

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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SENATE BILL 9

Judiciary II Committee Substitute Adopted 4/27/93

Short Title: Hospital Cooperation Act.

(Public)

Sponsors:

Referred to: Finance.

January 28, 1993

1 A BILL TO BE ENTITLED
2 AN ACT TO ENCOURAGE AND PERMIT COOPERATIVE AGREEMENTS OF
3 HOSPITALS.

4 The General Assembly of North Carolina enacts:

5 Section 1. This act shall be known as the Hospital Cooperation Act of 1993.

6 Sec. 2. Chapter 131E of the General Statutes is amended by adding the
7 following new Article to read:

8 **"ARTICLE 9A**

9 **"CERTIFICATE OF PUBLIC ADVANTAGE.**

10 **"§ 131E-192.1. Findings.**

11 The General Assembly of North Carolina makes the following findings:

12 (1) That technological and scientific developments in hospital care have
13 enhanced the prospects for further improvement in the quality of care
14 provided by North Carolina hospitals to North Carolina citizens.

15 (2) That the cost of improved technology and improved scientific methods
16 for the provision of hospital care contributes substantially to the
17 increasing cost of hospital care. Cost increases make it increasingly
18 difficult for hospitals in rural areas of North Carolina to offer care.

19 (3) That changes in federal and State regulations governing hospital
20 operation and reimbursement have constrained the ability of hospitals
21 to acquire and develop new and improved machinery and methods for
22 the provision of hospital-related care.

- 1 (4) That cooperative agreements among hospitals and between hospitals
2 and others for the provision of health care services may foster
3 improvements in the quality of health care for North Carolina citizens,
4 moderate increases in cost, improve access to needed services in rural
5 areas of North Carolina, and enhance the likelihood that smaller
6 hospitals in North Carolina will remain open in beneficial service to
7 their communities.
- 8 (5) That hospitals are often in the best position to identify and structure
9 cooperative arrangements that enhance quality of care, improve access,
10 and achieve cost-efficiency in the provision of care.
- 11 (6) That federal and State antitrust laws may prohibit or discourage
12 cooperative arrangements that are beneficial to North Carolina citizens
13 despite their potential for or actual reduction in competition and that
14 such agreements should be permitted and encouraged.
- 15 (7) That competition as currently mandated by federal and State antitrust
16 laws should be supplanted by a regulatory program to permit and
17 encourage cooperative agreements between hospitals, or between
18 hospitals and others, that are beneficial to North Carolina citizens
19 when the benefits of cooperative agreements outweigh their
20 disadvantages caused by their potential or actual adverse effects on
21 competition.
- 22 (8) That regulatory as well as judicial oversight of cooperative agreements
23 should be provided to ensure that the benefits of cooperative
24 agreements permitted and encouraged in North Carolina outweigh any
25 disadvantages attributable to any reduction in competition likely to
26 result from the agreements.

27 **"§ 131E-192.2. Definitions.**

28 As used in this Article, the following terms have the meanings specified:

- 29 (1) 'Attorney General' means the Attorney General of the State of North
30 Carolina or any attorney on his or her staff to whom the Attorney
31 General delegates authority and responsibility to act pursuant to this
32 Article;
- 33 (2) 'Cooperative agreement' means an agreement among two or more
34 hospitals, or between a hospital and any other person or persons, for
35 the sharing, allocation, or referral of patients, personnel, instructional
36 programs, support services and facilities, or medical, diagnostic, or
37 laboratory facilities or equipment, or procedures or other services
38 traditionally offered by hospitals. Cooperative agreement shall not
39 include any agreement by which ownership over substantially all of
40 the stock, assets, or activities of one or more previously licensed and
41 operating hospitals is transferred nor any agreement that would permit
42 self-referrals of patients by a health care provider that is otherwise
43 prohibited by law.

1 (3) 'Department' means the North Carolina Department of Human
2 Resources;

3 (4) 'Hospital' means any hospital required to be licensed under Chapters
4 131E or 122C of the General Statutes;

5 (5) 'Person' means any individual, firm, partnership, corporation,
6 association, public or private institution, political subdivision, or
7 government agency;

8 (6) 'Federal or State antitrust laws' means any and all federal or State laws
9 prohibiting monopolies or agreements in restraint of trade, including,
10 but not limited to, the federal Sherman Act, Clayton Act, and Federal
11 Trade Commission Act, and the North Carolina laws codified in
12 Chapter 75 of the General Statutes.

13 **"§ 131E-192.3. Certificate of public advantage; application.**

14 (a) A hospital and any person who is a party to a cooperative agreement with a
15 hospital may negotiate, enter into, and conduct business pursuant to a cooperative
16 agreement without being subject to damages, liability, or scrutiny under any
17 noncompetition provisions of the State antitrust law if a certificate of public advantage
18 is issued for the cooperative agreement, or in the case of activities to negotiate or enter
19 into a cooperative agreement, if an application for a certificate of public advantage is
20 filed. It is the intention of the General Assembly that immunity from noncompetition
21 provisions of the federal antitrust laws shall also be conferred by this statute and the
22 State regulatory program that it establishes.

