

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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SENATE BILL 9

Short Title: Hospital Cooperation Act.

(Public)

Sponsors: Senators Daniel; Perdue, Tally, and Seymour.

Referred to: Judiciary II.

January 28, 1993

A BILL TO BE ENTITLED

AN ACT TO FACILITATE COOPERATIVE AGREEMENTS AMONG HOSPITALS.

The General Assembly of North Carolina enacts:

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

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

"ARTICLE 9A

"CERTIFICATE OF PUBLIC ADVANTAGE.

"§ 131E-192.1. Findings.

The General Assembly of North Carolina makes the following findings:

- (1) That technological and scientific developments in hospital care have enhanced the prospects for further improvement in the quality of care provided by North Carolina hospitals to North Carolina citizens.
- (2) That the cost of improved technology and improved scientific methods for the provision of hospital care contributes substantially to the increasing cost of hospital care. Cost increases make it increasingly difficult for hospitals in rural areas of North Carolina to offer care.
- (3) That changes in federal and State regulations governing hospital operation and reimbursement have constrained the ability of hospitals to acquire and develop new and improved machinery and methods for the provision of hospital-related care.
- (4) That cooperative agreements among hospitals and between hospitals and others for the provision of hospital and hospital-related services may foster improvements in the quality of health care for North

1 Carolina citizens, moderate increases in cost, improve access to needed
2 services in rural areas of North Carolina, and enhance the likelihood
3 that smaller hospitals in North Carolina will remain open in beneficial
4 service to their communities.

5 (5) That hospitals are often in the best position to identify and structure
6 cooperative arrangements that enhance quality of care, improve access,
7 and achieve cost-efficiency in the provision of care.

8 (6) That federal and State antitrust laws may prohibit or discourage
9 cooperative arrangements that are beneficial to North Carolina citizens
10 despite their potential for or actual reduction in competition and that
11 such agreements should be permitted and encouraged.

12 (7) That because competition is important to the health care sector and
13 some cooperative agreements may operate to the detriment of the
14 public because of their anticompetitive effects, regulatory and judicial
15 oversight of cooperative agreements is necessary to ensure that the
16 benefits of cooperative agreements permitted and encouraged in North
17 Carolina outweigh any disadvantages attributable to any reduction in
18 competition likely to result from the agreements.

19 **"§ 131E-192.2. Definitions.**

20 As used in this Article, unless the content clearly requires otherwise, the following
21 terms have the meanings specified:

22 (1) 'Attorney General' means the Attorney General of the State of North
23 Carolina or any attorney on his or her staff to whom the Attorney
24 General delegates authority and responsibility to act pursuant to this
25 Article;

26 (2) 'Cooperative agreement' means an agreement among two or more
27 hospitals, or between a hospital and any other person or persons, for
28 the sharing, allocation or referral of patients, personnel, instructional
29 programs, support services and facilities, or medical, diagnostic or
30 laboratory facilities, or procedures or other services traditionally
31 offered by hospitals. 'Cooperative agreement' shall not include any
32 agreement by which ownership over substantially all of the stock,
33 assets, or activities of one or more previously licensed and operating
34 hospitals is transferred;

35 (3) 'Department' means the North Carolina Department of Human
36 Resources;

37 (4) 'Hospital' means any institution required to be licensed under Chapters
38 131E or 122C of the General Statutes;

39 (5) 'Person' means any physician or other natural person as well as any
40 entity, corporate or political;

41 (6) 'State or federal antitrust laws' means any and all State or federal laws
42 prohibiting monopolies or agreements in restraint of trade, including,
43 but not limited to, North Carolina laws codified in Chapter 75 of the

1 General Statutes and the federal Sherman Act, Clayton Act, and
2 Federal Trade Commission Act.

3 **"§ 131E.192.3. Certificate of public advantage; application.**

4 (a) A hospital and any person who is a party to an agreement with a hospital may
5 negotiate enter into, and conduct business pursuant to a cooperative agreement without
6 being subject to damages, liability, or scrutiny under any State or federal antitrust law if
7 a certificate of public advantage is issued for the cooperative agreement, or in the case
8 of activities, to negotiate or enter into a cooperative agreement, if an application for a
9 certificate of public advantage is filed.

10 (b) Parties to a cooperative agreement may apply to the Department for a certificate
11 of public advantage governing that cooperative agreement. The application must
12 include an executed written copy of the cooperative agreement or letter of intent with
13 respect to the agreement, a description of the nature and scope of the activities and
14 cooperation in the agreement, any consideration passing to any party under the
15 agreement, and any additional materials necessary to fully explain the agreement and its
16 likely effects. A copy of the application and all additional related materials shall be
17 submitted to the Attorney General at the same time when application is made to the
18 Department.

19 **"§ 131E-192.4. Procedure for review; standards for review.**

20 (a) The Department shall review the application in accordance with the standards
21 set forth in subsection (b) and may hold a public hearing in accordance with rules
22 adopted by the Department. The Department shall determine whether the application
23 should be granted or denied within 90 days of the date of filing of a complete
24 application.

