorney general to take action on a proposed agreement or transaction described in ~~section~~ sections 10-33-144 through 10-33-149 does not constitute approval of the transaction and does not prevent the attorney general from taking other action.

**SECTION 5.** Section 10-33-148 of the North Dakota Century Code is created and enacted as follows:

**10-33-148. Investigation - Subpoena - Hearing - Powers of the attorney general.** In discharging the attorney general's responsibilities under sections 10-33-144 through 10-33-149, and in connection with the public hearing provided for in section 10-33-146, the attorney general may conduct investigations, issue subpoenas to any person directly related to the proposed agreement or transaction, and conduct hearings in aid of an investigation or inquiry.

**SECTION 6.** Section 10-33-149 of the North Dakota Century Code is created and enacted as follows:

**10-33-149. Authority of the attorney general or a court is not impaired.** Sections 10-33-144 through 10-33-148 are in addition to, and do not supersede, any other authority of the attorney general established by statute, case law, or common law.

**SECTION 7.** A new subsection to section 50-24.4-15 of the North Dakota Century Code is created and enacted as follows:

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Recognize any mandated costs, fees, or other moneys paid to the attorney general through transactions under sections 10-33-144 through 10-33-149.\*

Renumber accordingly

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Deanna Waller  
Operator's Signature

10/22/03

Date

Date: 02-17-03  
Roll Call Vote #: (1)

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2348

Senate Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken

Amendments approved

Motion Made By

Sen. Fischer

Seconded By

Sen. Polovitz

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee - Chairman	✓				
Senator Richard Brown - V. Chair.	✓				
Senator Robert S. Erbele	✓				
Senator Tom Fischer	✓				
Senator April Fairfield	✓				
Senator Michael Polovitz	✓				

Total (Yes) 6 No 0

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

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10/22/03

Date

Date: 02-17-03  
Roll Call Vote #: (2)

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2348

Senate Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Pass as amended.

Motion Made By Sen. Fischer Seconded By Sen. Polovitz

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee - Chairman	✓				
Senator Richard Brown - V. Chair.	✓				
Senator Robert S. Erbele	✓				
Senator Tom Fischer	✓				
Senator April Fairfield	✓				
Senator Michael Polovitz	✓				

Total (Yes) 6 No 0

Absent \_\_\_\_\_

Floor Assignment Sen. Lee

If the vote is on an amendment, briefly indicate intent:

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Deanna Hallenbeck  
Operator's Signature

10/22/03  
Date

REPORT OF STANDING COMMITTEE (410)  
February 18, 2003 1:03 p.m.

Module No: SR-31-3088  
Carrier: J. Lee  
Insert LC: 38360.0101 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2348: Human Services Committee (Sen. J. Lee, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2348 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact sections 10-33-148 and 10-33-149 and a new subsection to section 50-24.4-15 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals and nursing homes and property-related costs for nursing homes; to amend and reenact sections 10-33-144, 10-33-145, 10-33-146, and 10-33-147 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals or nursing homes; and to provide a continuing appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 10-33-144 of the North Dakota Century Code is amended and reenacted as follows:

10-33-144. Transaction by a nonprofit corporation ~~doing business as operating or controlling a hospital or nursing home~~ - Notice to attorney general - Waiting period.

1. A nonprofit corporation ~~doing business as operating or controlling a hospital or nursing home~~ shall notify the attorney general in writing before closing an agreement or a transaction that will:
  - a. Sell, lease, transfer, exchange, option, convey, mortgage, create a security interest in, or otherwise dispose of to a for-profit organization ~~corporation or entity or a nonprofit corporation or entity~~ if fifty percent or more of the assets ~~or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization~~ of the selling corporation are involved in the agreement or transaction;
  - b. Sell, lease, transfer, exchange, option, convey, mortgage, create a security interest in, or otherwise dispose of any of the assets ~~or operations of the corporation doing business as a hospital or any of the assets or operations of a related organization~~ if the transaction or agreement will result in any for-profit organization owning or controlling fifty percent or more of the assets ~~or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization~~ Transfer control, responsibility, or governance of fifty percent or more of the assets or operations of the nonprofit corporation to a for-profit corporation or entity or another nonprofit corporation or entity; or
  - c. Result in any for-profit ~~organization~~ corporation or entity or another nonprofit corporation or entity having control of, governance of, or the power to direct management and policies of the nonprofit corporation ~~doing business as operating or controlling a hospital, nursing home, or a related organization.~~
2. The substitution of a new corporate member that transfers the control of, responsibility for, or governance of the nonprofit corporation, the substitution of a member of the governing body, or any arrangement,

(2) DESK, (3) COMM

Page No. 1

SR-31-3088

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Operator's Signature

10/22/03  
Date



written or oral, that would transfer voting control of the entity, is a transfer for purposes of this section.

3. This section applies to a foreign nonprofit corporation that operates or controls a hospital or nursing home within this state.
4. This section does not apply to the following transactions:
  - a. An action involving the enforcement or foreclosure of a security interest, lien, mortgage, judgment, or other creditor rights.
  - b. Agreements or transactions in the usual and regular course of the nonprofit corporation's business and activities.
5. The notice must be provided to the attorney general not less than ninety days before the closing date of the proposed agreement or transaction, and must include:
  - a. The names and addresses of the corporation doing business as a hospital, the for-profit organization, and all other parties to the proposed agreement or transaction;
  - b. The terms of the proposed agreement or transaction, including the proposed sale price;
  - c. A copy of the proposed agreement or transaction; and
  - d. Information regarding whether a Any financial or economic analysis by an expert or independent consultant has been prepared concerning the degree to which the proposed agreement or transaction will serve the public interest, or concerning the fair market value of the corporation doing business as a hospital retained by the nonprofit corporation which addresses the criteria set forth in section 10-33-145.

6. A nonprofit corporation doing business as a hospital or nursing home may neither transfer nor convey any assets or control through an agreement or transaction described in this section until ninety days after the corporation gives the attorney general notice required under this section, unless the attorney general waives all or part of the waiting period. Before the end of the waiting period, the attorney general may extend the period up to sixty additional days by providing written notice of the extension to the corporation. The waiting period may be extended for one or more additional sixty-day periods upon agreement between the corporation and the attorney general, or pursuant to a court order.

4. The notice requirements of this section do not apply to a proposed agreement or transaction between related organizations serving the same or similar charitable purposes and are in addition to any notice requirements that may apply under section 10-33-122.

**SECTION 2. AMENDMENT.** Section 10-33-145 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-145.** Transaction by a nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home - Attorney general's powers and duties - Experts - Continuing appropriation.

