

### **Certificate of Need (CON) Law Series Part IV: The Impact of the Affordable Care Act on CON**

The four-part *HC Topics Series: CON Law* provides an in-depth examination of Certificate of Need (CON) programs and their impact on the healthcare industry. The first installment provided an overview of state CON programs and the history of their development, Part II discussed the current state of CON regulations, and Part III evaluated CON programs against the changing landscape of the healthcare industry. The final installment, Part IV, examines the impact of the *Patient Protection and Affordable Care Act (ACA)* on CON programs and discusses implications for provider competition in the healthcare industry.

In recent decades, the theory that CON restrictions can effectively control healthcare costs has been largely discredited and the federal agencies tasked with monitoring competition in healthcare have discouraged the use of such restrictions, yet state laws in this area remain relatively unchanged.<sup>1</sup> The ACA created a number of programs and payment system reforms that are likely to fundamentally alter the healthcare delivery system, however, no provision of the ACA served to displace state-level restrictions on competition.<sup>2</sup> Although their views on the ACA's likely impact on competition vary widely, industry and government experts agree that the removal of CON restrictions may likely enhance competition.<sup>3</sup>

Several industry scholars have commented on the effects of highly concentrated healthcare markets, which have shown a correlation to higher prices. Both the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have taken the position that CON programs "...can actually increase prices by fostering anticompetitive barriers to entry."<sup>4</sup> However, the ACA does not explicitly address the problems posed by CON restrictions; rather, it contains provisions designed to stimulate competition in other ways. *Accountable Care Organizations (ACO)* and *Medical Home* models encourage collaboration and clinical integration among providers, and the payment mechanisms for these programs incentivize provider consolidation.<sup>5</sup> ACOs have been touted as an effective way to control costs, however, experts point out that consolidation under certain circumstances has resulted in significant price increases, and accordingly the FTC has implemented some policies for ACOs to monitor for anticompetitive effects.<sup>6</sup> Because these arrangements typically involve

existing facilities and services, many CON restrictions will not be implicated. In states that regulate capital expenditures, however, the CON process may be unavoidable.

In contrast to the potential procompetitive effects that ACOs may produce, another part of the ACA narrows competition to some extent. Section 6001 of the Act places new restrictions on physician-owned specialty hospitals (POH), defined as entities that are at least partially owned by physicians and that limit their services to certain surgical procedures or specialties, e.g., cardiac or orthopedic care.<sup>7</sup> Most of these hospitals exist in states without CON laws, and have often been preferred over traditional hospitals by physicians and patients.<sup>8</sup> The ACA provision amends the *whole-hospital exception* to the Stark Law, and prohibits existing POH facilities from increasing the number of beds, procedure rooms, and operating rooms permitted by the hospital's licensure unless they satisfy fairly stringent requirements.<sup>9</sup> Critics have argued that this prohibition effectively imposes a federal CON requirement and that its application may "...virtually destroy over 60 hospitals" under development, as well as inhibit any growth by existing facilities.<sup>10</sup> Proponents of Section 6001 assert it will help restrain the entrepreneurial approach to medicine that has evolved over time. Regardless of its merits, this ACA provision objectively operates to restrain competition.<sup>11</sup>

Many aspects of the ACA are explicitly designed to promote competition, but none of its provisions effectively counteract the effects of state CON programs in their respective healthcare markets.<sup>12</sup> Experts on competition policy assert that measures to reduce barriers to entry, e.g., the removal of CON restrictions, are still needed to address the issue of excessive market power by providers in highly concentrated markets.<sup>13</sup> Ultimately, states remain free to enforce their CON regulations on providers seeking to enter or expand their presence in various healthcare markets, and so providers should anticipate continued difficulty in states with such restrictions.

1 "Hospital Certificate-of-Need Controls: Impact on Investment, Costs, and Use" By David S. Salkever & Thomas W. Bice, American Enterprise Institute for Public Policy Research, Washington, D.C., 1976, p. 73, 75; "Duplicated Hospital

- Facilities: How Much Can We Save by Consolidating Them?” By Williams B. Schwartz & Paul L. Joskow, *New England Journal of Medicine*, Vol. 303, No. 25 (1980), p. 1455; “The Effect of State Certificate-of-Need Laws on Hospital Costs: An Economic Policy Analysis” By Daniel Sherman, To: Federal Trade Commission Washington, DC: FTC, 1988, p. iv,58; NCSL, 2012; “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, July 2004, Chapter 8, p.1-2.
- 2 “Health Care Act Oversight” Statement by Thomas L. Greaney before the House Judiciary Subcommittee on Intellectual Property, Competition and the Internet, Washington, DC: May 18, 2012.
  - 3 *Ibid.*
  - 4 *Ibid.*; “The Provider Monopoly Problem in Health Care” By Clark C. Havighurst and Barak D. Richman, *Oregon Law Review*, Vol. 89 (2011), p. 850-51; “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, July 2004, p. 22.
  - 5 *Ibid.*
  - 6 *Ibid.*
  - 7 “An Obituary for Physician-Owned Specialty Hospitals” By Joshua E. Perry, *Health Lawyer*, Vol. 23, No. 2, December 2010; “Physician-Owned Specialty Hospitals and the Patient Protection and Affordable Care Act: Health Care Reform at the Intersection of Law and Ethics” By Joshua E. Perry, *American Business Law Journal*, Vol. 49, No. 2, June 2012, p. 384.
  - 8 Perry, Joshua E., June 2012, p. 385, 408, 413-14.
  - 9 *Ibid.*
  - 10 *Ibid.*; Perry, Joshua E., December 2010.
  - 11 Perry, Joshua E., June 2012, p. 402.
  - 12 Greaney, Thomas L., May 18, 2012.
  - 13 *Ibid.*



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