

Fierce battles are underway regarding Kentucky's certificate of need laws and, especially, the exemption for "the private offices and clinics of physicians, dentists, and other practitioners of the healing arts."

Physicians across Kentucky have added to their existing office practices, and have included in new offices they have established, a wide range of ancillary services including (but by no means limited to) MRI and CT imaging, physical therapy, and lab services. They don't believe they need certificates of need from the Kentucky Cabinet for Health and Family Services.

Hospital organizations have initiated show cause hearings structured to impose on physicians the burden of showing that they are entitled to the CON exemption. The hospitals have argued that physicians providing or proposing to provide MRI and other ancillary services do not satisfy the exemption for various reasons, such as - the physicians are not in the office a sufficient amount of time each month . . . the physicians are not the true owners of the office because of their arrangements with various lessors or service providers . . . the physicians in the ownership group are contracting for interpretive services with other physicians who are not owners of the office.

The hospitals are concerned that a broadly construed practitioner exemption would reduce the certificate of need law to a practical nullity when physicians are the nominal owner of the facility or service in question.

Physicians have argued in response that the exemption statute is broad. It states that nothing in Kentucky's CON laws authorizes the Cabinet for Health and Family Services to regulate, supervise, or control physician offices in any way. Physicians are subject to a myriad of federal and state self-referral restrictions, coding and billing rules, and other regulations and limitations that deal with MRI services and other ancillary services physicians may choose to offer. The CON exemption language is clear. Kentucky's General Assembly did not intend to add a new layer of physician regulation in the CON laws. The only exception is a clearly stated dollar ceiling on major medical equipment physicians may employ. By providing for the ceiling, the General Assembly clearly intended that physicians could add MRI equipment and

other major medical equipment below the ceiling amount.

Several show cause cases have passed from administrative law judges to the Franklin Circuit Court. At the same time, the Cabinet for Health and Family Services has announced that it is undertaking a review of the entire CON system, including the practitioner office exemption.

As our judicial and executive branches tackle these questions, they should consider the following facts:

The Federal Government required all States to pass CON laws through the National Health Planning and Resources Development Act of 1974 and related regulations. The mandate was part of a federal effort to use federal grant funds wisely and reduce, or at least control, the total costs of health care in America.

In 1986, Congress repealed the federal CON mandate. It apparently was unable to find evidence that state CON laws control costs.

The first of Kentucky's CON statutes, KRS 216B.010, states that the General Assembly has found that:

. . . the proliferation of unnecessary health-care facilities, health services, and major medical equipment results in costly duplication and underuse of such facilities, services and equipment; and that such proliferation increases the cost of quality care within the Commonwealth.

As the Courts and the Cabinet address Kentucky's CON laws, they should get answers to the following questions:

1. What is the factual basis for the General Assembly's finding? What data support the idea that CON laws control health care costs? Was the Federal Government wrong in finding in 1986 that State CON laws do not control costs?

2. Are Kentucky's CON laws serving their announced purposes? If they have another purpose, what is it? If the effect of a law is to reduce or eliminate competition to a substantial degree, should not the lawmakers issue written findings supporting the lawful purpose of their enactment?

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