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SENATE . . . . . No. 899

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act further regulating hospitals..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 111 of the General Laws is hereby amended by inserting after section 5R the following section:—

Section 5S. The department of public health shall annually, by the first of October, make a determination of which acute hospitals and hospital services in the commonwealth are needed to protect the health of their communities. The department shall consider the following factors, among others, in making its determination:

(a) the availability of needed emergency and non-emergency inpatient and ambulatory hospital services to the citizens of each community or catchment area, (b) standards of travel time for those citizens, (c) financial accessibility and openness to serving persons vulnerable to deprivation of needed care, (d) acceptability and ease of use, (e) overall need for hospital care in each community, in light of the demonstrated comparative cost, safety, and efficacy of hospital care and its alternatives.

In its determinations, the department shall give particular consideration to the needs of low-income, uninsured, and other residents of the commonwealth who are especially vulnerable to underservice.

In annual revisions of the listing of essential acute hospitals and hospital services, the department shall evaluate individual hospitals in the light of any changes in the services or behavior of other nearby hospitals.

The department shall also set standards for identifying hospitals in danger of closing, or of changing services in ways that could harm their communities.

Then, the department will apply those standards and identify hospitals in danger of closing, or of changing services in ways that could harm their communities, and work pre-emptively to preserve all such hospitals deemed needed by their communities. All acute care hospitals in receivership, considered by informed persons to be at risk of receivership, or otherwise predicted by sound methods of be vulnerable to closing, changing, or reducing services in ways that could harm their communities shall be particularly scrutinized for inclusion on the list of essential acute care hospitals. Such pre-emptive work shall include technical and financial assistance, as described subsequently.

SECTION 2. Said chapter 111 is hereby further amended by inserting after section 70F the following seven sections:—

Section 70G. The department may bring an action in the superior court department of the trial court requesting the appointment of a receiver to operate a hospital. Before the department brings such an action, a hospital administrator designated by the commissioner shall be informed that the department intends to bring such an action and shall be

informed of the reasons for the decision to bring such an action. Said administrator may submit his recommendations concerning the hospital proposed for receivership within two business days after receiving the above information. After said two-day period, the department, in its sole discretion may bring an action in the superior court department described in this section. A patient residing in the hospital's primary service area, or the guardian of such a patient, may petition the department of public health to seek a receivership under this section. If the department denies such petition or fails to commence action within five days, the party bringing the petition may bring suit in the superior court department for the appointment of a receiver or other appropriate relief under this section. Upon filing of this suit, a patient or guardian shall serve a copy of the complaint on the department. Prior to any hearing for the appointment of a receiver, the department shall file, and the court shall consider, an affidavit made under oath describing the results of any investigation conducted by the department, including a statement of any findings with respect to the resident's petition and the reasons for not filing an action pursuant to this section, and shall append thereto the two most recent reports of deficiencies in that hospital. Nothing in this chapter shall be construed as abrogating or superseding any common law or statutory right of any person to bring an action requesting appointment of a receiver to operate a hospital.

The court shall issue a short order of notice and, where an emergency is alleged, set the matter for hearing within five days after filing of the action. In all other cases, a hearing shall be set within two weeks. A receiver shall be appointed immediately, on an ex parte basis, if it appears by verified complaint or by affidavit that there are grounds for the appointment of a receiver and that immediate appointment is necessary to prevent harm to the patients.

The court will name as receiver the commissioner of public health or his/her designee.

