

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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SENATE BILL 9

Judiciary II Committee Substitute Adopted 4/27/93

Finance Committee Substitute Adopted 5/26/93

Short Title: Hospital Cooperation Act.

(Public)

Sponsors:

Referred to:

January 28, 1993

A BILL TO BE ENTITLED

AN ACT TO ENCOURAGE AND PERMIT COOPERATIVE AGREEMENTS OF 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.

- 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    The following definitions apply in this Article:

- 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, for the sharing,  
35          allocation, or referral of patients, personnel, instructional programs,  
36          support services and facilities, or medical, diagnostic, or laboratory  
37          facilities or equipment, or procedures or other services traditionally  
38          offered by hospitals. Cooperative agreement shall not include any  
39          agreement by which ownership over substantially all of the stock,  
40          assets, or activities of one or more previously licensed and operating  
41          hospitals is transferred nor any agreement that would permit self-  
42          referrals of patients by a health care provider that is otherwise  
43          prohibited by law.
- 44          (3)   'Department' means the Department of Human Resources.

1           (4) 'Hospital' means any hospital required to be licensed under Chapters  
2           131E or 122C of the General Statutes.

3           (5) 'Person' means any individual, firm, partnership, corporation,  
4           association, public or private institution, political subdivision, or  
5           government agency.

6           (6) 'Federal or State antitrust laws' means any and all federal or State laws  
7           prohibiting monopolies or agreements in restraint of trade, including  
8           the federal Sherman Act, Clayton Act, Federal Trade Commission Act,  
9           and North Carolina laws codified in Chapter 75 of the General Statutes  
10           that prohibit restraints on competition.

11 **"§ 131E-192.3. Certificate of public advantage; application.**

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

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

29 **"§ 131E-192.4. Procedure for review; standards for review.**

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

37       (b) The Department shall determine that a certificate of public advantage should  
38 be issued for a cooperative agreement if it determines that an applicant has  
39 demonstrated by clear and convincing evidence that the benefits likely to result from the  
40 agreement outweigh the disadvantages likely to result from a reduction in competition  
41 from the agreement.

42       In evaluating the potential benefits of a cooperative agreement, the Department shall  
43 consider whether one or more of the following benefits may result from the cooperative  
44 agreement:

- 1           (1) Enhancement of the quality of hospital and hospital-related care  
2 provided to North Carolina citizens.
- 3           (2) Preservation of hospital facilities in geographical proximity to the  
4 communities traditionally served by those facilities.
- 5           (3) Lower costs of, or gains in, the efficiency of delivering hospital  
6 services.
- 7           (4) Improvements in the utilization of hospital resources and equipment.
- 8           (5) Avoidance of duplication of hospital resources.

9           In evaluating the potential disadvantages of a cooperative agreement, the  
10 Department shall consider whether one or more of the following disadvantages may  
11 result from the cooperative agreements:

- 12           (1) The extent to which the agreement may increase the costs or prices of  
13 health care at a hospital which is party to the cooperative agreement.
- 14           (2) The extent to which the agreement may have an adverse impact on  
15 patients in the quality, availability, and price of health care services.
- 16           (3) The extent to which the agreement may reduce competition among the  
17 parties to the agreement and the likely effects thereof.
- 18           (4) The extent to which the agreement may have an adverse impact on the  
19 ability of health maintenance organizations, preferred provider  
20 organizations, managed health care service agents, or other health care  
21 payors to negotiate optimal payment and service arrangements with  
22 hospitals, physicians, allied health care professionals, or other health  
23 care providers.
- 24           (5) The extent to which the agreement may result in a reduction in  
25 competition among physicians, allied health professionals, other health  
26 care providers, or other persons furnishing goods or services to, or in  
27 competition with, hospitals.
- 28           (6) The availability of arrangements that are less restrictive to competition  
29 and achieve the same benefits or a more favorable balance of benefits  
30 over disadvantages attributable to any reduction in competition.

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

33 **"§ 131E-192.5. Issuance of a certificate.**

34           If the Department determines that the likely benefits of a cooperative agreement  
35 outweigh the likely disadvantages attributable to reduction of competition as a result of  
36 the agreement by clear and convincing evidence, and the Attorney General has not  
37 stated any objection to issuance of a certificate during the review period, the  
38 Department shall issue a certificate of public advantage for the cooperative agreement at  
39 the conclusion of the review period. The certificate shall include any conditions of  
40 operation under the agreement that the Department, in consultation with the Attorney  
41 General, determines to be appropriate in order to ensure that the cooperative agreement  
42 and the activities engaged under it are consistent with this Article and its purpose to  
43 limit health care costs. The Department shall include conditions to control prices of  
44 health care services provided under the cooperative agreement. Consideration shall be

1 given to assure that access to health care is provided to all areas of the State. The  
2 Department shall publish its decisions on applications for certificates of public  
3 advantage in the North Carolina Register.

