

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1995

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SENATE BILL 396

Short Title: Physician Cooperation Act.

(Public)

Sponsors: Senators Rand, Forrester, and Soles.

Referred to: Judiciary II/Election Laws

March 20, 1995

A BILL TO BE ENTITLED

AN ACT TO ENCOURAGE REGULATED ARRANGEMENTS AMONG PHYSICIANS WHEN THE ARRANGEMENT WILL HELP CONTROL COSTS, IMPROVE ACCESS, IMPROVE QUALITY, OR IMPLEMENT MANDATED HEALTH CARE REFORMS.

The General Assembly of North Carolina enacts:

Section 1. This act shall be known as the Physician Cooperation Act of 1995.

Sec. 2. Chapter 90 of the General Statutes is amended by adding the following new Article to read:

"ARTICLE 1E.

"CERTIFICATE OF PUBLIC ADVANTAGE.

"§ 90-21.24. Findings.

The General Assembly of North Carolina makes the following findings:

- (1) That technological and scientific developments in health care have enhanced the prospects for further improvement in the quality of care provided to North Carolina citizens.
- (2) That the cost of improved technology and improved scientific methods for the provision of health care contributes substantially to the increasing cost of health care. Cost increases make it increasingly difficult for physicians in rural areas of North Carolina to offer care.
- (3) That cooperative agreements among physicians, hospitals, and others for the provision of health care services may foster improvements in the quality of health care for North Carolina citizens, moderate

1 increases in cost, and improve access to needed services in rural areas
2 of North Carolina.

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

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

10 (6) That competition as currently mandated by federal and State antitrust
11 laws should be supplanted by a regulatory program to permit and
12 encourage cooperative agreements between physicians or between
13 physicians, hospitals, and others, that are beneficial to North Carolina
14 citizens when the benefits of cooperative agreements outweigh their
15 disadvantages caused by their potential or actual adverse effects on
16 competition.

17 (7) That regulatory as well as judicial oversight of cooperative agreements
18 should be provided to ensure that the benefits of cooperative
19 agreements permitted and encouraged in North Carolina outweigh any
20 disadvantages attributable to any reduction in competition likely to
21 result from the agreements.

22 **"§ 90-21.25. Definitions.**

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

24 (1) 'Attorney General' means the Attorney General of the State of North
25 Carolina, or any attorney to whom the Attorney General delegates
26 authority and responsibility to act pursuant to this Article;

27 (2) 'Cooperative agreement' means an agreement among two or more
28 physicians, or between a physician, hospital, or any other person or
29 persons, for the sharing, allocation, or referral of patients, personnel,
30 instructional programs, support services and facilities, or medical,
31 diagnostic, or laboratory facilities or equipment, or procedures or other
32 services traditionally offered by physicians. Cooperative agreement
33 shall not include any agreement by which ownership over substantially
34 all of the stock, assets, or activities of one or more previously licensed
35 and operating hospitals is transferred nor any agreement that would
36 permit self-referrals of patients by a health care provider that is
37 otherwise prohibited by law;

38 (3) 'Department' means the North Carolina Department of Human
39 Resources;

40 (4) 'Federal or State antitrust laws' means any and all federal or State laws
41 prohibiting monopolies or agreements in restraint of trade, including,
42 but not limited to, the federal Sherman Act, Clayton Act, and Federal
43 Trade Commission Act, and the North Carolina laws codified in
44 Chapter 75 of the General Statutes;

1 (5) 'Hospital' means any hospital required to be licensed under Chapter
2 131E or 122C of the General Statutes;

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

6 (7) 'Physician' means an individual licensed to practice medicine pursuant
7 to Article 1 of this Chapter.

8 **"§ 90-21.26. Certificate of public advantage; application.**

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

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

26 **"§ 90-21.27. Procedure for review; standards for review.**

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

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

39 In evaluating the potential benefits of a cooperative agreement, the Department shall
40 consider whether one or more of the following benefits may result from the cooperative
41 agreement:

42 (1) Enhancement of the quality of health care provided to North Carolina
43 citizens;

- 1 (2) Preservation of other health care facilities in geographical proximity to
2 the communities traditionally served by those facilities;
- 3 (3) Lower costs of, or gains in the efficiency of delivering, health care
4 services;
- 5 (4) Improvements in the utilization of health care resources and
6 equipment;
- 7 (5) Avoidance of duplication of health care resources; and
- 8 (6) The extent to which medically underserved populations are expected to
9 utilize the proposed services.

