

Latest Developments in Health Care Consolidation

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Perhaps the most significant court decision in 2020 directly impacting the South Carolina hospital industry was issued in late 2020, when Judge Ralph King Anderson III of the South Carolina Administrative Law Court denied Greenville County-based Prisma Health the use of a 1997 certificate of public advantage to acquire the hospital assets of Providence Hospitals and Kershaw Health, currently owned by LifePoint Health, a private for-profit system based in Brentwood, Tennessee.

According to Prisma Health, it was one of several systems invited to submit proposals to acquire the Midlands-based hospital assets owned by LifePoint Health in late 2019. Presumably in an effort to limit the risk of federal or state antitrust scrutiny of the acquisition, Prisma Health proposed to purchase the hospital assets through its affiliate, Prisma Health-Midlands, and use the existing certificate of public advantage that had allowed Columbia-based Richland Memorial Hospital and Baptist Health System to enter into a joint operating agreement 23 years ago (Richland/Baptist COPA) to cover the acquired hospital assets. Apparently, LifePoint Health was opposed to participating in the public review process attendant to pursuing a new COPA from DHEC. If the transaction between these systems were consummated, Prisma Health would become the sole provider of all hospital-based acute care services in Richland, Kershaw, Sumter, and Fairfield Counties.

This alert offers an overview of the South Carolina Administrative Law Court's decision reversing the Department of Health and Environmental Control and rejecting Prisma Health's proposal to acquire new assets under the existing COPA. The larger antitrust considerations are beyond the scope of this discussion.

The certificate of public advantage law, commonly abbreviated as the COPA Act, was enacted by the South Carolina General Assembly in 1994. The South Carolina Department of Health and Environmental Control (DHEC) is responsible for administering the COPA program in accordance with the COPA Act.

To date, 26 years later, DHEC has issued just two COPAs:

1. the Richland/Baptist COPA in 1997, and
2. the Regional HealthPlus COPA, which is a physician/hospital joint venture involving Spartanburg Regional Medical Center.

The COPA Act sets forth a detailed application process that requires meaningful documentation of the proposed cooperative agreement and mandates there be public notice and an opportunity for the public to participate in DHEC's review of the application, as well as an opportunity for input by the South Carolina Attorney General. Judge Anderson's Order of November 2, 2020, succinctly summarizes the purpose of the COPA Act:

- *The purpose of the COPA Act is to encourage providers to cooperate when it will benefit the public by giving antitrust prosecutorial immunity to the providers. In enacting the COPA legislation, the General Assembly found:*
1. That the cost of improved health technology and scientific methods contributes significantly to the increasing cost of health care;
 2. that cooperative agreements among hospitals, health care purchasers, and other health care providers would foster improvements in the quality of health care for South Carolinians, moderate cost increases, improve access to needed services in rural areas, and enhance the likelihood that rural hospitals can remain open;
 3. that federal and state antitrust laws may prohibit or discourage cooperative agreements that are beneficial to South Carolinians and that such agreements should be encouraged; and
 4. that competition as currently mandated by federal and state antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers when the benefits outweigh the disadvantages caused by their potential adverse effects on competition.

Order Denying Cross-Motions for Summary Judgment, *Lexington County Health Services District, Inc. v. S.C. Dept. of Health and Envtl. Control, et al.*, Docket No. 20-ALJ-07-0108-cc, pp. 7-8 (S.C. Admin. Law J. Div. Nov. 2, 2020) (quoting S.C. Code Ann. § 44-7-505 (2018).)

Prisma Health's proposal to expand the Richland/Baptist COPA to protect its acquisition of three additional hospitals and a freestanding emergency department operating in the same market became known to the public through media announcements by Prisma Health and reporting by news outlets in early March 2020. Many of the Midlands' elected officials immediately raised questions and concerns. The Councils for Kershaw County, Lexington County, Richland County, Fairfield County and the City of Columbia made these questions and concerns public. Lexington Medical Center, one of the only other providers of hospital services in the entire Midlands area, was similarly concerned and objected. The questions, concerns and objections primarily focused on the lack of notice to the public that DHEC was reviewing Prisma Health's proposal to expand the Richland/Baptist COPA, which resulted in the lack of participation by any affected persons in the review and vetting of the proposal on its merits, as well as the propriety of using the Richland/Baptist COPA as the means for authorizing the acquisition.

After considerable discussion and debate amongst many interested parties in the community, it was Lexington Medical Center, the City of Columbia, Fairfield County, and Kershaw County that sought administrative review of DHEC's

decision by the Department's Board, and continuing that challenge in the Administrative Law Court after the Board declined to hear their concerns.

Lexington's contested case was filed on May 14, 2020, necessarily focused on the procedural deficiencies of the agency decision, as little to nothing was publicly known about the underlying transaction or the substance of DHEC's private review, but nonetheless also attacking the merits of the approval. This attack was necessitated by the absence of any determination by DHEC in the decision approving Prisma Health's request that the likely benefits of the proposed transaction outweighed the likely disadvantages and that the reduction in competition likely to result is reasonably necessary to obtain the likely benefits, which are cornerstone principles of the COPA Act.

Prisma Health's response to Lexington's challenge asserted there was no need for a public review or obligation to comply with the COPA application process because the proposed transaction was not a cooperative agreement subject to the COPA Act and DHEC had the discretion to amend the Richland/Baptist COPA to provide for the new assets using whatever type of review it deemed appropriate under the circumstances. Early in the proceedings, the City of Columbia, Fairfield County and Kershaw County each separately resolved their claims against Prisma Health in an undisclosed manner and dismissed their lawsuits, leaving Lexington as the only remaining petitioner questioning the legality of Prisma Health's proposal as approved by DHEC. LifePoint moved to intervene in the contested case proceeding, which Judge Anderson allowed on a restricted basis.

After engaging in limited written discovery, Prisma Health and Lexington filed cross motions for summary judgment, asking Judge Anderson to dispose of the case as a matter of law. Those cross motions led to Judge Anderson's November 2nd Order and his conclusion that the asset purchase agreement by which Prisma Health would acquire the Providence and KershawHealth assets from LifePoint was not a "cooperative agreement" under the COPA Act, and further that Prisma Health could not use the Richland/Baptist COPA to acquire the assets. Prisma Health and LifePoint both asked the Court to clarify the finality of its Order, which denied the cross-motions yet left no unresolved disputed issues for trial, and Prisma Health also sought reconsideration of the decision on several grounds. Lexington agreed that the Order was dispositive of the contested case but opposed the reconsideration sought by Prisma Health. On December 7, 2020, Judge Anderson clarified his November ruling and its finality in favor of Lexington, and considered but rejected Prisma Health's grounds for reconsideration.

Shortly thereafter, Prisma Health noticed its appeal to the South Carolina Court of Appeals, as did LifePoint. As it did before Judge Anderson, Prisma Health sought expedited treatment of the appeal in a request to the South Carolina Supreme Court for certification, which the Supreme Court similarly denied earlier this month. Prisma Health has now filed a third such request with the Court of Appeals, yet again claiming an urgency to consummate its purchase of the competing hospital assets but little to now details shared with the general public or affected persons. While it is unclear what path the appeal will take, what is clear is that the hospital industry in South Carolina is in a state of rapid consolidation that will leave South Carolinians with fewer and fewer choices in hospital providers.