

IDENTITY AND INTEREST OF AMICUS CURIAE

Consumers Union of U.S., Inc. (hereinafter “Consumers Union”), the nonprofit publisher of Consumer Reports, files this amicus curiae brief to provide the Court with a national perspective on the sale and conversion of nonprofit health care corporations. Consumers Union has been monitoring the sale and conversion of nonprofit health care corporations for over seventeen years. Over the past six years, Consumers Union, along with its partner organization Community Catalyst, has assisted consumer groups, legislators, regulators, courts, and Attorneys General reviewing these transactions in more than 40 states.

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ARGUMENT

The question before this Court is “[w]hether the laws of South Dakota recognize any legal theory that would subject any of the assets of a nonprofit corporation or proceeds from the sale of those assets to an implied or constructive charitable trust in

the absence of an express trust agreement.” Across the nation, courts and regulators have imposed charitable trust restrictions on the assets of nonprofit health care corporations, notwithstanding the absence of an express trust agreement. We will discuss the principles of charitable trust as applied to nonprofit hospitals, review cases from around the country where charitable trust principles have governed nonprofit hospital transactions, and discuss the application of the charitable trust doctrine, by analogy, to nonprofit health insurers, such as Blue Cross and Blue Shield plans.

I. Nonprofit Hospitals Are Widely Considered Charitable Trusts Subject to Attorney General Scrutiny.

As charitable institutions, nonprofit health care facilities hold assets in trust for the benefit of the communities they serve. These assets can be used only to further the charitable purposes of the facilities. Because charitable trust law is administered by the state in which a charity does business, the defendant attorney general is appropriately seeking to protect the assets at issue in this case. A nonprofit organization cannot be said to own the proceeds of a hospital sale. Instead, those assets belong to the people of the communities the organization serves.

A. The Assets of a Nonprofit Hospital, as a Charitable Institution, Can Be Used Only to Further the Original Charitable Purposes of the Organization.

As a charitable institution, Banner Health System (hereinafter “Banner Health System” or “Banner”) holds assets that are irrevocably dedicated for public charitable purposes in the communities that built up those assets.¹ The assets of these South Dakota facilities, like the assets of all other charities, are impressed with a charitable trust. Put simply, this means that the assets may only be used to further the original

charitable purposes for which they were acquired.² This requirement applies equally to the revenues of a nonprofit charitable corporation as it does to private donations to a charity.³ Once imposed, charitable trust restrictions continue to apply to all of the assets of a charity, even if the corporation transfers its assets to another entity.⁴

The existence of a charitable trust does not hinge on narrow technicalities about the structure or operation of the trust, but on broader considerations about the overall purpose of the funds.⁵ A charitable trust is, therefore, not a particular entity or thing, but a fiduciary relationship or status imposed once a charitable purpose is clear.⁶ In evaluating the existence of a charitable trust, South Dakota courts have traditionally followed liberal rules of judicial construction.⁷

B. Charitable Trusts Are Enforced by the State in which the Nonprofit Is Physically Located and Does Business.

Charitable trusts are governed by the laws of the state in which the trust is administered.⁸ The duties owed are enforceable for the benefit of the community by the

¹ Michael W. Peregrine & James R. Schwartz, The Application of Nonprofit Corporation Law to Healthcare Organizations 50 (2002).

² American Center for Education v. Cavnar, 145 Cal. Rptr. 736, 742 (1978).

³ See Attorney General v. Hahnemann Hospital, 494 N.E.2d 1011, 1020 (Mass. 1986) (holding that all of the proceeds from the sale of a nonprofit hospital must be used for purposes consistent with the charitable trust).

⁴ See New Hampshire Attorney General's Report on Optima Health, March 10 1998, discussed infra part III.C. (finding that elimination of acute care services at a hospital that had merged with another hospital was a violation of the first hospital's charitable trust).

⁵ Restatement of Trusts, 2d § 348 (1959).

⁶ Id.