23 (b) Parties to a cooperative agreement may apply to the Department for a
24 certificate of public advantage governing that cooperative agreement. The application
25 must include an executed written copy of the cooperative agreement or letter of intent
26 with respect to the agreement, a description of the nature and scope of the activities and
27 cooperation in the agreement, any consideration passing to any party under the
28 agreement, and any additional materials necessary to fully explain the agreement and its
29 likely effects. A copy of the application and all additional related materials shall be
30 submitted to the Attorney General at the same time when application is made to the
31 Department.

32 **"§ 131E-192.4. Procedure for review; standards for review.**

33 (a) The Department shall review the application in accordance with the standards
34 set forth in subsection (b) of this section shall hold a public hearing with the opportunity
35 for the submission of oral and written public comments in accordance with rules
36 adopted by the Department. The Department shall determine whether the application
37 should be granted or denied within 90 days of the date of filing of an application.
38 Provided, however, that the Department may extend the review period for a specified
39 period of time upon notice to the parties.

40 (b) The Department shall determine that a certificate of public advantage should
41 issue for a cooperative agreement if it determines that the applicant(s) has demonstrated
42 by clear and convincing evidence that the benefits likely to result from the agreement
43 outweigh the disadvantages likely to result from a reduction in competition from the
44 agreement.

- 1 (1) In evaluating the potential benefits of a cooperative agreement, the
2 Department shall consider whether one or more of the following
3 benefits may result from the cooperative agreement:
4 a. Enhancement of the quality of hospital and hospital-related care
5 provided to North Carolina citizens;
6 b. Preservation of hospital facilities in geographical proximity to
7 the communities traditionally served by those facilities;
8 c. Lower costs of, or gains in the efficiency of delivering, hospital
9 services;
10 d. Improvements in the utilization of hospital resources and
11 equipment; and
12 e. Avoidance of duplication of hospital resources.

- 13 (2) In evaluating the potential disadvantages of a cooperative agreement,
14 the Department shall consider whether one or more of the following
15 disadvantages may result from the cooperative agreements:
16 a. The extent to which the agreement may increase the costs or
17 prices of health care at the hospital(s) which are parties to the
18 cooperative agreement;
19 b. The extent to which the agreement may have an adverse impact
20 on patients in the quality, availability, and price of health care
21 services;
22 c. The extent to which the agreement may reduce competition
23 among the parties to the agreement and the likely effects
24 thereof;
25 d. The extent to which the agreement may have an adverse impact
26 on the ability of health maintenance organizations, preferred
27 provider organizations, managed health care service agents, or
28 other health care payors to negotiate optimal payment and
29 service arrangements with hospitals, physicians, allied health
30 care professionals, or other health care providers;
31 e. The extent to which the agreement may result in a reduction in
32 competition among physicians, allied health professionals, other
33 health care providers, or other persons furnishing goods or
34 services to, or in competition with, hospitals; and
35 f. The availability of arrangements that are less restrictive to
36 competition and achieve the same benefits or a more favorable
37 balance of benefits over disadvantages attributable to any
38 reduction in competition.

39 In making its determination, the Department may consider other benefits or
40 disadvantages that may be identified.

41 **"§ 131E-192.5. Issuance of a certificate.**

42 If the Department determines that the likely benefits of a cooperative agreement
43 outweigh the likely disadvantages attributable to reduction of competition as a result of
44 the agreement by clear and convincing evidence, and the Attorney General has not

1 stated any objection to issuance of a certificate during the review period, the
2 Department shall issue a certificate of public advantage for the cooperative agreement at
3 the conclusion of the review period. Such certificate shall include any conditions of
4 operation under the agreement that the Department, in consultation with the Attorney
5 General, determines to be appropriate in order to ensure that the cooperative agreement
6 and activities engaged in pursuant thereto are consistent with this Article and its purpose
7 to limit health care costs. The Department shall include conditions to control prices of
8 health care services provided under the cooperative agreement. Consideration shall be
9 given to assure that access to health care is provided to all areas of the State. The
10 Department shall publish its decisions on applications for certificates of Public
11 advantage in the North Carolina Register.