1. Upon receipt of a notice under section 10-33-144, the attorney general may review and investigate the proposed agreement or transaction and may require the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home and the ~~for-profit organization~~ other parties to the agreement or transaction to provide to the attorney general any additional information relevant to the review or investigation of the proposed agreement or transaction.
2. Upon receipt of a notice under section 10-33-144, the attorney general may review the proposed agreement or transaction to determine whether consummation of the proposed agreement or transaction by the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home is consistent with the purposes of the nonprofit corporation or entity operating or controlling a hospital or nursing home and the fiduciary obligations of the ~~corporation doing business as a hospital and the obligations of the~~ officers and directors of the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home and is in accordance with law. The attorney general shall consider the following factors in reviewing and evaluating a proposed agreement or transaction:
  - a. Whether appropriate steps were taken by the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home to safeguard restricted assets transferred to the ~~for-profit organization~~ acquiring entity;
  - b. Whether appropriate steps were taken by the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home to ensure that any proceeds of the proposed agreement or transaction are used for charitable purposes consistent with restrictions placed on assets of and with the charitable purposes of the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home;
  - c. Whether the terms and conditions of the proposed agreement or transaction are fair and reasonable to the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home, including whether the nonprofit corporation doing business as or entity operating or controlling the hospital or nursing home will receive fair market value for the its assets of the corporation and, in a proposed agreement or transaction involving a nursing home, whether the proposed agreement or transaction constitutes a bona fide transaction;
  - d. Whether any conflict of interest or breach of fiduciary duty, ~~as determined by the attorney general~~, exists ~~and/or~~ was disclosed, including any conflict of interest or breach of fiduciary duty related to directors and officers of, executives of, and experts retained by the nonprofit corporation doing business as or entity operating or controlling a hospital, the for-profit organization, or nursing home and any other party to the agreement or transaction; and
  - e. Whether the agreement or transaction will result in inurement, pecuniary gain, or excess benefit to any person associated with the nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home or to any other person;

- f. Whether the transaction is in the best interests of the nonprofit corporation or entity operating or controlling a hospital or nursing home; and
  - g. Whether the transaction is authorized by the nonprofit corporation's governing documents.
3. For the purpose of reviewing and evaluating the factors identified in subsection 2, the attorney general may retain experts if necessary and reasonable and ~~shall~~ may obtain public comment regarding the proposed agreement or transaction. A contract entered by the attorney general with an expert under this section does not require a bid and is exempt from chapters 44-08 and 54-44.4. If the attorney general intends to seek payment from the ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ for the cost of any expert retained under this subsection, at least five days before retaining that expert, the attorney general shall notify the ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ of the expert cost projected to be incurred. A ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ which receives notice under this subsection shall pay the reasonable cost of any retained expert. If the ~~nonprofit corporation doing business as or entity operating or controlling a hospital or nursing home~~ objects to paying the costs of an expert, the corporation ~~or entity~~ may seek a district court order limiting the corporation's ~~or entity's~~ liability for the costs. In determining whether to issue an order, the court shall consider whether the expert is necessary and reasonable and the cost of the expert relative to the value of the proposed agreement or transaction.
4. Section 44-04-18.4 applies to any information provided to the attorney general under sections 10-33-144 through 10-33-147.
5. All costs, fees, and other moneys received under sections 10-33-144 through 10-33-149 must be deposited into the attorney general's operating fund. The moneys in the fund are appropriated to pay the costs incurred in the attorney general's performance of responsibilities pursuant to sections 10-33-144 through 10-33-149.

**SECTION 3. AMENDMENT.** Section 10-33-146 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-146. Transaction by a nonprofit corporation~~doing business as or~~ entity operating or controlling a hospital or nursing home - Notice of decision - Public meeting - Meeting notice.** ~~Before the attorney general approves, denies, or takes any other action on a proposed agreement or transaction under section 10-33-144 or 10-33-145~~ Within ninety days of receipt of the written notice required under section 10-33-144, and such other additional extension of time permitted or provided under section 10-33-144, the attorney general shall notify, in writing, the nonprofit corporation ~~doing business as or~~ entity operating or controlling a hospital or nursing home of the attorney general's decision to approve, deny, or take any other action on the proposed agreement or transaction. Before issuing a written decision under this section, the attorney general ~~shall~~ may conduct ~~at least one or more public hearing hearings~~, one of which must be held in the county where the ~~corporation doing business as a hospital or nursing home~~ is located. At a public hearing under this section, the attorney general shall request and receive comments from any interested person regarding the proposed agreement or transaction. At least fourteen days

before a public hearing under this section, the attorney general shall provide notice of the meeting by publication in the official newspaper of the city in which the ~~corporation doing business as a~~ hospital or nursing home is located. The attorney general shall also provide notice of the meeting to the governing body of the county in which the ~~corporation doing business as a~~ hospital or nursing home is located, if applicable, and to the governing body of the city in which the ~~corporation doing business as a~~ hospital or nursing home is located, if applicable. Any party to the agreement may institute legal proceedings in the district court of the county in which the hospital or nursing home is located to review the attorney general's decision. In a district court action brought under this section, the attorney general's decision is subject to de novo review by the court. In a proceeding under this section, the attorney general must be served with notice and is entitled to be heard. If the attorney general substantially prevails in a proceeding under this section, the attorney general is entitled to an award of attorney's fees, investigation fees, costs, and expenses of any investigation and proceeding under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under this section as a limitation on an award of attorney's fees to the attorney general under any other section.

**SECTION 4. AMENDMENT.** Section 10-33-147 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-147. Transaction by a nonprofit corporation ~~doing business as~~ or entity operating or controlling a hospital or nursing home - Attorney general decision.** The attorney general may bring proceedings to secure compliance with ~~section sections~~ 10-33-144 through 10-33-149 in the district court of the county in which the hospital or nursing home is located. If the attorney general determines consummation of the proposed transaction or agreement is not consistent with the fiduciary obligations of the ~~nonprofit corporation doing business as~~ or entity operating or controlling a hospital or nursing home and the corporation's officers and directors, or is not in accordance with law, the attorney general may bring proceedings in the district court of the county in which the hospital or nursing home is located to enjoin the consummation of the proposed transaction or agreement or to secure any other relief available under the law. In a district court action brought under this section, the attorney general's decision is subject to de novo review by the court. If the attorney general substantially prevails in an action brought under this section, the attorney general is entitled to an award of attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under this section as a limitation on an award of attorney's fees to the attorney general under any other section. Failure of the attorney general to take action on a proposed agreement or transaction described in ~~section sections~~ 10-33-144 through 10-33-149 does not constitute approval of the transaction and does not prevent the attorney general from taking other action.

**SECTION 5.** Section 10-33-148 of the North Dakota Century Code is created and enacted as follows:

**10-33-148. Investigation - Subpoena - Hearing - Powers of the attorney general.** In discharging the attorney general's responsibilities under sections 10-33-144 through 10-33-149, and in connection with the public hearing provided for in section 10-33-146, the attorney general may conduct investigations, issue subpoenas

REPORT OF STANDING COMMITTEE (410)  
February 18, 2003 1:03 p.m.

Module No: SR-31-3088  
Carrier: J. Lee  
Insert LC: 38360.0101 Title: .0200

to any person directly related to the proposed agreement or transaction, and conduct hearings in aid of an investigation or inquiry.

**SECTION 6.** Section 10-33-149 of the North Dakota Century Code is created and enacted as follows:

10-33-149. Authority of the attorney general or a court is not impaired. Sections 10-33-144 through 10-33-148 are in addition to, and do not supersede, any other authority of the attorney general established by statute, case law, or common law.

**SECTION 7.** A new subsection to section 50-24.4-15 of the North Dakota Century Code is created and enacted as follows:

Recognize any mandated costs, fees, or other moneys paid to the attorney general through transactions under sections 10-33-144 through 10-33-149."