⁷ In re Geppert's Estate, 75 S.D. 96, 105, 59 N.W.2d 727, 731 (1953).

⁸ See Cavnar, 145 Cal. Rptr. at 743 (holding that a charity incorporated in the District of Columbia was nonetheless subject to California law because the assets were located and the charity operated in California).

state attorney general.⁹ Because Banner is a charitable organization with assets located and doing business in South Dakota, it is subject to scrutiny by the South Dakota attorney general.¹⁰

Banner Health System announced in the fall of 2001 that it was divesting from facilities in nine of the states in which it does business to concentrate its operations in Arizona and Colorado.¹¹ As Banner divests from each of these states, the charitable assets must be protected by the states in which they were originally generated. If South Dakota does not claim its assets now, they will forever be lost.

This is similar to what happened when Nevada Blue Cross and Blue Shield merged with the Colorado Blue Cross and Blue Shield plan. Because both plans were nonprofits, the Nevada Insurance Commissioner approved the transaction. A year and a half later, the Colorado plan converted to a for-profit. Nevada regulators then tried to protect assets for the people of their state, but it was too late. The regulators were denied party status in Colorado. The result: Colorado got \$155 million for its foundation and Nevada got just \$1.5 million.¹² If Nevada regulators had imposed restrictions on the assets earlier, they would have been much more likely to preserve Nevada's fair share.

New Mexico Attorney General Patricia Madrid asserted jurisdiction over the plaintiff Banner Health System earlier this year when Banner sold the nonprofit Los Alamos Medical Center to for-profit Province Healthcare and attempted to remove \$38 million in proceeds to its headquarters in Arizona. Under her broad authority to regulate

⁹ Rachel B. Rubin, Comment: Nonprofit Hospital Conversions in Kansas: The Kansas Attorney General Should Regulate All Nonprofit Hospital Sales, 47 Kan. L. Rev. 521, 531 (1999) (citing 4A Scott & Fratcher, The Law of Trusts, at 315-16 (4th ed. 1989)).

¹⁰ See Cavner, 145 Cal. Rptr. at 743.

¹¹ Banner Health System News Release, September 19, 2001.

nonprofit organizations and protect charitable assets,¹³ the attorney general began to investigate Banner Health System. Banner sued in federal court claiming, as it has in South Dakota, that Madrid's actions amounted to an unconstitutional "taking" of private property.¹⁴ The New Mexico case settled in May of 2002 without resolution of the charitable trust issue, and with Banner and the for-profit buyer committing to invest nearly \$14 million in the community, \$4.5 million of which will go to health charities.¹⁵

C. The Assets of a Nonprofit Organization Belong to the Communities that the Organization Serves.

If anyone owns the assets of these South Dakota facilities, it is the people of South Dakota. A nonprofit hospital is composed of assets that have been accumulated, in large part, over years of tax exemptions, community goodwill, volunteer time and philanthropic giving. The assets of a nonprofit, therefore, are unique. They do not belong to the board or management of the hospital.¹⁶ The assets belong to the people served by the nonprofit organization. The board simply manages the trust for the benefit of the community served by the nonprofit organization.¹⁷

This duty to manage the trust for the benefit of the community is a serious one. A case out of California illustrates this point. In the fall of 1996, California Attorney General Dan Lungren threatened to hold the nonprofit board of directors of Sharp Health System personally liable after the board decided to enter into a joint venture with for-

¹² Alan Greenblatt, Stinging the Blues, *Governing*, July 2001, at 42.

¹³ See N.M. Stat. Ann. § 57-22 (2001).

¹⁴ Complaint, Banner Health System v. Patricia Madrid (CIV-02-0488), at 20.

¹⁵ Settlement Agreement, Banner Health System v. Patricia Madrid, May 30, 2002, at 2-3.

¹⁶ See In re Manhattan Eye, Ear & Throat Hospital, 715 N.Y.S.2d 575, 593 (N.Y. Sup. Ct. 1999).