25 (b) The Department shall determine that a certificate of public advantage should
26 issue for a cooperative agreement if it determines that the applicant(s) has demonstrated
27 by clear and convincing evidence that the likely benefits resulting from the agreement
28 outweigh the likely disadvantages attributable to a reduction in competition that may
29 result from the agreement. In evaluating the potential benefits of a cooperative
30 agreement, the Department shall consider whether one or more of the following benefits
31 may result from the cooperative agreement:

- 32 (1) Enhancement of the quality of hospital and hospital-related care
33 provided to North Carolina citizens;
- 34 (2) Preservation of hospital facilities in geographical proximity to the
35 communities traditionally served by those facilities;
- 36 (3) Lower costs or gains in the cost efficiency of hospital services;
- 37 (4) Improvements in the utilization of hospital resources and equipment;
38 and
- 39 (5) Avoidance of duplication of hospital resources.

40 The Department's evaluation of potential disadvantages attributable to any reduction in
41 competition likely to result from the agreement shall include, but need not be limited to
42 the following factors:

- 43 (1) The extent to which the agreement would reduce competition among
44 the parties to the agreement and the likely effects thereof;

- 1 (2) The extent to which the agreement is likely to have an adverse impact
2 on the ability of health maintenance organizations, preferred provider
3 organizations, managed health care service agents, or other health care
4 payors to negotiate optimal payment and service arrangements with
5 hospitals, physicians, allied health care professionals, or other health
6 care providers;
- 7 (3) The extent to which the agreement is likely to result in a reduction in
8 competition among physicians, allied health professionals, other health
9 care providers, or other persons furnishing goods or services to, or in
10 competition with, hospitals;
- 11 (4) The extent to which the agreement is likely to have an adverse impact
12 on patients in the quality, availability, and price of health care services;
13 and
- 14 (5) The availability of arrangements that are less restrictive to competition
15 and achieve the same benefits or a more favorable balance of benefits
16 over disadvantages attributable to any reduction in competition likely
17 to result from the agreement.

18 **"§ 131E-192.5. Issuance of a certificate.**

19 If the Department determines that the likely benefits of a cooperative agreement
20 outweigh the likely disadvantages attributable to reduction of competition as a result of
21 the agreement, and the Attorney General has not stated any objection to issuance of a
22 certificate during the 90-day review period, the Department shall issue a certificate of
23 public advantage for the cooperative agreement at the conclusion of the 90-day review
24 period. Such certificate shall include any conditions of operation under the agreement
25 that the Department, in consultation with the Attorney General, determines to be
26 appropriate in order to ensure that the activities engaged in pursuant to the agreement
27 are consistent with this Article.

28 **"§ 131E-192.6. Objection by Attorney General.**

29 If the Attorney General is not persuaded that the likely advantages of the agreement
30 will outweigh the likely disadvantages of any reduction of competition resulting from
31 the agreement, the Attorney General may, within the 90-day review period, state an
32 objection to the issuance of a certificate of public advantage. Notice of the objection
33 shall be provided in writing to the applicant, together with a general explanation of the
34 concerns of the Attorney General. The parties may attempt to reach agreement with the
35 Attorney General on modifications to the agreement or to conditions in the certificate so
36 that the Attorney General no longer objects to issuance of a certificate. If the Attorney
37 General withdraws the objection and the Department maintains its determination that a
38 certificate should be issued, the Department shall issue a certificate of public advantage
39 with any appropriate conditions as soon as practicable following withdrawal of the
40 objection.

41 **"§ 131E-192.7. Judicial review.**

42 Any applicant or other person aggrieved by a decision to issue or not issue a
43 certificate of public advantage is entitled to judicial review of the action or inaction in
44 Superior Court in Wake County. Suit for judicial review under this subsection shall be

1 filed within 30 days of notice of the decision to issue or deny issuance of the certificate,
2 or expiration of the 90-day review period. To prevail in any action for judicial review
3 brought under this section, the proponent of the certificate must establish by clear and
4 convincing evidence that the likely advantages of the agreement outweigh the likely
5 disadvantages attributable to reduction of competition.

6 **"§ 131E-192.8. Record keeping.**

7 The Department shall maintain on file all cooperative agreements for which
8 certificates of public advantage are in effect and a copy of the certificate, including any
9 conditions imposed. Any party to a cooperative agreement who terminates an
10 agreement shall file a notice of termination with the Department within 30 days after
11 termination.

12 **"§ 131E-192.9. Change of circumstances after issuance of certificate.**

13 If at any time following the issuance of a certificate of public advantage, the
14 Department or the Attorney General has questions concerning whether circumstances
15 have changed so that the benefits or likely benefits resulting from a cooperative
16 agreement for which a certificate of public advantage has issued may no longer
17 outweigh the disadvantages or likely disadvantages attributable to a reduction in
18 competition resulting from the agreement, the Department shall advise the parties to the
19 agreement for which the certificate was issued, and request any information necessary
20 to complete a review of the matter.