Renumber accordingly

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Operator's Signature

10/22/03  
Date

2003 HOUSE JUDICIARY

SB 2348

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10/22/03  
Date



2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2348

House Judiciary Committee

☐ Conference Committee

Hearing Date 3-18-03

Tape Number	Side A	Side B	Meter #
1	xx		30-45.7, 48-end
1		xx	1-2
Committee Clerk Signature <i>Penrose</i>			

**Minutes:** 10 members present, 3 members absent (Rep. Grande, Wrangham, Eckre)

**Chairman DeKrey:** We will open the hearing on SB 2348.

**Sandi Tabor, Deputy AG:** Support - introduced the bill. This bill is the next step of a process that started several legislative sessions ago when the ND Healthcare Association and some others, got together and decided that it was time to put together some procedures and codify those procedures that will put the ground rules in place when you sell a nonprofit to other nonprofit entities. This is the next step in that overall procedure and that what this bill does is it puts procedures in law to govern the way that not-for-profit hospital or nursing homes can sell or transfer assets to for-profit entities. Some have dubbed this the Banner health bill. I handed out an article (which is attached) which provides you with some background on what that litigation is all about. Because it is in litigation, I am limited on what I can tell you, however, I can give you a very brief scenario and that is that in 1999, Banner Health was created through the formation of a merger of Lutheran Health Systems, health group in Fargo, and they merged with a group from

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10/22/03  
Date

Page 2

House Judiciary Committee

Bill/Resolution Number SB 2348

Hearing Date 3-18-03

Phoenix called Samaritan Health Systems. Within two years of that merger, Banner Health had sold almost all its assets in North Dakota and moved to Phoenix. Along with that sale went the benefits of the tax exemptions that the facilities in this state had been receiving throughout the years, along with donations from citizens of North Dakota to those nonprofit entities. While we have, under our office, in fact in common law have the ability to review these types of sales. But as Banner shows, however, we have no procedures in statute to facilitate the review. Without the procedures laid out in SB 2348, no timeline exists for companies considering sales or transfers of assets to contact our office so that we can begin our common law review process. Consequently, in the past, we've had to rely on the rumor mill, or other means to find out that these types of sales or transactions are about to proceed, so that we can ask the parties to come in and talk to us about what they are up to. SB 2348 provides those procedures. Parrell will go into greater detail about exactly what those safeguards are and really what this bill does is put the ground rules in place. Before Parrell comes up to go into the details, there is one thing that has come up between the time that the bill passed the Senate and this hearing and we want to make sure that the record is clear on this issue. A concern has been made that the bill may allow our office to use charitable trust law to try and stop the sales of nonprofit hospitals involving religious affiliation or to mandate that the purchasing entities provide certain health care procedures. That concern is unfounded, and it is not the intent of this bill. As I mentioned, what we are trying to do here, is to put in some ground rules so that when someone is contemplating the sale of a not-for-profit hospital or nursing home to a for-profit entity that we have the ability, a timeline and other mechanisms in place so that we can bring the parties to the table and have discussion about the transfer. With that, I'll let Parrell get up and review his testimony.

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10/22/03

Date



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House Judiciary Committee  
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**Chairman DeKrey:** Thank you.

**Parrell Grossman, Director of the Consumer Protection and Antitrust Division of the Office of the AG:** Support (see attached testimony).

**Rep. Kretschmar:** Now, say they sell a hospital that is a nonprofit organization in North Dakota, to whom do they generally sell to, somebody else who is going to operate it, or to a for-profit company or a nonprofit company, or what. Like this Banner outfit, they were going to sell and take the money?

**Mr. Grossman:** Yes, that's correct. When there is a sale proposed by a nonprofit entity, operator or controlling the hospital to either another for-profit entity or nonprofit entity, then that transaction would trigger this review process by the Attorney General. It would give the Attorney General an opportunity to consider that transaction in light of the public interest. Under current law, the only transactions that were subject to the Attorney General's review, were those transactions where the sale involved a sale by a nonprofit to a for-profit. In the Banner case, Banner had alleged that there were no statutes that addressed the transfer of a nonprofit corporation to another nonprofit corporation, which happened in Banner. Of course, the Attorney General's position is that there has always been and will continue to be a substantial body of law in regard to common law authority in the area of charitable trusts; but this legislation will certainly now provide that statutory road map for those reviews.

**Rep. Kretschmar:** That process is still in litigation here in North Dakota.

**Mr. Grossman:** Yes, that process is still in litigation. It has most recently been in federal court and now the process is exclusively in state district court at this time in Cass County.

Deanna Hall  
Operator's Signature

10/22/03  
Date

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House Judiciary Committee  
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**Rep. Delmore:** Does the Attorney General then have the ability to stop the sale to this entity.

**Mr. Grossman:** The Attorney General has the ability to review these sales, and then in some instances, it certainly would be a possibility if there hadn't been due diligence, or there was some fiduciary breach or there was some conflict of interest between the selling and acquiring an entity, those sorts of situations. It would provide the Attorney General with that basis to deny that, and in that event, the transacting parties could seek a review in district court of the Attorney General's position regarding that matter. Likewise, if the parties then proceeded under the objection of the Attorney General, the Attorney General would then have the opportunity to bring proceedings in district court.

**Chairman DeKrey:** Thank you.

**Arnold Thomas, President of the ND Healthcare Association:** Support. We were instrumental a number of sessions ago, in bringing to you recommendations for putting in place in the code, the process and criteria by which hospitals could engage in activity that, up until that period of time, was really somewhat foreign, that is the buying and selling of hospitals. We had no rules of the road in the areas of assets. What we have here today is a not-for-profit selling to another not-for-profit and to complicate the issue, when the purchaser is an out-of-state not-for-profit organization. What are the rules of the road that need to be followed to ensure that community's assets are handled at a level of responsibility that fulfills the obligations that were intended to tax designations preferred upon that enterprise. That is what 2348 does.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Shelly Peterson, President of the Long Term Care Association:** Support. We have worked with the Attorney General's office on this bill. As you are aware, the issue came up because of

*Deanna Hall*  
Operator's Signature

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the sale of a number of nursing facilities in ND. We believe that we have enjoyed great public trust and public good and as a result, we have been supportive of the merits of what this bill is trying to do. We don't know if it is the perfect answer or the perfect solution and I guess where it will be tested is the next time we have a sale of a nursing home in North Dakota and how smooth it goes. We may be back next session, but at this point, I guess this is the best attempt to try and outline when a nonprofit nursing home sells to another nonprofit. What you need to do in that process.

**Chairman DeKrey:** Thank you. Further testimony in support. Testimony in opposition. We will close the hearing.

(Reopened later in the same session)

**Chairman DeKrey:** What are the committee's wishes in regard to SB 2348.

**Rep. Maragos:** I move the amendments of the Attorney General.

**Rep. Delmore:** Seconded.

Voice vote: Carried.

**Rep. Maragos:** I move a Do Pass as amended.

**Rep. Delmore:** Seconded.

10 YES 0 NO 3 ABSENT      DO PASS AS AMENDED      CARRIER: Rep. Maragos

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PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2348  
HOUSE JUDICIARY COMMITTEE  
DUANE DEKREY, CHAIRMAN  
MARCH 18, 2003

PRESENTED BY  
OFFICE OF ATTORNEY GENERAL

Page 4, line 19, remove "charitable"

Page 4, line 20, remove "charitable"

Renumber accordingly

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10/22/03

Date

Date: 3/18/03  
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2348

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 38360.0201 , 0360

Action Taken Do Pass as Amended

Motion Made By Rep. Maragos Seconded By Rep. Delmore

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Vice Chairman Maragos	✓		Rep. Eckre	AB	
Rep. Bernstein	✓		Rep. Onstad	✓	
Rep. Boehning	✓				
Rep. Galvin	✓				
Rep. Grande	AB				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrangham	AB				

Total (Yes) 10 No 0

Absent 3

Floor Assignment Rep. Maragos

If the vote is on an amendment, briefly indicate intent:

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10/22/03  
Date

**REPORT OF STANDING COMMITTEE (410)**  
March 18, 2003 2:04 p.m.

Module No: HR-48-5078  
Carrier: Maragoe  
Insert LC: 35360.0201 Title: .0300

**REPORT OF STANDING COMMITTEE**

**SB 2348, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (10 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2348 was placed on the Sixth order on the calendar.**

Page 4, line 19, overstrike "charitable"

Page 4, line 20, overstrike "charitable"

Renumber accordingly

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Date

2003 TESTIMONY

SB 2348

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SENATE HUMAN SERVICES COMMITTEE  
JUDY LEE, CHAIRMAN  
FEBRUARY 17, 2003

TESTIMONY BY  
WAYNE STENEHJEM  
ATTORNEY GENERAL  
IN SUPPORT OF PROPOSED AMENDMENTS TO  
SENATE BILL NO. 2348

I appear to present amendments to SB 2348 proposed in cooperation with the ND Healthcare Association, the ND Long Term Care Association and other interested healthcare facilities in North Dakota.

