

CHAPTER 638

H.B. No. 1884

AN ACT

relating to cooperative agreements among hospitals.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subtitle F, Title 4, Health and Safety Code, is amended by adding Chapter 313 to read as follows:

CHAPTER 313. COOPERATIVE AGREEMENTS AMONG HOSPITALS

Sec. 313.001. DEFINITIONS. *In this chapter:*

(1) "Attorney general" means the attorney general of Texas or any assistant attorney general acting under the direction of the attorney general of Texas.

(2) "Cooperative agreement" means an agreement among two or more hospitals for the allocation or sharing of health care equipment, facilities, personnel, or services.

(3) "Department" means the Texas Department of Health.

(4) "Hospital" means a general or special hospital licensed under Chapter 241 or a private mental hospital licensed under Chapter 577.

Sec. 313.002. REVIEW AND CERTIFICATION OF COOPERATIVE AGREEMENTS.

(a) *A hospital may negotiate and enter into cooperative agreements with other hospitals in the state if the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition that may result from the agreements. Acting through their boards of directors, a group of hospitals may conduct discussions or negotiations concerning cooperative agreements, provided that the discussions or negotiations do not involve price fixing or predatory pricing.*

(b) *Parties to a cooperative agreement may apply to the department for a certification of public advantage governing the cooperative agreement. The application must include a written copy of the cooperative agreement and describe the nature and scope of the cooperation in the agreement and any consideration passing to any party under the agreement. A copy of the application and copies of all additional related materials must be submitted to the attorney general and to the department at the same time. The department shall charge an application fee in an amount not to exceed \$10,000 per application.*

(c) *The department shall review the application in accordance with the standards set forth in Subsections (e) and (f) and shall, if requested, hold a public hearing in accordance with rules adopted by the department. The department shall grant or deny the application within 120 days of the date of filing of the application and that decision must be in writing and set*

forth the basis for the decision. The department shall furnish a copy of the decision to the applicants, the attorney general, and any intervenor within 10 days of its issuance.

(d) The department shall issue a certificate of public advantage for a cooperative agreement if it determines that the applicants have demonstrated by clear and convincing evidence that the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition that may result from the agreement.

(e) In evaluating the potential benefits of a cooperative agreement, the department shall consider whether one or more of the following benefits may result from the cooperative agreement:

(1) enhancement of the quality of hospital and hospital-related care provided to Texas citizens;

(2) preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities;

(3) gains in the cost efficiency of services provided by the hospitals involved;

(4) improvements in the utilization of hospital resources and equipment; and

(5) avoidance of duplication of hospital resources.

(f) The department's evaluation of any disadvantages attributable to any reduction in competition likely to result from the agreement may include, but need not be limited to, the following factors:

(1) the extent of any likely adverse impact on the ability of health maintenance organizations, preferred provider organizations, or other health care payors to negotiate optimal payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;

(2) the extent of any 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;

(3) the extent of any adverse impact on patients in the quality, availability, and price of health care services; and

(4) the availability of arrangements that are less restrictive to competition and achieve similar benefits.

(g) The department shall consult with the attorney general regarding any potential reduction in competition that may result from a cooperative agreement. The attorney general shall review the application and all supporting documents provided by the applicants, any documents or other information provided by any intervenors, and any documents or testimony provided at a public hearing, if any, on the application and shall advise the department whether the proposed cooperative agreement would have inappropriate impact on competition. If the attorney general advises the department to deny an application, the attorney general shall state the basis and reasons for the recommended denial.

Sec. 313.003. **ATTORNEY GENERAL AUTHORITY.** (a) The attorney general, at any time after an application is filed under Section 313.002(b), may require by civil investigative demand the attendance and testimony of witnesses and the production of documents in Travis County or the county in which the applicants are located for the purpose of investigating whether the cooperative agreement satisfies the standards set forth in Section 313.002. All nonpublic documents produced and testimony given to the attorney general are subject to the prohibitions on disclosure and use of Section 15.10(i), Business & Commerce Code. The attorney general may seek an order from the district court compelling compliance with a civil investigative demand issued under this section.

(b) The attorney general may seek to enjoin the operation of a cooperative agreement for which an application for certificate of public advantage has been filed by filing suit against the parties to the cooperative agreement in district court. The attorney general may file an action before or after the department acts on the application for a certificate but, except as provided in Subsection (e), the action must be brought not later than 20 days following the attorney general's receipt of a copy of the final and appealable decision of the department.

(c) Upon the filing of the complaint in an action under Subsection (b), the department's certification, if previously issued, must be stayed and the cooperative agreement is of no further force unless the court orders otherwise or until the action is concluded. The attorney general may apply to the court for any ancillary temporary or preliminary relief necessary to stay the cooperative agreement pending final disposition of the case.