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

- 13 (1) The extent to which the agreement may increase the costs or prices of
14 health care at the locations of parties to the cooperative agreement;
- 15 (2) The extent to which the agreement may have an adverse impact on
16 patients in the quality, availability, and price of health care services;
- 17 (3) The extent to which the agreement may reduce competition among the
18 parties to the agreement and the likely effects thereof;
- 19 (4) The extent to which the agreement may have an adverse impact on the
20 ability of health maintenance organizations, preferred provider
21 organizations, managed health care service agents, or other health care
22 payors to negotiate optimal payment and service arrangements with
23 hospitals, physicians, allied health care professionals, or other health
24 care providers;
- 25 (5) The extent to which the agreement may result in a reduction in
26 competition among physicians, allied health professionals, other health
27 care providers, or other persons furnishing health care services; and
- 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 **"§ 90-21.28. 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. Such 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 activities engaged in pursuant thereto are consistent with this Article and its purpose
43 to 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 **"§ 90-21.29. Objection by Attorney General.**

5 If the Attorney General is not persuaded that the 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. 90-21.27, the Attorney General may, within the review period, state an
9 objection to the issuance of a certificate of public advantage and may extend the review
10 period for a specified period of time. Notice of the objection and any extension of the
11 review period shall be provided in writing to the applicant, together with a general
12 explanation of the concerns of the Attorney General. The parties may attempt to reach
13 agreement with the Attorney General on modifications to the agreement or to conditions
14 in the certificate so that the Attorney General no longer objects to issuance of a
15 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 withdrawal of the objection. If the Attorney General does not
19 withdraw the objection, a certificate shall not be issued.

20 **"§ 90-21.30. 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. 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 **"§ 90-21.31. 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 **"§ 90-21.32. 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 by
39 the anniversary day on which the certificate was issued. A copy of the periodic report
40 shall be submitted to the Attorney General at the same time it is filed with the
41 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 and the likely effect of those
3 activities.
- 4 (4) A signed certificate by each party to the agreement that the benefits or
5 likely benefits of the cooperative agreement as conditioned continue to
6 outweigh the disadvantages or likely disadvantages of any reduction in
7 competition from the agreement as conditioned.
- 8 (5) Any additional information requested by the Department or the
9 Attorney General.

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

16 (b) Failure to file a periodic report required by this section after notice of default,
17 or failure to provide information requested pursuant to a review under G.S. 90-21.31 are
18 grounds for revocation of the certificate by the Attorney General or the Department.

19 (c) The Department shall review each periodic report, public comments, and
20 information submitted in response to a request under G.S. 90-21.31 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. 90-21.27. 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. Provided,
28 however, that the Department may extend the review period an additional 30 days. If
29 the Department or Attorney General determines that the parties to the 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 certificate is revoked, the parties shall be entitled to no benefits under this Article,
33 beginning on the date of revocation. If the Department determines that the certificate
34 should remain in effect and the Attorney General has not stated any objection to the
35 certificate remaining in effect during the review period, the certificate shall remain in
36 effect subject to any changes in the conditions of the certificate imposed by the
37 Department. The parties shall be notified in writing of the Department's decision and of
38 any changes in the conditions of the certificate. The Department shall publish its
39 decision and any changes in the conditions in the North Carolina Register.

40 If the Department determines that the benefits or likely benefits of the agreement
41 and the unavoidable costs of terminating the agreement do not continue to outweigh the
42 disadvantages or likely disadvantages of any reduction in competition from the
43 agreement, or if the Attorney General objects to the certificate remaining in effect based
44 upon a review of the benefits and disadvantages set forth in G.S. 90-21.27, the

1 Department shall notify the parties to the agreement in writing of its determination or
2 the objections of the Attorney General, and shall provide a summary of any concerns of
3 the Department or Attorney General to the parties.

4 **"§ 90-21.33. Right to judicial action.**

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

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

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

26 (d) In any action instituted under this section, the work product of the
27 Department or the Attorney General or his staff, is not a public record under Chapter
28 132 of the General Statutes, and shall not be discoverable or admissible, nor shall the
29 Attorney General or any member of the Attorney General's staff be compelled to be a
30 witness, whether in discovery or at any hearing or trial.

31 **"§ 90-21.34. Fees for applications and periodic reports.**

32 The Department and the Attorney General shall establish and collect administrative
33 fees for filing of an application for a certificate of public advantage based on the total
34 cost of the project for which the application is made, in an amount not to exceed fifteen
35 thousand dollars (\$15,000), and an administrative fee for filing each periodic report
36 required to be filed in an amount not to exceed two thousand five hundred dollars
37 (\$2,500). The fee schedule established should generate sufficient revenue to offset the
38 costs of the program. An application filing fee must be paid to the Department at the
39 time an application for a certificate of public advantage is submitted pursuant to G.S.
40 90-21.26. A periodic report filing fee must be paid to the Department at the time a
41 periodic report is submitted to it pursuant to G.S. 90-21.32.

42 **"§ 90-21.35. Department and Attorney General authority.**

43 The Department and Attorney General shall adopt rules to conduct review of
44 applications for certificates of public advantage and of periodic reports filed in

1 connection therewith and to bring actions in the Superior Court of Wake County as
2 required under G.S. 90-21.33. This Article shall not limit the authority of the Attorney
3 General under federal or State antitrust laws.

4 **"§ 90-21.36. Effects of certificate of public advantage; other laws.**

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

13 (b) Nothing in this Article shall exempt physicians or others from compliance
14 with State or federal laws governing certificate of need, licensure, or other regulatory
15 requirements.

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

18 Sec. 3. The Department of Human Resources shall report to the 1999
19 General Assembly a summary and analysis of the effects of this act, including the
20 results of efforts to assure access to health care and to control increases in health care
21 costs and recommendations, if any, for amendments to this act.

22 Sec. 4. This act becomes effective October 1, 1995.