These proposed amendments will amend sections 10-33-144 through 10-33-147 of chapter 10-33 regulating nonprofit corporations. The existing sections regulate the conversion of nonprofit hospitals to for-profit hospitals.

This legislation will provide additional statutory authority for the Attorney General's role in reviewing proposed agreements or transactions that transfer the assets or governance of one nonprofit corporation or entity operating or controlling a hospital or nursing home to another nonprofit corporation or entity operating or controlling a hospital.

Section 1 amends section 10-33-144 and defines when a sale or transfer of governance has occurred and provides that the parties to the transaction must notify the Attorney General and provide certain information regarding the proposed agreement or transaction.

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Section 2 amends section 10-33-145 to provide that the Attorney General may review and investigate a proposed transaction, and provides the Attorney General with appropriate powers and duties to complete these responsibilities. This section provides: 1) the factors for the Attorney General to consider in the review; 2) for a hearing for public comment; and 3) for the Attorney General to obtain experts if necessary and for reimbursement of costs.

This section also provides for a continuing appropriation for the Attorney General for costs incurred performing in the responsibilities under this legislation.

Section 3 amends section 10-33-146 to provide for the Attorney General, when necessary, to conduct a public hearing and receive comments from interested persons, and to issue a written decision on the Attorney General's decision to approve, deny or take any other action on the proposed transaction. This section permits any party to the agreement to bring an action in district court to review the Attorney General's decision.

Section 4 amends section 10-33-147 to provide the Attorney General authority to bring proceedings in district court to secure compliance with this legislation if the proposed transaction is not in accordance with law, including obtaining an injunction or other relief available under law.

Section 5 creates and enacts section 10-33-148 with any investigation, subpoena and hearing powers necessary to discharge the Attorney General's responsibilities under this legislation.

Section 6 creates and enacts section 10-33-149, providing additional clarification that this legislation is in addition to, and does not supercede, any other authority of the Attorney General whether it is established by statute, case law, or common law.

This legislation adds to and does not replace the Attorney General's existing authority over nonprofit corporations and their use of charitable trust proceeds. The Attorney General has always had common law authority in the area of charitable trusts to correct abuses in public charities. In the area of charitable, nonprofit corporations, this common law authority was referred to as the right of supervision or visitation and included the Attorney General's supervision or visitorial powers. The Attorney General's common law authority has since been supplemented in North Dakota by N.D.C.C. ch. 59-04 "The Administration of Trusts," N.D.C.C. ch. 59-02 "Trusts for the Benefit of Third Persons," and N.D.C.C. ch. 10-33 "Nonprofit Corporations," which provide the Attorney General statutory authority over charitable trusts. This legislation further supplements the Attorney General's existing authority to review nonprofit to nonprofit healthcare conversions.

Section 7 creates a new subsection to section 54-24.4-15 addressing property-related costs in the rate-setting system for nursing homes. This provides that any mandated costs and fees paid to the Attorney General pursuant to a review invoked by this legislation would be considered in the nursing home property cost payment mechanism.

The North Dakota Long Term Care Association was concerned about management agreements for day-to-day operations.

"Senate Bill 2348 is not intended to apply to or impact agreements entered into by non-profit nursing homes, with a third party management company for the purpose of providing management over the day to day operation of the facility; provided, however, such agreements are not otherwise excluded from any other authority of the attorney general whether established by statute, case law, or common law."

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2348

PRESENTED BY  
OFFICE OF ATTORNEY GENERAL

Page 1, line 1, after "Act" replace the remainder of the bill with "to create and enact sections 10-33-148 and 10-33-149 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals and nursing homes; to create and enact a new subsection to section 50-24.4-15 relating to property-related costs for nursing homes; to amend and reenact sections 10-33-144, 10-33-144, 10-33-145, 10-33-146, and 10-33-147 of the North Dakota Century Code, relating to transactions by nonprofit corporations that operate or control hospitals or nursing homes; and to provide a continuing appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 10-33-144 of the North Dakota Century Code is amended and reenacted as follows:

10-33-144. Transaction by a nonprofit corporation doing business as operating or controlling a hospital or nursing home - Notice to attorney general - Waiting period.

1. A nonprofit corporation doing business as operating or controlling a hospital or nursing home shall notify the attorney general in writing before closing an agreement or a transaction that will:

- a. Sell, lease, transfer, exchange, option, convey, mortgage, ~~create a security interest in,~~ or otherwise dispose of to a for-profit organization corporation or entity or a nonprofit corporation or entity when fifty percent or more of the assets or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization of the selling corporation are involved in the agreement or transaction;
- b. ~~Sell, lease, transfer, exchange, option, convey, mortgage, create a security interest in, or otherwise dispose of any of the assets or operations of the corporation doing business as a hospital or any of the assets or operations of a related organization if the transaction or agreement will result in any for-profit organization owning or controlling fifty percent or~~

~~more of the assets or operations of the corporation doing business as a hospital or fifty percent or more of the assets or operations of a related organization~~ Transfer control, responsibility, or governance of fifty percent or more of the assets or operations of the nonprofit corporation to a for-profit corporation or entity or another nonprofit corporation or entity; or

- c. Result in any for-profit organization corporation or entity or another nonprofit corporation or entity having control of, governance of, or the power to direct management and policies of the nonprofit corporation operating or controlling a hospital, nursing home or a related organization.

2. The substitution of a new corporate member or members that transfers the control of, responsibility for, or governance of the nonprofit corporation, the substitution of one or more members of the governing body, or any arrangement, written or oral, that would transfer voting control of the entity, is a transfer for purposes of this section.

3. This section applies to a foreign nonprofit corporation that operates or controls a hospital or nursing home within the state.

4. This section does not apply to the following transactions:

- a. An action involving the enforcement or foreclosure of a security interest, lien, mortgage, judgment or other creditor rights.
- b. Agreements or transactions in the usual and regular course of the nonprofit corporation's business and activities.

2. 5. The notice must be provided to the attorney general not less ninety days prior to the closing date of the proposed agreement or transaction, and must include:

- a. The names and addresses of the corporation doing business as a hospital, the for-profit organization, and all other parties to the proposed agreement or transaction;
- b. The terms of the proposed agreement or transaction, including the proposed sale price;
- c. A copy of the proposed agreement or transaction; and

- d. ~~Information regarding whether a~~ Any financial or economic analysis by an expert or independent consultant has been prepared concerning the degree to which the proposed agreement or transaction will serve the public interest, or concerning the fair market value of the corporation doing business as a hospital, retained by the nonprofit corporation which addresses the criteria set forth in section 10-33-145(2).
3. 6. A nonprofit corporation doing business as a hospital or nursing home may neither transfer nor convey any assets or control through an agreement or transaction described in this section until ninety days after the corporation gives the attorney general notice required under this section, unless the attorney general waives all or part of the waiting period. ~~Before the end of the waiting period, the attorney general may extend the period up to sixty additional days by providing written notice of the extension to the corporation.~~ The waiting period may be extended for one or more additional sixty-day periods upon agreement between the corporation and the attorney general, or pursuant to a court order.
4. ~~The notice requirements of this section do not apply to a proposed agreement or transaction between related organizations serving the same or similar charitable purposes and are in addition to any notice requirements that may apply under section 10-33-122.~~