4 **"§ 131E-192.6. Objection by Attorney General.**

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

20 **"§ 131E-192.7. Record keeping.**

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

27 **"§ 131E-192.8. Review after issuance of certificate.**

28 If at any time following the issuance of a certificate of public advantage, the  
29 Department or the Attorney General has questions concerning whether the parties to the  
30 cooperative agreement have complied with any condition of the certificate or whether  
31 the benefits or likely benefits resulting from a cooperative agreement may no longer  
32 outweigh the disadvantages or likely disadvantages attributable to a reduction in  
33 competition resulting from the agreement, the Department or the Attorney General shall  
34 advise the parties to the agreement and either the Department or the Attorney General  
35 shall request any information necessary to complete a review of the matter.

36 **"§ 131E-192.9. Periodic reports.**

37 (a) During the time that a certificate is in effect, a report of activities pursuant to  
38 the cooperative agreement must be filed every two years with the Department on or  
39 before the anniversary date on which the certificate was issued. A copy of the periodic  
40 report shall be submitted to the Attorney General at the same time that it is filed with  
41 the Department. A report shall include all of the following:

- 42 (1) A description of the activities conducted pursuant to the agreement.
- 43 (2) Price and cost information.

- 1           (3) The nature and scope of the activities pursuant to the agreement  
2 anticipated for the next two years, the likely effect of those activities.  
3           (4) A signed certificate by each party to the agreement that the benefits or  
4 likely benefits of the cooperative agreement as conditioned continue to  
5 outweigh the disadvantages or likely disadvantages of any reduction in  
6 competition from the agreement as conditioned.  
7           (5) Any additional information requested by the Department or the  
8 Attorney General.

9           The Department shall give public notice in the North Carolina Register that a report  
10 has been received. After notice is given, the public shall have 30 days to file written  
11 comments on the report and on the benefits and disadvantages of continuing the  
12 certificate of public advantage. Periodic reports, public comments, and information  
13 submitted in response to a request shall be public records as set forth in Chapter 132 of  
14 the General Statutes.

15           (b) Failure to file a periodic report required by this section after notice of default  
16 or failure to provide information requested pursuant to a review under G.S. 131E-192.8  
17 is grounds for the revocation of the certificate by the Attorney General or the  
18 Department.

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

39           If the Department determines that the benefits or likely benefits of the agreement  
40 and the unavoidable costs of terminating the agreement do not continue to outweigh the  
41 disadvantages or likely disadvantages of any reduction in competition from the  
42 agreement, or if the Attorney General objects to the certificate remaining in effect based  
43 upon a review of the benefits and disadvantages set forth in G.S. 131E-192.4, the  
44 Department shall notify the parties to the agreement in writing of its determination or

1 the objections of the Attorney General, and shall provide a summary of any concerns of  
2 the Department or Attorney General to the parties.

3 **"§ 131E-192.10. Right to judicial action.**

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

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

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

26 **"§ 131E-192.11. Fees for applications and periodic reports.**

27 The Department and the Attorney General shall establish a schedule of fees for filing  
28 an application for a certificate of public advantage and for filing a periodic report based  
29 on the total cost of the project for which the application or periodic report is made. The  
30 fee for filing an application may not exceed fifteen thousand dollars (\$15,000). The fee  
31 for filing a periodic report may not exceed two thousand five hundred dollars (\$2,500).  
32 The fee schedule established should generate sufficient revenue to offset the costs of the  
33 program. An application filing fee must be paid to the Department at the time an  
34 application for a certificate of public advantage is submitted to it pursuant to G.S. 131E-  
35 192.3. A periodic report filing fee must be paid to the Department at the time a periodic  
36 report is submitted to it pursuant to G.S. 131E-192.9.

37 **"§ 131E-192.12. Department and Attorney General authority.**

38 The Department and Attorney General shall have the necessary powers to conduct a  
39 review of applications for certificates of public advantage and of periodic reports filed  
40 in connection therewith and to bring actions in the Superior Court of Wake County as  
41 required under G.S. 131E-192.10. This Article shall not limit the authority of the  
42 Attorney General under federal or State antitrust laws.

43 **"§ 131E-192.13. Effects of certificate of public advantage; other laws.**

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

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

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

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

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

26       Sec. 4. The Department of Human Resources shall prepare and submit a  
27 report to the 1999 General Assembly summarizing and analyzing the effects of this act.  
28 The report shall include the results of efforts to assure access to health care and to  
29 control increases in health care costs and any recommendations the Department may  
30 have for amendments to the act.

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