¹⁷ See Daniel L. Kurtz, Board Liability Guide for Nonprofit Directors 85 (1988).

profit Columbia/HCA. After concluding that the board's action "constituted an abandonment and breach" of its charitable mission, the attorney general ordered the nonprofit hospital system to suspend further negotiations for the joint venture.¹⁸ As part of his investigations, the attorney general concluded that the assets had been undervalued by as much as \$200 million, and stated that if "this deal should close in the proposed form, [he] would seek to hold Sharp directors who voted to approve the transaction personally liable for this amount."¹⁹ It is therefore appropriate that the South Dakota attorney general take action to protect the charitable assets at issue in this case.

Just as these assets do not belong to the board, neither do they belong to the people of Arizona and Colorado, the states in which Banner is consolidating its operations. Instead, the people of each of Banner's 14 states have a right to their proportional share. In states from which Banner is divesting, it must leave the assets behind because it is abandoning the charitable mission by selling the facilities. If Banner were allowed to remove the proceeds of these sales to invest in its facilities in other states, this would set a precedent that a nonprofit chain of hospitals can replace the missions of its subsidiary hospitals with that of the larger system, and thus obviate the individual missions of the subsidiaries. It is the attorney general and the courts who are responsible for overseeing whether a charitable organization remains true to its mission, and for approving changes to that mission.

¹⁸ Julio Mateo, Jr. and Jaime Rossi, Consumers Union, White Knights or Trojan Horses? A Policy and Legal Framework for Evaluating Hospital Consolidations in California, at 9 (1999).

¹⁹ Id.

II. The Assets at Issue in This Case Must Continue to Serve the Charitable Purposes of These South Dakota Facilities.

It is clear under standards of fiduciary duty, South Dakota statute, and the common law that the charitable purposes of these health care facilities must continue. The question to be answered in this case is whether the removal of the proceeds of this sale is a violation of these charitable purposes.

A. Banner Health System Owes a Duty of Obedience to the Charitable Purposes of These South Dakota Health Facilities.

In its opening brief, Banner Health System claims that recognition of a charitable trust “would make officers and directors of nonprofit corporations subject to the stricter fiduciary standard of care applicable to trustees.”²⁰ But the first and foremost duty owed by nonprofit directors is that of obedience to the charitable purposes of the nonprofit organization.²¹ According to a noted authority on nonprofit board liability, “[t]he duty of obedience is akin to that of a trustee administering a trust in a manner faithful to the expressed wishes of the creator.”²² Although directors may have “considerable latitude”²³ to determine how the charitable purpose is to be fulfilled, they “may not deviate in any substantial way from the duty to fulfill the particular purposes” of the organization.²⁴ Transferring the assets of community-based health care facilities and investing them in the other operations of a multi-state corporation is, to say the least, a substantial deviation from the duty to fulfill the charitable purposes of those community-

²⁰ Brief and Argument for Plaintiff 5.

²¹ See Michael W. Peregrine & James R. Schwartz, Nonprofit Corporations: The M&A Process and the Meaning of MEETH, 28 Health Law Digest, at 4 (May 2000).

²² Kurtz, supra, at 84.

²³ Id. at 85.

²⁴ Id.

based facilities. To do so would appear to be a clear violation of the duty of obedience to the charitable purposes.

A recent case out of New York illustrates this point. In 1999, New York Attorney General Eliot Spitzer held a nonprofit hospital to its duty of obedience to the charitable purposes of the hospital in the case of the Manhattan Eye, Ear, and Throat Hospital (hereinafter “MEETH”). The board had moved to sell the hospital’s real property and use the proceeds to fund diagnostic and treatment centers. The question before a New York judge was whether the seller’s use of the sale proceeds would promote its charitable purposes.²⁵ The attorney general argued that MEETH had failed to explore all available options to maintain the principal charitable purpose of the corporation, which was to operate a hospital in the city of New York. The judge agreed and enjoined the sale, reasoning that the fact that the sale made good business sense did not justify an abandonment of the hospital’s original mission.²⁶