**SECTION 2. AMENDMENT.** Section 10-33-145 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-145. Transaction by a nonprofit corporation or entity doing business as operating or controlling a hospital or nursing home--Attorney general's powers and duties-- Experts.**

1. Upon receipt of a notice under section 10-33-144, the attorney general may review and investigate the proposed agreement or transaction and may require the nonprofit corporation or entity doing business as operating or controlling a hospital or nursing home and the for-profit organization other parties to the agreement or transaction to provide to the attorney general any additional information relevant to the review or investigation of the proposed agreement or transaction.
2. Upon receipt of a notice under section 10-33-144, the attorney general may review the proposed agreement or transaction to determine whether consummation of the proposed agreement or transaction by the nonprofit corporation or entity doing business as operating or controlling a hospital or nursing home is consistent with the purposes of the nonprofit

corporation or entity operating or controlling a hospital or nursing home, the fiduciary obligations of the corporation doing business as a hospital and the obligations of the officers and directors of the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home and is in accordance with law. The attorney general shall consider the following factors in reviewing and evaluating a proposed agreement or transaction:

- a. Whether appropriate steps were taken by the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home to safeguard restricted assets transferred to the for-profit organization acquiring entity;
- b. Whether appropriate steps were taken by the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home to ensure that any proceeds of the proposed agreement or transaction are used for purposes consistent with restrictions placed on assets of and with the purposes of the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home;
- c. Whether the terms and conditions of the proposed agreement or transaction are fair and reasonable to the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home, including whether the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home will receive fair market value for the its assets of the corporation; in a proposed agreement or transaction involving a nursing home the attorney general shall also consider whether the proposed agreement or transaction constitutes a bona fide transaction;
- d. Whether any conflict of interest or breach of fiduciary duty, as determined by the attorney general, exists and or was disclosed, including any conflict of interest or breach of fiduciary duty related to directors and officers of, executives of, and experts retained by the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home, the for-profit organization, and any other party to the agreement or transaction; and

- e. Whether the agreement or transaction will result in inurement or pecuniary gain, or excess benefit to any person associated with the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home, or any other party to the transaction, or any other person;
  - f. Whether the transaction is in the best interests of the nonprofit corporation or entity operating or controlling a hospital or nursing home; and
  - g. Whether the transaction is authorized by the nonprofit corporation's governing documents.
3. For the purpose of reviewing and evaluating the factors identified in subsection 2, the attorney general may retain experts if necessary and reasonable and ~~shall~~ may obtain public comment regarding the proposed agreement or transaction. A contract entered by the attorney general with an expert under this section does not require a bid and is exempt from chapters 44-08 and 54-44.4. If the attorney general intends to seek payment from the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home for the cost of any expert retained under this subsection, at least five days before retaining that expert, the attorney general shall notify the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home of the expert cost projected to be incurred. A nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home which receives notice under this subsection shall pay the reasonable cost of any retained expert. If the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home objects to paying the costs of an expert, the corporation or entity may seek a district court order limiting the corporation's or entity's liability for the costs. In determining whether to issue an order, the court shall consider whether the expert is necessary and reasonable and the cost of the expert relative to the value of the proposed agreement or transaction.
4. Section 44-04-18.4 applies to any information provided to the attorney general under sections 10-33-144 through 10-33-147.



5. All costs, fees, and other moneys received pursuant to sections 10-33-144 through 10-33-149 must be deposited into the attorney general's operating fund. The moneys in the fund are appropriated to pay the costs incurred in the attorney general's performance of responsibilities pursuant to sections 10-33-144 through 10-33-149.

**SECTION 3. AMENDMENT.** Section 10-33-146 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-146. Transaction by a nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home—Notice of decision—Public meeting—Meeting notice.**

~~Before the attorney general approves, denies, or takes any other action on a proposed agreement or transaction under section 10-33-144 or 10-33-145, Within ninety days of receipt of the written notice required under section 10-33-144, and such other additional extension of time permitted or provided under section 10-33-144, the attorney general shall notify, in writing, the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home of the attorney general's decision to approve, deny, or take any other action on the proposed agreement or transaction. Before issuing a written decision under this section, the attorney general shall may conduct at least one or more public hearing hearings, one of which must be held in the county where the corporation doing business as a hospital or nursing home is located. At a public hearing under this section, the attorney general shall request and receive comments from any interested person regarding the proposed agreement or transaction. At least fourteen days before a public hearing under this section, the attorney general shall provide notice of the meeting by publication in the official newspaper of the city in which the corporation doing business as a hospital or nursing home is located. The attorney general shall also provide notice of the meeting to the governing body of the county in which the corporation doing business as a hospital or nursing home is located, if applicable, and to the governing body of the city in which the corporation doing business as a hospital or nursing home is located, if applicable. Any party to the agreement may institute legal proceedings in the district court of the county in which the hospital or nursing home is located, to review the attorney general's decision. In a district court action brought pursuant to this section, the attorney general's decision shall be subject to de novo review by the court. In a proceeding under this section the attorney general must be served with notice and is entitled to be heard. If the attorney general substantially prevails in a proceeding under this section the attorney general is entitled to an award of attorney's fees, investigation fees, costs and expenses of any~~

Investigation and proceeding under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under sections 10-33-146 and 10-33-147 as a limitation on an award of attorney's fees to the attorney general under any other section.

**SECTION 4. AMENDMENT.** Section 10-33-147 of the North Dakota Century Code is amended and reenacted as follows:

**10-33-147. Transaction by a nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home--Attorney general decision.**

The attorney general may bring proceedings to secure compliance with section sections 10-33-144 through 10-33-149, in the district court of the county in which the hospital or nursing home is located. If the attorney general determines consummation of the proposed transaction or agreement is not consistent with the fiduciary obligations of the nonprofit corporation or entity operating or controlling doing business as a hospital or nursing home and the corporation's officers and directors, or is not in accordance with law, the attorney general may bring proceedings in the district court of the county in which the hospital or nursing home is located to enjoin the consummation of the proposed transaction or agreement or to secure any other relief available under the law. In a district court action brought pursuant to this section, the attorney general's decision shall be subject to de novo review by the court. If the attorney general substantially prevails in an action brought under this section the attorney general is entitled to an award of attorney's fees, investigation fees, costs and expenses of any investigation and action brought under this section. The court shall award attorney's fees to the attorney general under this section based upon the hourly rates the attorney general charges to state agencies for the attorney general's legal services. A court may not apply the limitation on the rate of the attorney general's attorney's fees under sections 10-33-146 and 10-33-147 as a limitation on an award of attorney's fees to the attorney general under any other section. Failure of the attorney general to take action on a proposed agreement or transaction described in section sections 10-33-144 through 10-33-149 does not constitute approval of the transaction and does not prevent the attorney general from taking other action.

**SECTION 5.** Section 10-33-148 of the North Dakota Century Code is created and enacted as follows:

**10-33-148. Investigation - Subpoena - Hearing - Powers of the Attorney General.**

In discharging the attorney general's responsibilities under sections 10-33-144 through 10-33-149, and in connection with the public hearing required by section 10-33-146, the attorney general may conduct investigations, issue subpoenas to any person, agent, trustee, fiduciary, consultant, institution, association, or corporation directly related to the proposed agreement or transaction, and may conduct hearings in aid of an investigation or inquiry. The attorney general has the powers under section 10-33-123."

**SECTION 6.** Section 10-33-149 of the North Dakota Century Code is created and enacted as follows:

10-33-149. The attorney general's or court's authority is not impaired. The provisions of sections 10-33-144 through 10-33-148 are in addition to, and do not supercede, any other authority of the attorney general whether it is established by statute, case law, or common law.

