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Getting Conned by CONs

Wednesday, October 8th, 2014 by [Allen Mendenhall](#) posted in [Health Care](#).



In the healthcare industry, a certificate of need, also known by the acronym CON, is an anticompetitive licensing restriction allegedly designed to promote fair competition by requiring hospitals to demonstrate the need for certain projects and services in order to receive governmental permission for those projects and services.

Under a CON scheme, a hospital--let's call it Hospital X--that wishes to expand its facilities applies to a state health planning agency for a CON. Nearby hospitals--perhaps Hospital X's competitors, Hospital Y and Hospital Z--may oppose Hospital X's CON application. An administrative law judge (ALJ) reviews Hospital X's CON application and supporting evidence, holds a hearing on the matter, evaluates the parties and witnesses, and determines whether Hospital X has met the statutory criteria for the issuance of a CON. These criteria differ from jurisdiction to jurisdiction.

The ALJ's decision may then be appealed to some higher body within the state health-planning agency. That body's decision may in turn be appealed to a court of first instance or a trial court within the state judiciary. Now that the matter is within the judicial branch of government and not within a state agency, it can be appealed all the way up to the state's highest appellate court.

This lengthy, expensive, and complex process is said to benefit consumers by placing hospitals under governmental supervision and to benefit hospitals by maintaining an equilibrium of regulated competition. In practice, however, CONs have the opposite effect: they harm consumers by increasing healthcare costs and hamstringing hospitals by necessitating vast expenditures on lawyers, litigation, and bureaucratic fees and paperwork.

CONs also suppress entrepreneurship by regulating all aspects of hospitals from the



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number of beds to the purchase of new equipment to the construction of new wings or parking lots. A struggling hospital that plans to relocate to a nearby highway or to a convenient thoroughfare (where access to hospital facilities would be easier and emergency response-time would be faster) cannot simply close down its current building and move; it must apply for the privilege of moving, its competitors must have a chance to oppose the move, and it must submit construction designs and, *inter alia*, proposed business plans for the new facilities.

This process does not generate competition; it creates barriers to needed change, restricts access to equipment and technology, transforms hospitals into political machines mobilized by wealthy lobbying operatives, delays the construction of new facilities, and impedes the free flow of goods and services to consumers. Some hospitals abuse this system by filing CON applications for facilities or services that, in fact, are not necessary, anticipating that one day such facilities or services might become necessary. Other hospitals under a CON regime will file frivolous CON applications to force their competitors into expensive legal battles.

As a matter of course, most hospitals seeking CONs oppose every CON application filed by a competitor. The CON regime thereby causes hospitals to turn their focus away from patients and toward the political arena, seeking the favor of politicians and government proxies within state health planning agencies rather than keeping costs low and the quality of services high.

Several states have realized the benefits of doing away with their CON schemes. The case of Texas is illustrative. Texas established the Texas Health Facilities Commission in 1975 to administer the state's CON program and to promulgate rules and regulations regarding CON services. That commission was abolished in 1985. The CON program was terminated that same year. The Texas healthcare industry has since become a rapidly growing industry. Although far from a free market, the conditions of the healthcare industry in Texas suggest that the regulatory impacts of CONs were detrimental and subversive of the legislative goals that facilitated CONs to begin with.

CON regimes are predicated on the faulty assumption that healthcare facilities and management cannot be left to the operation of free markets. The actual administration of CONs, however, proves something different: the freer the healthcare market, the more benefits there are for both consumers and hospitals. CONs increase the costs of healthcare and force hospitals to spend money that could and should be put to better use. CONs stifle innovation and undercut competition; they make life tougher and more expensive for those whom hospitals are meant to protect: the patients.

More than half of the states in the United States remain under CON regimes. As more and more states begin to realize the burdens and costs that CON laws create, the more state legislatures will begin repealing their CON laws. This is one area of policy in which even semiliterate politicians seem to be coming to their senses and acknowledging the superiority of the market-based approach. There is still, of course, a long way to go.

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