B. Under Dakota Law, Charitable Assets May Be Used Only to Further the Charitable Purposes of the Organization.

The assets of a charitable corporation are irrevocably dedicated to further its charitable purposes.²⁷ South Dakota law clearly states that the assets of a charitable nonprofit organization must forever serve that organization’s purposes. The relevant South Dakota statute, which plaintiff cites, states that:

Assets received and held by the corporation subject to limitations permitting their use only for charitable . . . purposes shall be transferred or conveyed to one or more domestic or foreign corporations . . . engaged in

²⁵ See In re Manhattan Eye, Ear & Throat Hospital, 715 N.Y.S.2d at 594.

²⁶ See id. at 596.

²⁷ See Peregrine & Schwartz, supra, The Application of Nonprofit Corporation Law to Healthcare Corporations, at 50.

activities substantially similar to those of the dissolving or liquidating corporations. S.D. Codified Laws 47-26-30(3) (emphasis added).

Applying this statute to the case at hand, the two-part question is therefore: 1) Are the charitable purposes of these health care facilities to provide health care in the South Dakota communities they currently serve? and 2) if so, can a corporation with no remaining facilities in South Dakota be said to be engaging in activities substantially similar to those purposes? Put another way, if the purpose of these South Dakota facilities is to operate hospitals and nursing homes in South Dakota, how can an Arizona corporation with no remaining facilities in South Dakota be said to be using the assets for activities “substantially similar” to operating hospitals and nursing homes in South Dakota?

In a similar situation in California, the attorney general required that assets of a nonprofit community hospital selling to a chain of nonprofit hospitals be set aside because the missions of the two organizations were different. After the nonprofit St. Luke’s Hospital (hereinafter “St. Luke’s”) was bought by the nonprofit hospital chain Sutter Health, which owned more than two dozen hospitals throughout Northern California, the attorney general required assets from St. Luke’s to go to a foundation. Because the charitable mission of St. Luke’s was different from that of Sutter Health,²⁸ the attorney general required that the original charitable mission of St. Luke’s continue through the foundation.²⁹

²⁸ Affiliation Agreement By and Between St. Luke’s Hospital and Sutter Health, March 12, 2001, at 1.

²⁹ Letter from Bill Lockyer, Attorney General, State of California, to Laurie Sobel and Leslie Bennett, Consumers Union 1-2 (August 21, 2002).

C. In Order to Identify the Charitable Purposes of These South Dakota Facilities, a Court Must Look to the Historical Use of the Assets and How the Hospitals Held Themselves Out to Their Communities.

To determine the charitable purposes of a nonprofit corporation, it is appropriate to look to three sources: the articles of incorporation, the historical use of the money, and how the nonprofit held itself out to the community.³⁰ “An organization’s purposes may be defined by what it does as well as what it says it does.”³¹

In Queen of Angels Hospital v. Younger, the California court of appeals found that a hospital corporation could not use the proceeds from a lease with a for-profit to provide outpatient clinics when its charitable purpose was to operate a hospital.³² The court reasoned that the hospital corporation could not obviate its mission to operate a hospital by switching to outpatient care. Instead, the hospital must be true to its charitable mission, which can be found in its articles of incorporation, in the historical use of its assets, and in how it holds itself out to the public.³³ These three factors determine the charitable purposes of the nonprofit and, therefore, the restrictions of the charitable trust. In Queen of Angels this meant that the hospital could not divert the proceeds from its lease to a for-profit to any purpose other than operating the hospital it was chartered to operate.³⁴ Doing so would constitute an abandonment of its mission.³⁵

In order to identify the charitable purposes of these South Dakota facilities, a court must look to the historical use of the assets and how the hospitals held themselves

³⁰ See Queen of Angels v. Younger, 136 Cal. Rptr. 36, 40-41 (1977).

