

Certificate of Public Advantage

Presentation to the House Select Committee on the
Certificate of Need Process and Related Hospital Issues

Research Division Staff, September 14, 2011

What is a COPA?

- An agreement among two or more hospitals
 - for the sharing, allocation, referral of patients, personnel, programs, services, facilities, equipment, or procedures traditionally offered by hospitals, or
 - that results in the purchase of assets pursuant to a merger or sale, a partnership, a joint venture, or any other affiliation by which ownership or control over all or substantially all of the stock, assets, or activities of a hospital are transferred to another hospital
- Must demonstrate benefits outweigh reduction of competition
- Conditions of Operation included to control prices of health care services

Purpose of COPA

- Authorize and encourage activities under regulatory and judicial oversight designed to ensure consumer protections from potentially anti-competitive behavior that:
 - Foster improvements in the quality of health care
 - Moderate increases in cost
 - Improve access to services in rural areas
 - Enhance likelihood smaller hospitals remain operation

Effect of COPA

Activities conducted in accordance to an approved cooperative agreement are immune from challenges or scrutiny of State or federal anti-trust law.

- State- G.S. 131E-192.13
- Federal- Case Law
 - State Purpose Doctrine (*Parker v. Brown*)
 - Two-prong test (*FTC v. Ticor*)
 - Articulated a clear and affirmative policy
 - Provide active supervision

Distinguished from CON

Certificate of Need

- Grants permission to buy (*build, convert, etc.*) health care related items generally allowed under a system of free enterprise
- Application to Division of Health Service Regulation
- Finite process authorizes activities under certificate

Certificate of Public Advantage

- Allows relationships between systems generally not permitted under antitrust laws
- Application to Division of Health Service Regulation and Attorney General
- Continuous review of authorized activities within agreement after issuance

State laws referencing COPA

Idaho- (1994)

- § 39-4902~4904

Kansas- (1994)

- § 65-4957~4961

Louisiana- (1994)

- § 40-2254.1~2254.12

Maine- (2005)

- 22 M.R.S. §1842-1851

Mississippi-(2004)

- § 41-9-305~307

Montana- (1993*)

- § 50-4-601~603

Nebraska-(1994)

- § 71-7703~7711

North Carolina (1993*)

- § 90-21.24~21.36 and
- § 131E-192.1~192.13

North Dakota (1993*)

- § 23-17.5-02~17.5-10

South Carolina (1994)

- § 44-7-510~7-580

Tennessee (1998*)

- § 33-2-704~2-706

Texas (1993*)

- § 314.002~314.006

Wisconsin (1991*)

- § 150.85~150.86

Legislative History in North Carolina

Hospital Cooperation Act of 1993

- Session Law 1993-529 (House Bill 729)
 - Ratified July 24, 1993
 - Incorporated language from Section 9 of Senate Bill 554 (committee substitute adopted June 17, 1993)

Hospital Cooperation Act Amendment

- Session Law 1995-205 (Senate Bill 886)
 - Ratified June 8, 1995
 - Expanded definition of cooperative agreement to include purchase of assets language and authorizes additional application fee for contracting with consultants to complete a review of a COPA application.

COPA - Application

- Parties to a cooperative agreement apply to DHSR
- The application includes:
 - an executed written copy of the cooperative agreement or
 - letter of intent with respect to the agreement,
 - description of the nature and scope of the activities and cooperation in the agreement,
 - any consideration passing to any party under the agreement, and
 - any additional materials necessary to fully explain the agreement and its likely effects.
- A copy of the application and related materials is submitted to the Attorney General at the same time the application is submitted to the Department.

COPA- Application, cont.

- The Department reviews the application in accordance with the statutorily articulated standards
- A public hearing is held for the submission of oral and written public comments
- The Department provides its determination whether the application within **90 days** of the date the application is filed.

