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# Certificate of Need (CON) Law Series Part III: CON and the Changing Landscape of Healthcare

The four-part *HC Topics Series: CON Law* will provide an in-depth examination of Certificate of Need (CON) programs and their impact on the healthcare industry. The first installment provided an overview of states' CON programs and the history of their development, and Part II discussed the current state of CON regulations. Part III evaluates CON programs against the changing landscape of the healthcare industry, and Part IV will examine the impact of the *Patient Protection and Affordable Care Act (ACA)* on CON programs.

Last month's installment of the *HC Topics Series: CON Law* discussed the current state of CON programs across the country and how, despite evidence that such regulations are ineffective at controlling healthcare costs, most states still restrict the supply of at least some healthcare facilities, technologies, and services. In addition to cost-control justifications, proponents of CON regulations argue that these restrictions help many facilities cross-subsidize care to indigent patients, as well as promote quality and access to care.[1] However, changes to the healthcare industry with respect to provider reimbursement and healthcare delivery may have fundamentally altered markets, at least partially invalidating these justifications and potentially transforming CON regulations into competitive barriers to entry that do more harm than good. This month's installment will explore the relationship between CON programs and the changing landscape of the healthcare industry.

When CON laws originated, the primary driver was the "*cost-plus*" form of reimbursement utilized by the federal government and private payors, by which providers were incentivized to unnecessarily expand in exchange for greater reimbursement, thereby increasing healthcare costs in the process.[2] CON laws were intended to correct for this problem and stem the "medical arms race" that had ensued.[3] However, the adoption of the Medicare inpatient prospective payment system (IPPS) in the 1980s eliminated the reimbursement incentive for providers to expand, and the market forces of managed care in the 1990s played a significant role in correcting for excess capacity.[4] The *National Health Planning and Resources Development Act* of 1974, which had made federal Medicaid funds contingent on states' implementation of CON programs, was repealed in 1986, eliminating an additional financial and regulatory justification for these restrictions.[5] As provider reimbursement shifts away from volume-based, fee-for-service (FFS) mechanisms toward value-driven forms, some CON proponents believe these restrictions will be less necessary moving forward.[6]

In addition to the argument that CON programs are no longer necessary to or effective at controlling costs, there is a growing consensus that these restrictions actually drive up the cost of healthcare instead. Incumbent providers are protected from the competition that new entrants would bring, and as a result, these providers are not incentivized to lower costs or deliver more efficient care, and the exclusion of new competitors from a market keeps the supply of healthcare facilities and services below a competitive level.[7] Many proponents argue that CON restrictions in lucrative healthcare service markets allow incumbent providers to realize profits by which they can cross-subsidize indigent patients' care, and some have observed that *"this method of financing indigent care may be preferred by legislators who do not want to face the political consequences of raising taxes to pay for the service[.]"*[8] However, evidence suggests that the protection of this ability to cross-subsidize may be unnecessary, as new competition does not impede community hospitals in the fulfillment of their charitable missions.[9] This is largely due to the fact that specialty hospitals, long known for their "cherry picking" of more favorably reimbursed procedures, are generally emerging in geographic areas where they are competing for *new* patients (attributable to population growth), rather than luring existing patients away from community hospitals.[10]

Although CON proponents argue these restrictions enhance access and quality, the exclusion that results from CON regulations may also keep competitors who can provide higher quality services or more innovative technology from entering markets, which in turn negatively impacts consumers' access to care and quality of care received.[11] Additionally, the length of CON application and appeal processes can delay the adoption of advanced technology, which limits patient choice and can also negatively impact some providers' ability to recruit specialist physicians.[12] Though the effect of CON regulations on *quality* of care is highly debated, there is some evidence to suggest that these restrictions may have the potential to improve *access* to care for underserved populations.[13] However, the Department of Justice (DOJ), one of the two federal


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agencies responsible for protecting and promoting competition in the healthcare industry, contends that these objectives can also be achieved through means that do not restrict competition.[14]

From the provider perspective, hospitals tend to view CON restrictions favorably when they serve to exclude physician-owned facilities from entering a market, but may take steps to circumvent the CON application process where their own expansion is concerned.[15] Hospitals may shift their growth into areas that escape their respective state's regulation or limit their capital expenditures to avoid the threshold that triggers CON review.[16] In contrast, most physicians are opposed to CON programs, particularly in the context of for-profit facilities, and medical societies commonly support the repeal of CON regulations.[17] In addition to increasing the cost of healthcare services, many providers agree that the expenses related to the CON application process significantly increase the costs of capital projects.[18]