³¹ Kurtz, *supra*, at 148, n.104. See also Queen of Angels, 136 Cal. Rptr. at 39; Miami Retreat Foundation v. Ervin, 62 So.2d 748 (1952).

³² 136 Cal. Rptr. at 41.

³³ Id. at 40-41.

³⁴ Id. at 41.

³⁵ Id.

out to their communities. This is because Banner Health System’s articles of incorporation broadly define its mission as to operate hospitals “throughout the United States,”³⁶ and are therefore not helpful in defining the jurisdictional boundaries of the charitable trust. Given that charitable trust law is administered by the states in which the charities operate, these boundaries are very relevant here. If the assets were used to operate facilities in those communities, and the facilities historically held themselves out as community-based institutions, then the assets must remain in the state to further these charitable purposes.

III. Attorneys General Regularly Use Their Charitable Trust Authority to Enforce the Charitable Purposes of Nonprofit Hospitals.

Attorneys General derive their authority to protect the public interest both from statutes drawn up to address a particular type of health care transaction and from their common law authority to regulate charitable trusts.³⁷ Although we know of no case with the same facts as the instant case, other than the Banner case in New Mexico discussed above, the following are cases where an attorney general has taken action to enforce the charitable purposes of a nonprofit hospital.

A. The Sale of a Nonprofit Hospital Can Constitute a Violation of the Hospital’s Charitable Purposes.

It can be a violation of a charitable trust for a nonprofit hospital board to sell a community hospital to a nonprofit chain. In 1996, Florida Attorney General Robert Butterworth sued to stop the sale of Boca Raton Community Hospital to a nonprofit

³⁶ Amended and Restated Articles of Incorporation at 1.

³⁷ William Josephson, Guiding the Way Through Changes in Charities Law, New York Law Journal, September 18, 2000, at 1 (“It falls to the courts, and to the Attorney General, in his *parens patriae* capacity, and by statute, to protect charitable assets . . .”).

hospital chain.³⁸ The attorney general claimed that the initial corporate purpose of the hospital was to operate a community facility and that it would be inconsistent with that purpose to sell the hospital to an out-of-town hospital system. The decision to sell was eventually rescinded by the trustees, and the case was voluntarily dismissed by the attorney general.

The sale of a nonprofit hospital to a for-profit can also constitute abandonment of charitable purposes. For example, on December 5, 2002, Missouri Attorney General Jay Nixon went to court seeking to oust the entire board of directors of Health Midwest, a nonprofit hospital system that is attempting to sell to HCA, a for-profit hospital chain. Explaining why he went to court, the attorney general said, “Health Midwest existed for the purpose of running hospitals in the Kansas City area. The board of directors has made a decision to abandon the very thing for which the corporation exists, so Health Midwest must be dissolved and its directors replaced.”³⁹ The attorney general of Kansas, Carla Stovall, filed a similar lawsuit against Health Midwest on December 11, 2002, “to ensure that the charitable assets located in Kansas stay in Kansas.”⁴⁰

B. A Violation of Charitable Purposes May Also Occur when a Parent Corporation Siphons Assets from a Subsidiary Nonprofit Hospital.

It may also be a violation of charitable trust and/or nonprofit corporation law for a parent nonprofit corporation to siphon the assets of a subsidiary hospital to pay off the parent’s debts. In Pennsylvania, the Allegheny Health, Education and Research Foundation (hereinafter “AHERF”) was the parent and sole controlling member of

³⁸ Butterworth v. Boca Raton Community Hospital, No. CL 96-10191AF (Fla. Cir. Ct. Dec. 2, 1996).

³⁹ News Release, Missouri Attorney General Jay Nixon, December 5, 2002.

⁴⁰ News Release, Kansas Attorney General Karla Stovall, December 11, 2002.

several nonprofit charitable corporations, all of which formed a state-wide health care system operating hospitals concentrated in Pittsburgh and Philadelphia. When AHERF sought relief under Chapter 11 of the Bankruptcy Code, the Pennsylvania attorney general filed suit in state court challenging AHERF's ability to continue to control its non-debtor subsidiaries and utilize their assets to pay the claims of its creditors.