12 **"§ 131E-192.6. Objection by Attorney General.**

13 If the Attorney General is not persuaded that the applicant(s) has demonstrated
14 by clear and convincing evidence that the benefits likely to result from the agreement
15 outweigh the likely disadvantages of any reduction of competition to result from the
16 agreement as set forth in G.S. 131E-192.4, the Attorney General may, within the review
17 period, state an objection to the issuance of a certificate of public advantage and may
18 extend the review period for a specified period of time. Notice of the objection and any
19 extension of the review period shall be provided in writing to the applicant(s), together
20 with a general explanation of the concerns of the Attorney General. The parties may
21 attempt to reach agreement with the Attorney General on modifications to the
22 agreement or to conditions in the certificate so that the Attorney General no longer
23 objects to issuance of a certificate. If the Attorney General withdraws the objection and
24 the Department maintains its determination that a certificate should be issued, the
25 Department shall issue a certificate of public advantage with any appropriate conditions
26 as soon as practicable following withdrawal of the objection. If the Attorney General
27 does not withdraw the objection, a certificate shall not be issued.

28 **"§ 131E-192.7. Record keeping.**

29 The Department shall maintain on file all cooperative agreements for which
30 certificates of public advantage are in effect and a copy of the certificate, including any
31 conditions imposed. Any party to a cooperative agreement who terminates an
32 agreement shall file a notice of termination with the Department within 30 days after
33 termination. These files shall be public records as set forth in Chapter 132 of the
34 General Statutes.

35 **"§ 131E-192.8. Review after issuance of certificate.**

36 If at any time following the issuance of a certificate of public advantage, the
37 Department or the Attorney General has questions concerning whether the parties to the
38 cooperative agreement have complied with any condition of the certificate or whether
39 the benefits or likely benefits resulting from a cooperative agreement may no longer
40 outweigh the disadvantages or likely disadvantages attributable to a reduction in
41 competition resulting from the agreement, the Department or the Attorney General shall
42 advise the parties to the agreement and either the Department or the Attorney General
43 shall request any information necessary to complete a review of the matter.

44 **"§ 131E-192.9. Periodic reports.**

1 (a) During the time that a certificate is in effect, a report of activities pursuant to
2 the cooperative agreement must be filed every two years with the Department on or by
3 the anniversary day on which the certificate was issued. A report shall contain a
4 description of the activities conducted pursuant to the agreement, price and cost
5 information, the nature and scope of the activities pursuant to the agreement anticipated
6 for the next two years, the likely effect of those activities, and a signed certificate by
7 each party to the agreement that the benefits or likely benefits of the cooperative
8 agreement as conditioned continue to outweigh the disadvantages or likely
9 disadvantages of any reduction in competition from the agreement as conditioned, and
10 any additional information requested by the Department or the Attorney General. A
11 copy of each periodic report shall be submitted to the Attorney General at the same time
12 that it is filed with the Department. The Department shall give public notice in the
13 North Carolina Register that such reports have been received. These reports shall be
14 public records as set forth in Chapter 132 of the General Statutes. After notice is given,
15 the public shall have 30 days to file written comments on the report and on the benefits
16 and disadvantages of continuing the certificate of public advantage. Periodic reports,
17 public comments, and information submitted in response to a request shall be public
18 records as set forth in Chapter 132 of the General Statutes.

19 (b) Failure to file periodic reports required by this section after notice of default,
20 or failure to provide information requested pursuant to a review pursuant to G.S. 131E-
21 192.8, are grounds for revocation of the certificate by the Attorney General or the
22 Department.

23 (c) The Department shall review each periodic report, public comments, and
24 information submitted in response to a request pursuant to G.S. 131E-192.8 to
25 determine whether the advantages or likely advantages of the cooperative agreement
26 continue to outweigh the disadvantages or likely disadvantages of any reduction in
27 competition from the agreement, and to determine what, if any, changes in the
28 conditions of the certificate should be made. In the review the Department shall
29 consider the benefits and disadvantages set forth in G.S. 131E-192.4. Within 60 days of
30 the filing of a periodic report, the Department shall determine whether the certificate
31 should remain in effect and whether any changes to the conditions in the certificate
32 should be made. Provided, however, that the Department may extend the review period
33 an additional 30 days. If the Department or Attorney General determine that the parties
34 to the cooperative agreement have not complied with any condition of the certificate,
35 the Department or the Attorney General shall revoke the certificate and the parties shall
36 be notified. If the Department determines that the certificate should remain in effect
37 and the Attorney General has not stated any objection to the certificate remaining in
38 effect during the review period, the certificate shall remain in effect subject to any
39 changes in the conditions of the certificate imposed by the Department. The parties
40 shall be notified in writing of the Department's decision and of any changes in the
41 conditions of the certificate. The Department shall publish its decision and any changes
42 in the conditions in the North Carolina Register. If the Department determines that the
43 benefits or likely benefits of the agreement and the unavoidable costs of terminating the
44 agreement do not continue to outweigh the disadvantages or likely disadvantages of any

1 reduction in competition from the agreement, or if the Attorney General objects to the
2 certificate remaining in effect based upon a review of the benefits and disadvantages set
3 forth in G.S. 131E-192.4, the Department shall notify the parties to the agreement in
4 writing of its determination or the objections of the Attorney General, and shall provide
5 a summary of any concerns of the Department or Attorney General to the parties.