COPA - Standards for review

- Applicant must demonstrate
 - *clear and convincing evidence*
- The **benefits** likely to result from the agreement outweigh the **disadvantages** likely to result from a reduction in competition from the agreement

Benefits considered

- Enhancement of the quality of hospital and hospital-related care provided to North Carolina citizens.
- Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities.
- Lower costs of, or gains in, the efficiency of delivering hospital services.
- Improvements in the utilization of hospital resources and equipment.
- Avoidance of duplication of hospital resources.
- The extent to which medically underserved populations are expected to utilize the proposed services.

Disadvantages considered

The extent to which the agreement may:

- Increase the costs or prices of health care at a hospital which is party to the cooperative agreement.
- Have an adverse impact on patients in the quality, availability, and price of health care services.
- Reduce competition among the parties to the agreement and the likely effects thereof.
- Have an adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed health care service agents, or other health care payors to negotiate optimal payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers.
- Result in a reduction in competition among physicians, allied health professionals, other health care providers, or other persons furnishing goods or services to, or in competition with, hospitals.

The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition.

COPA - Issuance of Certificate

The Department makes determination **and** the Attorney General has not stated an objection

Certificate issued

- Includes conditions of operation
- Includes conditions to control prices of health care services

COPA - Review

- The agreement is subject to review by the Department or the Attorney General *at any time* following the issuance of a certificate of public advantage.
- Holders must also submit biennial reports

COPA- Review, cont.

Report of activities must include all of the following:

- A description of the activities conducted pursuant to the agreement.
- Price and cost information.
- The nature and scope of the activities pursuant to the agreement anticipated for the next two years, the likely effect of those activities.
- A signed certificate by each party to the agreement that the benefits or likely benefits of the cooperative agreement as conditioned continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement as conditioned.
- Any additional information requested by the Department or the Attorney General.

30 days to file written comments on the report

The Department determines if any changes in the conditions of the certificate should be made.

10 NCAC Subchapter 14I

- Division of Health Service Regulation responsible
- Application fees
 - \$3,750 for each provider participating in the application (\$15,000 maximum)
- Filing Fees
 - \$500 with biennial reports to offset cost of review and maintenance
 - Additional fees up to \$2,000 for costs associated with investigating and assessing compliance
- Public Hearings
 - Must be held within 45 days of receipt of an application
 - Published not less than 10 days prior in at least one newspaper of general circulation

History of COPA in North Carolina

Initial (Revised) COPA- 1995

- Mission-St. Joseph's Health System to manage and operate Memorial Mission Hospital, Inc. and St. Joseph's Hospital as integrated entities

First Amended- 1998

- Memorial Mission Hospital, Inc. acquired St. Joseph's Hospital in a statutory merger

Second Amended- 2005

Second Amended and Restated COPA-2007

- Currently in operation as amended

Third Amended COPA-2011

- 2nd amended remains in full force and effect for the combined hospitals now known as Mission Health System with an adjustment to the provision relating to the employment of contracting with Physicians

Mission Health

Provisions include:

- Accreditation
- Charity and Indigent Care
- Contract restrictions
 - Purchase through Competitive Bidding
 - Non-exclusivity and Nondiscrimination
 - Prohibits “Most Favored Nation” provisions
- Cost and Margin Controls
- Physician Employment controls

Mission Health

COPA contains three principal regulatory constraints:

- **Cost Cap**-Under the COPA, the rate at which Mission Hospital's "cost per adjusted patient discharge" increases must not exceed the rate of increase in the producer price index for general medical and surgical hospitals in the U.S.
- **Margin Cap**- Under the COPA, the operating margin of MHS over any three-year period shall not exceed by more than one percent the mean of the median operating margin of comparable hospitals.
- **Physician Employment Cap** - Under the COPA, MHS is not permitted to employ, or enter into exclusive contracts with, more than 30 percent of the physicians practicing in Buncombe and Madison counties except those practicing in cardiology, genetics, hospitalists, neuro-hospitalists, and neurology.