**SECTION 7.** A new subsection to section 50-24.4-15 of the North Dakota Century Code is created and enacted as follows:

Recognize any mandated costs, fees or other moneys paid to the Attorney General pursuant to transactions sections 10-33-144 through 10-33-149.

Renumber accordingly

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SENATE HUMAN SERVICES COMMITTEE  
JUDY LEE, CHAIRMAN  
FEBRUARY 5, 2003

TESTIMONY BY  
PARRELL D. GROSSMAN  
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION  
OFFICE OF ATTORNEY GENERAL  
IN SUPPORT OF  
SENATE BILL NO. 2348

Madam Chairman and members of the Senate Human Services Committee. I am Parrell Grossman, Director of the Consumer Protection and Antitrust Division of the Attorney General's Office. I appear on behalf of the Attorney General in support of Senate Bill No. 2348.

Senate Bill No. 2348 proposes to amend existing sections of and create new sections to chapter 10-33 regulating nonprofit corporations. This legislation relates to transactions involving nonprofit corporations that operate or control hospitals, nursing homes, or other health care facilities. This legislation is commonly referred to as the nonprofit healthcare conversion law.

North Dakota law, in sections 10-33-144 through 10-33-147, currently addresses the conversion of a nonprofit hospital or nursing home to a for-profit hospital or nursing home and provides the Attorney General the opportunity to review the transaction, conduct a public hearing and to challenge the transaction under very limited circumstances. These sections, however, do not address the conversion of a nonprofit healthcare facility to another nonprofit healthcare facility.

Senate Bill No. 2348 proposes legislation that will address the conversion of a nonprofit corporation to either a for-profit corporation or another nonprofit corporation. The legislation provides that, prior to entering into an agreement for the sale or transfer of assets of the nonprofit corporation to a for-profit or nonprofit corporation, the selling nonprofit corporation must provide written notice to and obtain the consent of the Attorney General. The notice must provide the Attorney General with specific information about the proposed agreement or transaction, including any information the Attorney General deems necessary.

The Attorney General, within 90 days of the notice of the proposed transaction, is required to notify the selling nonprofit corporation in writing of the Attorney General's decision to consent to, give conditional consent to, or not consent to the agreement or transaction. The Attorney General may extend the review period by 60 days and again thereafter by agreement of the selling corporation.

If the Attorney General does not consent to the agreement, the parties could not enter into the agreement or transaction without a court order. Upon request for a court order by the parties seeking to complete the proposed transaction, the court shall determine if the proposed agreement is in the public interest. In the event of a court proceeding, the

Attorney General is entitled to an award of reasonable attorney's fees and costs and expenses incurred in the proceeding.

The Attorney General, before issuing a decision, may conduct public hearings in the county where the health care facility is located.

The Attorney General in making his determination whether to consent to or not consent to, shall consider any factors the Attorney General deems relevant, including the following:

1. Whether the terms and conditions of the agreement or transaction are fair and reasonable to the nonprofit corporations, including whether the exchange of assets or consideration between the seller nonprofit corporation and the acquiring for-profit corporation is at fair market value.
2. Whether the agreement or transaction will result in any inurement, pecuniary gain, or excess benefit to any person associated with the selling corporation or acquiring corporation.
3. Whether the governing body of the selling corporation exercised due diligence in deciding to dispose of the selling corporation's assets, selecting the acquiring entity, and negotiating the terms and conditions of the disposition.
4. Whether any conflict of interest or breach of fiduciary duty, as determined by the attorney general, exists and was disclosed, including any conflict of interest or breach of fiduciary duty related to directors, officers and executives of the nonprofit corporations, as well as experts retained.
5. Whether the proceeds from the agreement or transaction will be used for appropriate charitable health care purposes consistent with the selling corporation's original purpose and past operations or for the support and promotion of health care in the affected community or area.

The legislation provides that the Attorney General may engage or retain experts and consultants for the process of reviewing proposed transactions or agreements relating to the sale or transfer of the nonprofit corporation's assets. The legislation provides that the Attorney General is entitled to reimbursement by the parties for all contract costs incurred in reviewing, evaluating, and making the determination whether to consent to, give conditional consent to, or not consent to the proposed agreement.

All of these factors the Attorney General applies in reviewing a proposed transaction are important in the Attorney General's role of protecting the public interest. However, the Attorney General's oversight responsibilities in protecting and preserving the charitable assets of nonprofit corporations engaged in healthcare are one of the Attorney General's most important responsibilities in this area. The Attorney General's role is to determine if, or ensure that, the sale proceeds, or the "charitable trust" will be used for appropriate

charitable health care consistent with the seller's original purpose or for the support of health care in the affected community.

California, Georgia, Nebraska, New Hampshire and Rhode Island are some of the states that have codified the Attorney General's statutory responsibilities in reviewing nonprofit to nonprofit conversions. Now is an appropriate time to further define by statute the North Dakota Attorney General's role, authority and responsibility in regard to nonprofit healthcare conversions.

This legislation will add to and not supplant the Attorney General's existing authority over nonprofit corporations and their use of charitable trust proceeds. The Attorney General has always had common law authority in the area of charitable trusts to correct abuses in public charities. In the area of charitable, nonprofit corporations, this common law authority was referred to as the right of supervision or visitation and included the Attorney General's supervision or visitorial powers. The Attorney General's common law authority has since been supplemented in North Dakota by N.D.C.C. ch. 59-04 "The Administration of Trusts," N.D.C.C. ch. 59-02 "Trusts for the Benefit of Third Persons," and N.D.C.C. ch 10-33 "Nonprofit Corporations," which provide the Attorney General statutory authority over charitable trusts.

The Attorney General is reviewing the proposed legislation with the North Dakota Healthcare Association and other interested persons. He is engaged in ongoing discussions and will review any proposed amendments to Senate Bill No. 2348, when he receives those proposed amendments. The Attorney General will then provide additional information to this committee for further consideration.

For these reasons, the Attorney General respectfully urges this committee to give Senate Bill 2348 a "do pass" recommendation, with such proposed amendments as may be appropriate.

Thank you for your time and consideration and I will be available to try and answer any questions.

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March 25, 2002 Issue

Opinions-Editorials

Protecting the public's assets: The real  
'takings' of property are being done by  
companies, not government

By: Todd Sloane

Hospital companies and insurers are being disingenuous when they profess not to understand that they can't sell off or dump their assets without just compensation. How else can we explain the issue keeps being replayed nationwide, as insurers convert their status and hospitals are sold, consolidated or closed?

Hospitals built through donations from the community and by state and local tax breaks should not simply be liquidated like any other corporate asset. Likewise, insurance companies benefited from tax breaks and from the payments of policyholders part to ensure that the most people are covered, can't just trade assets without just compensation.

Anyone who makes it more complicated than that is playing with fire. The most recent to do so is Phoenix-based Banner Health System. In September 2001, not-for-profit Banner announced plans to sell its 29 hospitals and 17 long-term-care facilities in seven states, concentrated its efforts in higher-growth markets in Arizona and Colorado.

South Dakota Attorney General Mark Barnett is using the state laws to prevent Banner from selling two hospitals and three Banner health facilities in his state. Banner earlier this month sued Barnett, claiming that he has misinterpreted state laws and that he can do whatever it wants with its property. Further, the health system claims that Barnett's actions amount to a violation of the "takings" clauses of the Fifth and 14th amendments of the U.S. Constitution.

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prohibiting the government from passing laws that take away assets without fair compensation.