In 2004, the Federal Trade Commission and the Department of Justice (the Agencies) issued a joint report recommending states examine their CON programs and *"reconsider whether these programs best serve their citizens' health care needs."*[19] Since that time, the Agencies have continued to advocate that states consider reforming or eliminating these barriers to entry, and recent litigation as to the constitutionality of these restrictions suggests the era of CON regulation may be nearing an end.[20] Next month's installment of the *CON Law Series* will consider the impact of the *Patient Protection and Affordable Care Act (ACA)* on CON programs.

- "Certificate of Need (CON) Law Series: Part I - A Controversial History," Health Capital Topics Newsletter, Vol. 5, No. 9, September 2010.
- "Certificate of Need (CON) Law Series Part II of IV: The Current State of CON Programs Across the County," Health Capital Topics Newsletter, Vol. 5, No. 10, October 2012.

1 "Competition in Healthcare and Certificates of Need" By Mark J. Botti, U.S. Department of Justice, Statement Before a Joint Session of the Health and Human Services Committee of the State Senate and the CON Special Committee of the State House of Representatives of the General Assembly of the State of Georgia: Washington, DC, February 23, 2007, p. 6; "Improving Health Care: A Dose of Competition" A Report by the Federal Trade Commission and the Department of Justice, July 2004, Chapter 8, p. 3.

2 "Competition in Healthcare and Certificates of Need" By Mark J. Botti, p. 5.

3 Ibid.

4 Ibid, p. 5-6; "Health Care Certificate-of-Need Laws: Policy or Politics?" By Tracy Yee et al., National Institute for Health Care Reform, Research Brief No. 4 (May 2011), p. 7.

5 "Competition in Healthcare and Certificates of Need" By Mark J. Botti, p. 6; "Physicians Sue over Long-Standing Certificate-of-Need Mandate" By Alicia Gallegos, American Medical News, June 25, 2012, http://www.ama-assn.org/amednews/2012/06/25/gvsc0625.htm (Accessed 11/19/12).

6 "Health Care Certificate-of-Need Laws: Policy or Politics?" By Tracy Yee et al., National Institute for Health Care Reform, Research Brief No. 4 (May 2011), p. 7.

7 "Improving Health Care: A Dose of Competition" A Report by the Federal Trade Commission and the Department of Justice, July 2004, Chapter 8, p. 4.

8 Ibid., p. 6-7; "Certificate-of-Need Deregulation and Indigent Hospital Care" By Ellen S. Campbell and Gary M. Fournier, Journal of Health Politics, Policy and Law, Vol. 18, No. 4, Winter 1993, p. 910-11, 912-13, 905.

9 "Competition in Healthcare and Certificates of Need" By Mark J. Botti, p. 7.

10 Ibid.

11 "Improving Health Care: A Dose of Competition" FTC and DOJ, Chapter 8, p.4; "Health Care Certificate-of-Need Laws: Policy or Politics?" By Tracy Yee et al., National Institute for Health Care Reform, Research Brief No. 4 (May 2011), p. 5, 7.

12 "Health Care Certificate-of-Need Laws: Policy or Politics?" By Tracy Yee et al., p. 5, 7.

13 Ibid., p. 6.

14 "Competition in Healthcare and Certificates of Need" By Mark J. Botti, p. 2.

15 "Health Care Certificate-of-Need Laws: Policy or Politics?" By Tracy Yee et al., p. 4, 5.

16 Ibid., p. 5.

17 Ibid.

18 "Health Care Certificate-of-Need Laws: Policy or Politics?" By Tracy Yee et al., p. 7; "Physicians Sue over Long-Standing Certificate-of-Need Mandate" By Alicia Gallegos.

19 "Improving Health Care: A Dose of Competition," FTC and DOJ, p. 22.

20 "Competition in Healthcare and Certificates of Need" By Mark J. Botti, p. 2, 10; "Physicians Sue over Long-Standing Certificate-of-Need Mandate" By Alicia Gallegos.



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Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious "*Shannon Pratt Award in Business Valuation*" conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS).

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