Although AHERF was the parent and sole corporate member of each subsidiary, each subsidiary was an independent nonprofit charitable corporation with an independent board of directors. Using charitable trust principles, the Pennsylvania attorney general argued, *inter alia*, that any net equity inherent in AHERF's financially solvent hospitals remained subject to their specific charitable missions and could not be liquidated to satisfy the claims of AHERF's bankruptcy creditors, who had no direct claims or rights against them.⁴¹ Although the case was decided on other grounds, it presents another example of how the restricted nature of the assets of nonprofit charitable hospitals has meant that they must remain in the communities in which they are located.

C. A Reduction in Services Resulting from a Merger of Nonprofit Hospitals Can Also Constitute a Violation of a Hospital's Charitable Purposes.

A reduction in services can also be a violation of the charitable purposes of a nonprofit hospital. In 1998, New Hampshire Attorney General Philip McLaughlin investigated two private, nonprofit hospitals that had merged and thereafter moved to consolidate acute care services at one of their campuses. As part of his review, the attorney general released a report concluding that the hospitals violated the state's charity

⁴¹ In re Allegheny Health Education and Research Foundation, 252 B.R. 309 (1999) (staying bankruptcy court's orders enjoining state court action pending attorney general's appeal); In re Allegheny Health Education and Research Foundation, 252 B.R. 332 (1999) (reversing bankruptcy court's orders enjoining state court action).

laws by attempting to consolidate acute care services. The report concluded that a reduction in services by a nonprofit hospital falls under the doctrine of charitable trust.⁴² As a result of that report, the 1994 merger that created what was known as Optima Health was abandoned.⁴³

D. An Attorney General Can Augment His or Her Statutory Mandate with Common Law Charitable Trust Authority to Enforce Charitable Purposes.

Because nonprofit statutes cannot be written to anticipate every type of transaction, attorneys general regularly piece together their authority to investigate potential violations of charitable trust from various statutory and common law sources of authority. This is what happened when Florida Attorney General Robert Butterworth sued Intracoastal Health Systems in 2001 to block the proposed reduction in services of a hospital in Palm Beach County -- St. Mary's Hospital (hereinafter "St. Mary's"). St. Mary's had a history of serving a low-income community and was the largest provider of charity care in the county.⁴⁴ The hospital system owned two hospitals in the area, and planned to consolidate inpatient services at the other hospital, and use St. Mary's for non-acute care services. The attorney general investigated and concluded that closure of acute care services at St. Mary's would reduce health care services for the poor.⁴⁵ The attorney general then sought an injunction to prevent the closure, arguing that court review of the change in mission was appropriate because both hospitals were charitable trusts. The

⁴² See New Hampshire Attorney General's Report on Optima Health, March 10, 1998.

⁴³ Deanna Bellandi, The Watchdogs are Biting: State Attorneys General Asserting Authority Over Not-For-Profit Hospitals, Modern Healthcare, January 29, 2001, at 22-23.

⁴⁴ See Elena N. Cohen and Jill C. Morrison, National Women's Law Center, Hospital Mergers and the Threat to Women's Reproductive health Services: Using Charitable Assets Laws to Fight Back, at 31 (2001).

⁴⁵ See Office of the Florida Attorney General, Report: Intracoastal Health Systems, Inc. (2000).

defendant hospital sought a court declaration that the attorney general lacked authority to bring the claim. The court, however, ruled in favor of the attorney general, finding that the facts alleged were sufficient to support his claims.⁴⁶ The lawsuit was settled prior to trial.

The proposal by the hospital system to eliminate acute care services at St. Mary's was not governed by Florida's hospital conversion statute, nor was it covered by the procedural requirements outlined in Florida's nonprofit corporation statute.⁴⁷ Yet the attorney general argued successfully that he had the authority to intervene. In so doing, the attorney general was fulfilling his mandate to enforce the charitable purposes of the hospital for the benefit of the citizens of Palm Beach County. Given that attorneys general from around the nation have used charitable trust principles to enforce the charitable purposes of nonprofit hospitals, it is customary and proper for defendant Attorney General Mark Barnett to do so in the instant case.