But whose assets are these? The public, through the granting of tax breaks and individual philanthropy, has built a stake in the industry that is bigger than that of any group of corporate executives. In the case of not-for-profit corporations, the facilities existed individually before ownership was transferred to a predecessor of Banner. Banner was formed in September 1999 when Fargo, N.D.-based Lutherus Health Systems acquired Phoenix-based Samaritan Health System. Deputy Attorney General Larry Long told Modern Healthcare "Banner never paid a nickel for these facilities."

We have seen again and again what happens after such a deal: a hospital system buys two hospitals in a community and closes one. It closes clinics that once provided charity care, or stops investing in community health programs.

What is needed are more laws like California's, which require attorney general review of all transactions between not-for-profit hospitals to ensure that they do not reduce charitable services to the community and that the charitable assets of the not-for-profit are properly protected.

The other recent news on this topic is that state hospital associations are rising up to fight the for-profit conversions and sales of regional Blue Cross and Blue Shield plans. One of those is the Maryland Hospital Association, which opposes the conversion of a \$1.3 billion sale of not-for-profit CareFirst Blue Cross and Blue Shield to for-profit giant WellPoint Health Networks, Thousand Oaks, Calif. The MHA believes WellPoint won't provide the same level of care and reimbursement to hospitals. One might also be concerned about future coverage of hard-to-insure residents, and about the fate of the person, William Jews, president and chief executive officer of CareFirst, who stands to make \$9.1 million from the deal.

CareFirst argues that the sale will benefit providers because it has the cash to invest in better technology to more quickly verify claims and pay providers. Other WellPoint officials promise to develop lower-cost policies. Of course, there also will be a cash payout to governments and policyholders.

But after decades of tax breaks, not to mention a charitable deduction, that's just not good enough.

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Deanna Waller  
Operator's Signature

10/22/03  
Date





Wayne Stenehjem  
ATTORNEY GENERAL

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OFFICE OF ATTORNEY GENERAL

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*Banner*  
**FILE**

May 20, 2002

Geoffrey B. Shields  
Attorney At Law  
321 N. Clark Street, Suite 3400  
Chicago, Illinois 60610

Re: Banner Health System ("Banner")

Dear Mr. Shields:

This letter is to inform you of my position regarding Banner's sale of nursing homes, hospital and other corporate assets located in North Dakota. I contend a constructive or charitable trust applies to a significant portion of the sale proceeds and I request Banner help determine the appropriate value of the trust.

A constructive or charitable trust attaching to a portion of the sale proceeds existed prior to Banner's sales of the nursing homes and hospital, or liquidation of other corporate assets in North Dakota. Banner, while known as Lutheran Hospitals and Homes Society of America (LHHS), received contributions from the local communities in North Dakota, which enabled Banner to establish or acquire the nursing homes. Over the years, the local communities invested in the nursing homes through their patronage. Tax-exempt status enhanced the value of the nursing homes by allowing the homes to retain money that otherwise would have been used to pay taxes. Local contributors, patrons, and taxpayers placed their trust and confidence in the integrity of Banner and helped create and enhance the value of the facilities. If a constructive trust did not arise, there would be unjust enrichment because funds attributable to local investors, patrons, and taxpayers would be diverted to foreign communities. A constructive or charitable trust thus attached to that portion of the sale proceeds attributable to the local communities.

While Banner may have authority to liquidate its North Dakota assets, the sale does not extinguish your trust obligations. Rather, those obligations, as well as the corporate purposes of Banner, continue to govern the use of the proceeds.

The notion that Banner can reap the benefits of tax-exempt status and generous community contributions and patronage for almost 60 years, and then abruptly withdraw its community commitment, discontinue its service responsibilities and transfer the assets out of state, is totally unacceptable.

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*Deanne Stenehjem*  
Operator's Signature

10/22/03

Date

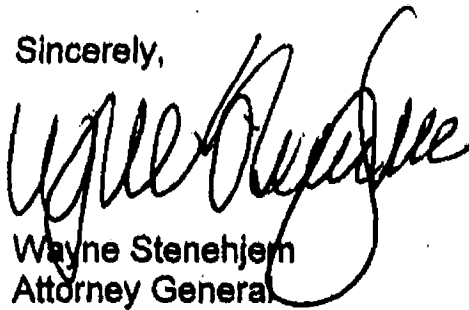
Geoffrey B. Shields  
Re: Banner Health System  
May 20, 2002  
Page Two.

I request that Banner meet with me and members of my staff to discuss the fair value of the trust and how Banner must meet its trust obligations in the area historically served by LHHS and Banner. I am hopeful that an amicable determination will be reached so that a fair and equitable portion of the sale proceeds will be maintained in the local communities. If Banner is unwilling to acknowledge its trust obligations, then I intend to pursue the remedies available under North Dakota law.

Be advised that my office has been in contact with our counterparts in the South Dakota Attorney General's office, and we are aware of the course you have decided to pursue with regard to the similar claims in that state. This includes the lawsuit you filed seeking to prohibit the Attorney General from enforcing the laws of South Dakota. If this is the course you intend to pursue in North Dakota, you may as well tell me right away, so we can avoid pointless discussions that are not intended to reach an equitable settlement.


I ask that you contact me within the next seven days if you wish to cooperate in such a meeting.

Sincerely,



Wayne Stenehjem  
Attorney General

WS/lb

  
Operator's Signature

10/22/03

Date

HOUSE JUDICIARY COMMITTEE  
DUANE DEKREY, CHAIRMAN  
MARCH 18, 2003

TESTIMONY BY  
PARRELL D. GROSSMAN  
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION  
OFFICE OF ATTORNEY GENERAL  
IN SUPPORT OF  
ENGROSSED SENATE BILL NO. 2348

Mr. Chairman and members of the House Judiciary Committee. I am Parrell Grossman, Director of the Consumer Protection and Antitrust Division of the Attorney General's Office. I appear on behalf of the Attorney General in support of Senate Bill No. 2348.

Senate Bill No. 2348 proposes to amend existing sections of and create new sections to chapter 10-33 regulating nonprofit corporations. This legislation relates to transactions involving nonprofit corporations that operate or control hospitals or nursing homes. This legislation is commonly referred to as the nonprofit healthcare conversion law.

North Dakota law, in sections 10-33-144 through 10-33-147, currently addresses the conversion of a nonprofit hospital to a for-profit hospital and provides the Attorney General the opportunity to review the transaction, conduct a public hearing and to challenge the transaction under limited circumstances. These sections, however, do not address the conversion of a nonprofit hospital or nursing home to another nonprofit hospital or nursing home.

This legislation will provide additional statutory authority for the Attorney General's role in reviewing proposed agreements or transactions that transfer the assets or governance of one nonprofit corporation or entity operating or controlling a hospital or nursing home to another nonprofit corporation or entity operating or controlling a hospital.

Section 1 amends section 10-33-144 and defines when a sale or transfer of governance has occurred and provides that the parties to the transaction must notify the Attorney General and provide certain information regarding the proposed agreement or transaction.

Section 2 amends section 10-33-145 to provide that the Attorney General may review and investigate the proposed transaction and provides the Attorney General with appropriate powers and duties to complete these responsibilities. This section provides: 1) the factors for the Attorney General to consider in the review; 2) for a hearing for public comment; and 3) for the Attorney General to obtain experts if necessary and for reimbursement of costs.

This section also provides for a continuing appropriation for the Attorney General for costs incurred in the responsibilities under this legislation.

Section 3 amends section 10-33-146 to provide for the Attorney General, when necessary, to conduct a public hearing and receive comments from interested persons, and to issue a written decision on the Attorney General's decision to approve, deny or take any other action on the proposed transaction. This section permits any party to the agreement to bring an action in district court to review the Attorney General's decision.