(d) In any action brought under Subsection (b), the applicants for a certificate bear the burden of establishing by clear and convincing evidence that in accordance with Sections 313.002(e) and (f), the likely benefits resulting from the cooperative agreement outweigh any disadvantages attributable to a reduction in competition that may result from the agreement. In assessing disadvantages attributable to a reduction in competition likely to result from the agreement, the court may draw upon the determinations of federal and Texas courts concerning unreasonable restraint of trade under 15 U.S.C. Sections 1 and 2, and Chapter 15, Business & Commerce Code.

(e) If, at any time following the 20-day period specified in Subsection (b), the attorney general determines that as a result of changed circumstances the benefits resulting from a certified agreement no longer outweigh any disadvantages attributable to a reduction in competition resulting from the agreement, the attorney general may file suit in the district court seeking to cancel the certificate of public advantage. The standard for adjudication for an action brought under this subsection is as follows:

(1) except as provided in Subdivision (2), in any action brought under this subsection the attorney general has the burden of establishing by a preponderance of the evidence that as a result of changed circumstances the benefits resulting from the agreement and the unavoidable costs of canceling the agreement are outweighed by disadvantages attributable to a reduction in competition resulting from the agreement;

(2) in any action under this subsection, if the attorney general first establishes by a preponderance of evidence that the department's certification was obtained as a result of material misrepresentation to the department or the attorney general or as the result of coercion, threats, or intimidation toward any party to the cooperative agreement, then the parties to the agreement bear the burden of establishing by clear and convincing evidence that the benefits resulting from the agreement and the unavoidable costs of canceling the agreement are outweighed by disadvantages attributable to any reduction in competition resulting from the agreement.

Sec. 313.004. MONITORING OF APPROVED COOPERATIVE AGREEMENTS. (a) If, at any time following the approval of a cooperative agreement by the department, the department determines that as a result of changed circumstances the benefits resulting from an approved agreement no longer outweigh any disadvantages attributable to a reduction in competition resulting from the agreement, the department may initiate proceedings to terminate the certificate of public advantage.

(b) The department may request documents from the parties to the cooperative agreement regarding the current status of the agreement, including information relative to the continued benefits and any disadvantages of the agreement and shall, if requested, hold a public hearing to solicit additional information concerning the effects of the cooperative agreement.

(c) If the department determines that the likely benefits resulting from an approved cooperative agreement no longer outweigh any disadvantages attributable to any potential reduction in competition resulting from the agreement, the department may terminate the certificate of public advantage.

Sec. 313.005. JUDICIAL REVIEW OF DEPARTMENT ACTION. Any party aggrieved by a decision of the department in granting or denying an application, refusing to act on an application, or terminating a certificate is entitled to judicial review of the decision in accordance with the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

Sec. 313.006. VALIDITY OF CERTIFIED COOPERATIVE AGREEMENTS. (a) Notwithstanding Section 15.05(a), Business & Commerce Code, or any other provision of law, a cooperative agreement for which a certificate of public advantage has been issued is a lawful agreement. Notwithstanding Section 15.05(a), Business & Commerce Code, or any other

provision of law, if the parties to a cooperative agreement file an application for a certificate of public advantage governing the agreement with the department, the conduct of the parties in negotiating and entering into a cooperative agreement is lawful conduct.

(b) If the department, or in any action by the attorney general the district court, determines that the applicants have not established by clear and convincing evidence that the likely benefits resulting from a cooperative agreement outweigh any disadvantages attributable to any potential reduction in competition resulting from the agreement, the agreement is invalid and has no further force or effect.

(c) Nothing in this chapter exempts hospitals from compliance with the requirements of Chapters 241 or 577 of this code.

Sec. 313.007. **MERGERS AND CONSOLIDATIONS INVOLVING HOSPITALS.** The provisions of this chapter do not apply to any agreement among hospitals by which ownership or control over substantially all of the stock, assets of activities of one or more previously licensed and operating hospitals is placed under the control of another licensed hospital or hospitals.

Sec. 313.008. **AUTHORITY TO ADOPT RULES; EFFECTIVE DATE.** (a) This Act specifically excludes ground and/or air ambulance services.

(b) The department shall have the authority to adopt rules to implement the requirements of this chapter. Such rules shall be adopted by March 1, 1994, at which time hospitals may file an application with the department for a certification of public advantage.

SECTION 2. This Act takes effect September 1, 1993.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on May 11, 1993, by a non-record vote; the House concurred in Senate amendments to H.B. No. 1884 on May 28, 1993, by a non-record vote; passed by the Senate, with amendments, on May 26, 1993, by a viva-voce vote.

Approved June 12, 1993.

Effective Sept. 1, 1993.