Appropriate grounds for establishing a receivership under this section shall be any of the following:

(a) to assure the temporary continued operation of the hospital when there is a substantial risk of its closing before adequate arrangements have been made for the transfer of its patients;

(b) to maintain any needed health care services for residents within the service area of the hospital when such services are not otherwise available or reasonably convenient to the service area;

(c) to maintain any health care services needed by residents within a service area of the hospital who are particularly vulnerable to medical underservice or denial of needed medical services;

(d) to secure the continued operation of effective or potentially effective, low-cost facilities;

(e) to protect the lives and safety of patients when the hospital is operating without a license or a valid, completed application for licensure on file with and awaiting action by the department of public health, or if the department has denied, revoked, or refused to renew a license, or has initiated license denial, revocation, or non-renewal procedures and the lives, health, safety, or welfare of the patients cannot be adequately assured pending the full hearing and decision on the matter;

(f) a declaration by the governor of a public health emergency pursuant to section 2A of chapter 17, if the declaration, by its terms, is applicable.

A receiver appointed hereunder shall not take any actions or assume any responsibilities inconsistent with this purpose.

No person shall impede the operation of a receivership created under this section. There shall be an automatic stay for a sixty-day period subsequent to the appointment of a receiver, of any action that would interfere with the functioning of the hospital, including but not limited to cancellation of insurance policies executed by the licensee, termination of utility services, attachments or set-offs of resident trust funds and working capital accounts, and repossession of equipment used in the hospital.

Section 70H. When a receiver is appointed, the licensee shall be divested of possession and control of the hospital in favor of the receiver. With the approval of the court, the receiver shall have authority to remedy violations of federal and state law and regulations governing the operation of the hospital; to hire, direct, manage and discharge any consultant or employees, including the administrator of the hospital; to receive and expend in a reasonable and prudent manner the revenues of the hospital; to continue the business of the hospital and the care of the patients; to perform those acts necessary or desirable to accomplish the purpose of the receivership; to perform regular accountings and make periodic reports to the court; and to exercise such additional powers and perform such additional duties, as the court may deem appropriate.

The receiver shall apply the current revenues of the hospital to current operating expenses and, subject to the following provisions, to debts incurred by the licenses

prior to the appointment of the receiver. The receiver shall ask the court for direction in the treatment of debts incurred prior to this appointment where such debts appear extraordinary, of questionable validity, or unrelated to the normal and expected maintenance and operation of the facility, or where payment of debts will interfere with the purposes of the receivership. Priority shall be given by the receiver to expenditures for current, direct patient care.

Revenues held by or owing to the receiver in connection with the operation of the hospital shall be exempt from attachment and trustee process. Any retroactive payment that may be due or owing to the hospital as the result of a retroactive rate adjustment shall be disposed of in accordance with the orders of the court, after it considers competing claims to said payments.

The receiver shall not close the hospital without leave of court. In ruling on the issue of closure, the court shall consider the best interest of the residents of the commonwealth and the patients and the possibility of transferring them to suitable, alternative placements; the rights, interests and obligations of the licensee, the owner, the mortgagees, and other secured parties and lienholders; the licensure status of the facility; the condition of the real estate with respect to state and federal construction requirements and any other factor which the court deems relevant.

If the court has approved closure of the hospital, the receiver shall make major repairs to the real or personal property of the hospital but only to the extent necessary to prevent or remove jeopardy to the health, safety or welfare of the patient. If the court has not directed closure of the hospital, the receiver may make such repairs but only to the extent necessary to prevent or remove jeopardy to the health, safety or welfare of the residents or to minimally

qualify the hospital for continuing participation in the medical care and assistance programs, established under chapter one hundred and eighteen E, or in the program of health insurance for the aged and disabled under Title XVIII of the Social Security Act (P.L.-89-97).

In the event that a receiver appointed under section seventy G does not have sufficient capital to advanced for major repairs or improvements, the receiver may petition the court for permission to apply to the department for a loan. Notice shall be given to the owner of the real estate, the licensee, the department, and to any mortgagee and other secured parties and lienholders of record. The court shall after hearing, authorize the receiver to apply for such assistance if it determines that the hospital should not be closed, and the commissioner certifies that the repair or improvement is necessary to prevent or remove jeopardy to patients or to minimally qualify the facility for participation in said medical care and assistance program and said program of health insurance for the aged and disabled; or it determines that the hospital should be closed and the commissioner certifies that the repair or improvement is necessary to prevent jeopardy to patients for the limited period of time that they are awaiting transfer. The purposes of this provision shall be to protect patients and to prevent the closure of facilities which, given proper management, are likely to be viable operations. This section shall not be construed as a method of financing major repairs or capital improvements to hospitals which have been abandoned because the licensee has been unable to secure financing by conventional means.