IV. States Have Treated Nonprofit Health Insurance Plans As Charitable Trusts, and Therefore Have Required Transactional Proceeds to Remain in the Community to Continue to Serve the Plans' Missions.

Most of the regulatory and judicial precedent on whether a nonprofit health care corporation is a charitable trust has come in the context of the conversion of nonprofit Blue Cross and Blue Shield plans to for-profit entities. These decisions are informative in the hospital transaction context because nonprofit health insurance plans, like nonprofit hospitals, are charitable health care corporations.

⁴⁶ See State ex rel. Butterworth v. Intracoastal Health Sys., Inc., No. CL 01-0068 AB (Fla. Cir. Ct. Feb. 27, 2001).

⁴⁷ Cohen and Morrison, supra, at 31. See also Fla. Stat. ch. 155.40 (2002).

A. Nonprofit Blue Cross and Blue Shield Plans Are Analogous to Nonprofit Hospitals in Terms of Their Charitable Trust Obligations.

Across the nation, Blue Cross and Blue Shield plans were established in the 1930's and 1940's as charitable organizations to address the public's need for affordable health care. These transactions are analogous to hospital transactions because nonprofit health plans, like nonprofit hospitals, were chartered as charitable health care organizations.⁴⁸

B. As Blue Cross and Blue Shield Plans Have Denied Their Charitable Trust Obligations, Courts and Regulators Have Nevertheless Imposed Charitable Trust Restrictions on Their Assets.

In states in which an attorney general has exercised charitable trust authority over Blue Cross and Blue Shield plans, the health plans have often denied their charitable status, just as Banner Health System is doing in this case. Courts and regulators have nevertheless imposed charitable trust restrictions on the assets of these health plans, and have required that the transactional proceeds remain in their states to continue the missions of these nonprofit health plans. This body of precedent demonstrates that the assets of nonprofit health care corporations do indeed constitute charitable trusts.⁴⁹

C. Over \$4.6 Billion in Proceeds from the Sale or Conversion of Blue Cross and Blue Shield Plans Have Been Set Aside in Foundations Nationwide as a Result of the Imposition of Charitable Trust Restrictions.

The solution most commonly used to ensure that nonprofit health care assets continue to fulfill the charitable trust is the creation of a foundation to continue the

⁴⁸ Until 1986, when Congress created a special category for Blue Cross and Blue Shield plans, the plans were automatically tax exempt as 501(c)(4) organizations. Treas. Reg. § 1.501(c)(4) – 1 (a) (2) (i).

charitable health purposes of the former nonprofit. As a result of regulatory scrutiny over the sale and conversion of nonprofit health care corporations, to date over \$16 billion in health care assets has been set aside in foundations nationwide to continue the charitable missions of these nonprofit organizations. Nearly \$4.7 billion of this amount has come from Blue Cross and Blue Shield plans.⁵⁰ Given that nonprofit health plans are analogous to nonprofit hospitals in terms of their obligations to fulfill certain charitable purposes, it is appropriate for the defendant attorney general to similarly enforce the charitable purposes of the facilities at issue in the instant case.

CONCLUSION

For the foregoing reasons, Consumers Union respectfully recommends the Court answer the certified question in the affirmative. Nonprofit health care corporations are widely considered charitable trusts, which simply means their assets must continue to serve their charitable purposes. It is clear that the attorney general has the authority to investigate and seek to enforce the charitable purposes of these South Dakota facilities. The removal of the proceeds of these transactions from the communities that built the facilities would appear to be a violation of those charitable purposes.

⁴⁹ See Addendum A.

⁵⁰ See Addendum B.

Respectfully submitted this 19th day of December, 2002,

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