6 **"§ 131E-192.10. Right to judicial action.**

7 (a) Any applicant or other person aggrieved by a decision to issue or not issue a
8 certificate of public advantage is entitled to judicial review of the action or inaction in
9 superior court. Suit for judicial review under this subsection shall be filed within 30
10 days of public notice of the decision to issue or deny issuance of the certificate. To
11 prevail in any action for judicial review brought under this subsection, the plaintiff or
12 petitioner must establish that the determination by the Department or the Attorney
13 General was arbitrary or capricious.

14 (b) Any party or other person aggrieved by a decision to allow the certificate to
15 remain in effect or to make changes in the conditions of the certificate is entitled to
16 judicial review of the decision in superior court. Suit for judicial review under this
17 subsection shall be filed within 30 days of public notice of the decision to allow the
18 certificate to remain in effect or to make changes in the conditions of the certificate. To
19 prevail in any action for judicial review brought under this subsection, the plaintiff or
20 petitioner must establish that the determination by the Department or the Attorney
21 General was arbitrary or capricious.

22 (c) If the Department or the Attorney General determine the certificate should
23 not remain in effect, the Attorney General may bring suit in the Superior Court of Wake
24 County on behalf of the Department or on its own behalf to seek an order to authorize
25 the cancellation of the certificate. To prevail in the action, the Attorney General must
26 establish the benefits resulting from the agreement are outweighed by the disadvantages
27 attributable to reduction in competition resulting from the agreement.

28 (d) In any action brought under this section, the court may award to the
29 prevailing party its reasonable costs, including attorneys' fees.

30 **"§ 131E-192.11. Fees for applications and periodic reports.**

31 The Department shall establish and collect administrative fees for filing of an
32 application for a certificate of public advantage based on the total cost of the project for
33 which the application is made, in an amount not to exceed fifteen thousand dollars
34 (\$15,000), and an administrative fee for filing each periodic report required to be filed
35 in an amount not to exceed two thousand five hundred dollars (\$2,500).

36 **"§ 131E-192.12. Department and Attorney General authority.**

37 The Department and Attorney General shall have such powers as are necessary to
38 conduct review of applications for certificates of public advantage and periodic reports
39 filed in connection therewith and to bring such actions in the Superior Court of Wake
40 County as are specified in this Article. This Article shall not limit the authority of the
41 Attorney General under federal or State antitrust laws.

42 **"§ 131E-192.13. Effects of certificate of public advantage; other laws.**

43 (a) Activities conducted pursuant to a cooperative agreement for which a
44 certificate of public advantage has been issued are immunized from challenge or

1 scrutiny under any noncompetition provisions of the State antitrust laws. In addition,
2 conduct in negotiating and entering into a cooperative agreement for which an
3 application for a certificate of public advantage is filed in good faith shall be immune
4 from challenge or scrutiny under any noncompetition provisions of the State antitrust
5 laws, regardless of whether a certificate is issued. It is the intention of the General
6 Assembly that this Article shall also immunize covered activities from challenge or
7 scrutiny under any noncompetition provisions of the federal antitrust law.

8 (b) Nothing in this Article shall exempt hospitals or other health care providers
9 from compliance with State or federal laws governing certificate of need, licensure, or
10 other regulatory requirements.

11 (c) Any dispute among the parties to cooperative agreement concerning its
12 meaning or terms is governed by normal principles of contract law."

13 Sec. 3. G.S. 131E-7(b) reads as rewritten:

14 "~~(b) A municipality may contract with or otherwise arrange with other~~
15 ~~municipalities of this or other states, federal or public agencies or with any person,~~
16 ~~private organization or nonprofit association for the provision of hospital, clinical, or~~
17 ~~similar services. The municipality may pay for these services from appropriations or~~
18 ~~other moneys available for these purposes. A municipality or a public hospital may~~
19 ~~contract with or enter into any arrangement with other public hospitals or municipalities~~
20 ~~of this or other states, the State of North Carolina, federal or public agencies, or with~~
21 ~~any person, private organization, or nonprofit corporation or association for the~~
22 ~~provision of health care. The municipality or public hospital may pay for or contribute~~
23 ~~its share of the cost of any such contract or arrangement from revenues available for~~
24 ~~these purposes, including revenues rising from the provision of health care."~~

25 Sec. 4. The Department of Human Resources shall report to the 1999
26 General Assembly a summary and analysis of the effects of this act, including the
27 results of efforts to assure access to health care and to control increases in health care
28 costs, and recommendations, if any, for amendments to the act.

29 Sec. 5. This act becomes effective October 1, 1993.