Upon court approval, the receiver may apply to the department of medical security, which shall administer financial assistance from the essential hospital preservation trust fund.

The licensee or the owner may apply to the court to determine the reasonableness of any expenditure by the receiver.

Section 70I. A receiver shall not be required to honor any lease, mortgage, or secured transaction entered into by the licensee of the hospital if the court finds that the agreement was entered into for a fraudulent purpose or to hinder or delay creditors or that the rental, price or rate of interest required to be paid under the agreement is in excess of a reasonable rental, price or rate of interest at the time the agreement was entered into; or the agreement is unrelated to the operation of the hospital.

If the receiver is in possession of real or personal property subject to a lease, mortgage or security interest which the receiver is permitted to avoid, and if the possession of said property is necessary for the continued operation of the hospital the receiver shall apply to the court to set a reasonable rental, price or rate of interest to be paid by the receiver to the person entitled thereto during the duration of the receivership. The court shall hold a hearing on the application within fifteen days. The receiver shall send notice of the application to any owners of record and to mortgagees and other secured parties and lienholders of record of the property involved at least ten days prior to the hearing. In no event shall the amount set by the court exceed what is reasonable for the hospital. Payment by the receiver of the amount determined by the court to be reasonable shall be a defense to any action against the receiver for payment or for the possession of said property subject to the lease, mortgages or security interest involved by any person who received such notice.

Notwithstanding the foregoing, there shall be no foreclosure or eviction during the receivership period where such foreclosure or eviction would, in the view of the court, serve to defeat the purpose of the receivership.

Section 70J. A receivership shall not be terminated if a license to operate the facility would not be in effect upon termination; or the hospital would revert to the licensee during the pendency of proceedings to revoke, deny, or suspend its license; or the hospital revert to it person not approved for licensure by the department.

The receivership may be terminated by the court upon the petition of the receiver, the attorney-general, or any other interested party provided that the court finds that the deficiencies or problems that were the cause of the receivership have been remedied or eliminated. This would take place when the threat to the lives, health, or safety of the residents of the area have been eliminated; when access to care has been secured; or when costs of care have been sufficiently contained through other means.

A temporary receivership shall not exceed five years.

Section 70K. No person shall bring an action against a receiver appointed under section seventy G without first securing leave of court. The receiver shall be liable in his personal capacity for gross negligence or intentional wrongdoing. In all other cases, the receiver shall be liable in his official capacity only, and any judgment rendered shall be satisfied out of the receivership assets.

Section 70L. An order appointing a receiver under section seventy G shall have the effect of a license for the duration of the receivership. The receiver shall be responsible to the court for the conduct of the hospital during the receivership, and any violation

of regulations governing the conduct of the hospital, if not promptly corrected, shall be reported by the department to the court.

Section 70M. The department is hereby authorized and directed to promulgate rules and regulations necessary for the implementation of sections seventy G to seventy L, inclusive.

SECTION 3. Said chapter 111 is hereby further amended by inserting after section 72Q the following section:—

Section 72Q 1/2. The court shall set a reasonable compensation for the receiver and shall require the receiver to furnish a bond. Such expenses shall be paid from the revenues of the hospital. The licensee shall be liable for any adjustment to the hospital's rate that is necessitated by the provisions of the first paragraph of this section.