Section 4 amends section 10-33-147 to provide the Attorney General authority to bring proceedings in district court to secure compliance with this legislation if the proposed transaction is not in accordance with law, including obtaining an injunction or other relief available under law.

Section 5 creates and enacts section 10-33-148 with any investigation, subpoena and hearing powers necessary to discharge the Attorney General's responsibilities under this legislation.

Section 6 creates and enacts section 10-33-149 to provide additional clarification that this legislation is in addition to, and does not supersede, any other authority of the Attorney General whether it is established by statute, case law, or common law.

This legislation adds to and does not replace the Attorney General's existing authority over nonprofit corporations and their use of charitable trust proceeds. The Attorney General has always had common law authority in the area of charitable trusts to correct abuses in public charities. In the area of charitable, nonprofit corporations, this common law authority was referred to as the right of supervision or visitation and included the Attorney General's supervision or visitatorial powers. The Attorney General's common law authority has since been supplemented in North Dakota by N.D.C.C. ch. 59-04 "The Administration of Trusts," N.D.C.C. ch. 59-02 "Trusts for the Benefit of Third Persons," and N.D.C.C. ch. 10-33 "Nonprofit Corporations," which provide the Attorney General statutory authority over charitable trusts. This legislation further supplements the Attorney General's existing authority to review nonprofit to nonprofit healthcare conversions.

This legislation creates a statutory roadmap for the Attorney General to follow in these transactions involving nonprofit corporations operating or controlling hospitals or nursing homes, resulting in a sale or conversion of assets.

Section 7 creates a new subsection to section 54-24.4-15 addressing property-related costs in the rate-setting system for nursing homes. This provides that any mandated costs and fees paid to the Attorney General pursuant to a review invoked by this legislation would be considered in the nursing home property cost payment mechanism.

The North Dakota Long Term Care Association was concerned about management agreements for day-to-day operations.

Senate Bill 2348 is not intended to apply to or impact agreements entered into by non-profit nursing homes, with a third party management company for the purpose of providing management over the day to day operation of the facility; provided, however, such agreements are not otherwise excluded from any other authority of the attorney general whether established by statute, case law, or common law.

A concern has been raised that the bill may allow the AG to use charitable trust law to try to stop sales involving religious affiliated hospitals or to mandate that the purchasing entity provide certain health care procedures. This concern is unfounded and not the intent of the bill. The changes are proposed to provide the ground rules for how the AG will conduct his common law right to review such sales.

The Attorney General is submitting proposed amendments to remove the words "charitable" on page 4, lines 18 and 19 of Engrossed Senate Bill No. 2348.

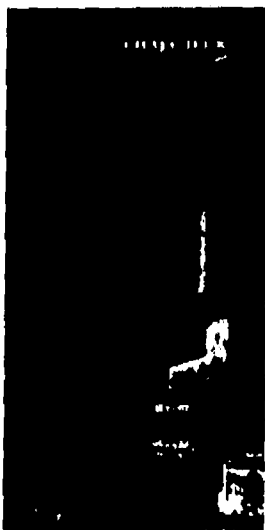
For these reasons, the Attorney General respectfully urges this committee to give Engrossed Senate Bill 2348 a "do pass" recommendation, with the proposed amendments.

Thank you for your time and consideration and I will be available to try and answer any questions.

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## Banner's end run must end

Company plays chess with assets it inherited while communities pay the price

Story originally published March 3, 2003

Can a national company operating not-for-profit hospitals and nursing homes sell off facilities without any obligation to the communities these institutions once served? That question is at the heart of a major legal battle between Phoenix-based Banner Health System and the attorneys general of New Mexico, North Dakota and South Dakota. At stake are millions of dollars in charitable health assets that will be lost by these communities if Banner is allowed to take the money and run.

Banner's history in each of those states has been brief. Banner was created as the result of a 1999 merger of Fargo, N.D.-based Lutheran Health Systems and Phoenix-based Samaritan Health System. Two years later, Banner announced it was selling 10 of its 29 hospitals and 17 long-term-care facilities in seven states as it concentrated its efforts in higher-growth markets in Arizona and Colorado. The company clearly has the right to do so, but it shouldn't unjustly profit from these transactions.

Under the law, not-for-profit organizations cannot divert funds from charitable purposes. As charitable institutions, not-for-profit hospitals and nursing homes hold assets in trust for the benefit of the communities they serve. Those assets must continue to serve the communities in perpetuity. It is the duty of the state attorneys general to protect such charitable trusts to ensure that the assets of not-for-profit hospitals or nursing homes forever further their original charitable purposes.

The attorneys general of New Mexico, North Dakota and South Dakota have answered the call, challenging the legality of Banner's attempts to remove the proceeds of these sales from their states. Banner has responded by swiftly suing each attorney general in federal court.

In South Dakota, a federal court referred the matter to the state Supreme Court, which on March 24 will hear Banner's claims that it may do whatever it wishes with proceeds of property it sells. The South Dakota attorney general argues Banner "never paid a nickel" for seven hospitals and nursing homes in that state but now wants to remove millions of dollars in charitable assets.

For decades, a succession of not-for-profit operators of these facilities have transferred the facilities and their charitable assets to other organizations that acted as fiduciaries of that trust, with no money changing hands. Now Banner, the current fiduciary, which acquired these facilities for free, claims it has no obligation to the

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communities that paid for and built the hospitals and nursing homes.

Banner claims its actions are in keeping with charitable trust law because the proceeds generated from these sales will be diverted to the not-for-profit facilities it operates in Colorado and Arizona. But if the charitable purpose of a South Dakota hospital is to provide healthcare to people in South Dakota, how can an out-of-state corporation with no remaining facilities in the state be said to be fulfilling that purpose?

Consider what happened in New Mexico. Banner's predecessor won the right from the federal government to take over not-for-profit Los Alamos Medical Center for \$1 (that's right, a dollar) back in 1963. Banner acquired the hospital through a merger in 1999, then announced two years later it was selling the facility to a for-profit and removing \$38 million in sale proceeds from the state. Although it's understandable that Banner would want to profit from such a fortuitous investment, those funds rightfully belong to the community.

After New Mexico Attorney General Patricia Madrid sent a letter to Banner questioning its right to the Los Alamos sale proceeds, Banner sued her in federal court. The attorney general moved to dismiss the case, claiming the facility was essentially a gift to the community and that the community therefore had a right to the sale proceeds. Madrid also alleged that Banner had siphoned assets from the facility by deferring millions of dollars in maintenance and diverting trust income to its operations in other states.

The New Mexico case was settled in May 2002 for nearly \$14 million, which will remain in the community to fund healthcare charities and to improve the hospital.

Meanwhile, in North Dakota last week a federal judge dismissed Banner's case. The dispute is now pending in state court.

Banner has aggressively sought to defend its efforts to remove the proceeds, suing these attorneys general while in active negotiations. In New Mexico, Banner's lawyers did not attempt to hide their motive. At the time the lawsuit was filed, Banner Vice President Dan Green said in a prepared statement that he hoped "the federal filing will expedite a resolution in this matter."

Lawyers for not-for-profit hospital chains have argued in the pages of Modern Healthcare they simply cannot do business if they are prohibited from moving money around. But that broad question is not what this case is about. It's about whether a not-for-profit hospital chain can acquire a facility as a gift, turn around and sell it for a huge profit, and then remove the proceeds from the state. This money belongs to the communities that built and maintained these facilities.

We applaud these attorneys general for standing up to Banner to protect funds that rightfully belong to the people of their states. When Banner abandons its charitable mission in these states, it must leave the money behind.

Barbara Gorham is a staff lawyer at Consumers Union, San Francisco, the publisher of Consumer Reports magazine.

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