21 **"§ 131E-192.10. Periodic reports required.**

22 (a) During the time that a certificate is in effect, a report of activities pursuant to
23 the cooperative agreement must be filed every two years with the Department on or by
24 the anniversary day on which the certificate was issued. A report shall contain a
25 description of the activities conducted pursuant to the agreement, the nature and scope
26 of the activities pursuant to the agreement anticipated for the next two years, the likely
27 effect of those activities, and any additional information requested by the Department.
28 A copy of each periodic report shall be submitted to the Attorney General at the same
29 time that it is filed with the Department.

30 (b) Failure to file periodic reports required by this section after notice of default,
31 or failure to provide information requested pursuant to a reexamination of the matter
32 pursuant to G.S. 131E-192.9 are grounds for the Attorney General to seek to have the
33 certificate cancelled pursuant to G.S. 131E-192.11.

34 (c) The Department shall review each periodic report and information submitted
35 in response to a request pursuant to G.S. 131E-201 to determine whether the advantages
36 or likely advantages of the cooperative agreement continue to outweigh the
37 disadvantages or likely disadvantages of any reduction in competition from the
38 agreement, and to determine what, if any, changes in the conditions of the certificate
39 should be made. Within 30 days of the filing of a periodic report, the Department shall
40 determine whether the certificate should remain in effect and whether any changes to
41 the conditions in the certificate should be made. If the Department determines that the
42 certificate should remain in effect and the Attorney General has not stated any objection
43 to the certificate remaining in effect during the 30-day review period, the certificate
44 shall remain in effect, subject to any changes in the conditions of the certificate imposed

1 by the Department. The parties shall be notified in writing of any changes in the
2 conditions of the certificate. If the Department determines that the advantages or likely
3 advantages of the agreement and the unavoidable costs of terminating the agreement do
4 not continue to outweigh the disadvantages or likely disadvantages of any reduction in
5 competition from the agreement, or if the Attorney General objects to the certificate
6 remaining in effect, the Department shall notify the parties to the agreement in writing
7 of its determination or the objections of the Attorney General, and shall provide a
8 summary of any concerns of the Department or Attorney General to the parties.

9 **"§ 131E-192.11. Action to cancel certificate.**

10 If the parties to the agreement are unable to cure the concerns of the Department or
11 the Attorney General concerning the agreement, the Attorney General may bring suit in
12 Superior Court of Wake County on behalf of the Department or on its own behalf to
13 cancel the certificate. To prevail in the action, the Attorney General must establish by
14 clear and convincing evidence that as a result of changed circumstances, the benefits
15 resulting from the agreement are outweighed by the disadvantages attributable to
16 reduction in competition resulting from the agreement or that the parties to the
17 agreement have unreasonably refused to provide information to the Department or the
18 Attorney General that would permit their review of the matter.

19 **"§ 131E-192.12. Fees for applications and periodic reports.**

20 An administrative fee shall be charged for filing of an application for a certificate of
21 public advantage in the amount of \$. An administrative fee in the amount of \$
22 shall be charged for each periodic report.

23 **"§ 131E-192.13. Authority of Attorney General.**

24 The Attorney General shall have such powers as are necessary to conduct review of
25 applications for certificates of public advantage and periodic reports filed in connection
26 therewith and to bring such actions in Superior Court of Wake County as are specified
27 in this Article.

28 **"§ 131E-192.14. Effects of certificate of public advantage; other laws.**

29 (a) Activities conducted pursuant to a cooperative agreement for which a
30 certificate of public advantage has been issued are immunized from challenge or
31 scrutiny under any State or federal antitrust laws. In addition, conduct in negotiating
32 and entering into a cooperative agreement for which an application for a certificate of
33 public advantage is filed shall be immune from challenge or scrutiny under any state or
34 federal antitrust laws, regardless of whether a certificate is issued.

35 (b) Nothing in this Article shall exempt hospitals or other health care providers
36 from compliance with laws governing certificate of need, licensure or other regulatory
37 requirements.

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

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

41 "~~(b) A municipality may contract with or otherwise arrange with other~~
42 ~~municipalities of this or other states, federal or public agencies or with any person,~~
43 ~~private organization or nonprofit association for the provision of hospital, clinical, or~~
44 ~~similar services. The municipality may pay for these services from appropriations or~~

1 ~~other moneys available for these purposes.—~~A municipality or a public hospital may
2 contract with or enter into any arrangement with other public hospitals or municipalities
3 of this or other states, the State of North Carolina, federal or public agencies, or with
4 any person, private organization or nonprofit corporation or association for the
5 provision of health care. The municipality or public hospital may pay for or contribute
6 its share of the cost of any such contract or arrangement from revenues available for
7 these purposes, including revenues rising from the provision of health care."

8 Sec. 4. This act is effective upon ratification.