The commonwealth shall have a lien for any expenditure under section seventy H upon the following property: the building in which the hospital is located; the land on which the hospital is located; any fixtures, equipment or goods used in the operation of the hospital. Such lien shall be prior to any mortgage or lien which the court finds has been executed or obtained for a fraudulent purpose or to hinder or delay creditors. Such lien shall also be prior to a mortgage or lien held by any person with an ownership interest in the hospital; or any person which controls or has the ability to directly or indirectly control to any significant degree the management of policies of the licensee or the hospital; or any person related to the licensee or to the hospital by any significant degree of common ownership or common control. The receiver shall cause notice of any lien created hereunder to be duly filed.

As an additional remedy for recouping commonwealth expenditures, the licensee, persons responsible for the affairs of the licensee, or the owner, may be held liable for such expenditures to the extent that any of these persons benefits financially from the expenditure. Recoupment shall also be available against any person who, prior to the appointment of the receiver, breached a legal responsibility to assure appropriate maintenance of the hospital, if such breach necessitated the expenditure by the commonwealth, and against any person who was responsible for an abandonment of the hospital.

SECTION 4. Chapter 118F of the General Laws is hereby amended by adding the following two sections:—

Section 21. 1. There is hereby established an essential acute hospital stabilization and preservation trust fund which shall be administered and expended by the division of health care, finance and policy (DHCFP).

The fund shall consist of all sums collected under an essential hospital preservation assessment levied annually and amounting to 0.25 percent of total annual revenue for each acute hospital operating in the commonwealth.

To keep the accumulated trust fund's value from exceeding 1.0 percent of statewide acute hospital revenue, the assessment shall be reduced or eliminated in any year in which the accumulated trust fund is expected to exceed 1.0 percent of state-wide total acute hospital revenue. The assessment shall be reduced as needed in any year in which an assessment smaller than 0.25 percent will bring the trust fund to 1.0 percent of statewide total acute hospital revenue.

In the event that a shortfall arises, and the fund is unable to meet all of its obligations, the commissioner of DHCFP will notify the commissioner of public health, and, at the direction of the commissioner of public health, the commissioner of DHCFP will make special binding uniform proportionate assessments on all hospitals to generate funds needed. Such assessments will not exceed 25 percent of total expenses, averaged over the past three years, of the hospitals in receivership.

The trust fund shall be used solely for stabilizing and preserving essential hospitals determined to be in danger of closing or reducing needed services. Stabilization and preservation assistance may take either of these two forms:

(a) financing for technical and administrative assistance for hospitals needing reorganization, and

(b) partial underwriting of capital and operating costs to stabilize needed but financially distressed hospitals.

2. The commissioner of DHCFP shall, if necessary, obtain additional funds for the purposes described in the previous subsection through a reallocation, in favor of financially distressed but needed hospitals, of distributions from the hospital free care pool.

Section 22. 1. Any hospital which appears on the department of public health's annual listing of essential acute hospitals may petition the DHCFP for funding for technical and administrative assistance, or for grants towards capital or operating costs. The DHCFP will determine whether such assistance or grants are essential or important to the survival of an entire essential hospital or the survival of listed essential services at a particular hospital.

At the initiative of the commissioner of DHCFP, of the speaker of the Massachusetts house, of the president of the Massachusetts senate, of the administrator or receiver of the hospital, of the trustees of the hospital, or of a patient residing in a hospital's primary service area or of the guardian of such a patient, the department of public health shall undertake a redetermination of whether a hospital previously excluded from the annual listing of essential acute hospitals deserves to be placed on that list.

At the initiative of the commissioner of DHCFP, of the commissioner of public health, or of a patient residing in a hospital's primary service area or of the guardian of such a patient, the DHCFP shall also undertake determination of the need for technical assistance or grants for a particular hospital.

3. The DHCFP shall identify accounting firms, law firms, hospital administration consultants and other needed experts with whom it may contract as needed to provide technical and administrative assistance to essential hospitals in danger of closing or to hospitals where essential services are in danger of closing.