

Certificates of Need: Why Limit Competition?

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What is a Certificate of Need?

- A “CON” is a permit issued by a state regulatory authority allowing a new health care service or facility upon an adequate showing of unmet need



Why does the Antitrust Division Care About Certificate of Need Regulation?

- Antitrust law regulates the competitive process. Competition produces consumer welfare; artificial restrictions on the competitive process reduce consumer welfare
- Certificates of Need limit competition – that's their purpose.



Agency Expertise in Health Care Markets

- *Improving Health Care: A Dose of Competition* (2004)
 - Report based on weeks of hearings, testimony from 250 panelists, etc. collecting views on all aspects of health care competition
- Case Work: FTC and DOJ investigate and litigate in health care markets
- Competition advocacy before state boards and legislatures



Antitrust Division's Views on CONs

- CONs create barriers to entry and expansion to the detriment of the competitive process and consumers
- CONs undercut consumer choice, stifle innovation, weaken the market's ability to contain health care costs, reduce pressure on incumbents to improve service



Premise for my Argument

- Market forces tend to improve quality, lower costs, drive innovation.
 - Example: ambulatory surgery centers increase consumer choice, shorter wait times, lower coinsurance, etc. *Forced improvements in traditional acute care hospitals.*
- Health care markets respond to market forces.
 - Health care is “different” has been rejected by the courts, same argument rejected for doctors and engineers



Original Reasons for CONs no Longer Apply

- National Health Planning and Resources Development Act of 1974
 - Encouraged states to implement CON programs
 - Cost plus reimbursement was prevalent at the time, incentives to over-invest, driving up costs
- Repealed in 1986
 - Cost plus not typical today – negotiation between payors and providers the norm
- CONs failed in their intended purpose of controlling costs



Examining the Current Arguments for CONs

- CONs as a tool to cross-subsidize care: protect acute care hospital's market power so it can use extra revenues for charity care, emergency rooms, etc.
 - Effectively taxing consumers who demand lower cost more convenient care
 - more efficient to get the benefits of competition, achieve social goals directly at lower cost
 - Does it work? Does the extra revenue go toward charity care, emergency rooms, etc?
 - Removes incentives for acute care hospital to improve – the competitive process at its best



Examining current arguments in favor of CONs (cont'd)

- CONs facilitate health and safety regulatory functions of state government
 - Same response – more efficient to achieve those goals directly and let competition provide benefits to consumers
 - Congress has set the policy: competition in health care is good. States can meet health and safety goals in a way that minimizes damage to the competitive process



CONs Can be Abused by Incumbent Firms – Rent Seeking

- Exploit the regulatory process to delay or thwart entry to protect market power
 - Use the process itself to delay new competing facilities by years through frivolous filings
 - Example: Proton Beam Therapy in Michigan
- Use the CON process to facilitate illegal agreements, then get the state agency's to “blessing”
 - Recent examples: illegal market allocations in West Virginia, Vermont; use threat of CON hold up to induce agreement to locate hospital where it would not be as competitive with existing hospital



Questions?

