

POLICY NOTE

Why Washington's restrictive Certificate of Need medical services law should be repealed

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Key Findings

1. *Government officials passed Certificate of Need (CON) laws to control the number of health care facilities in a specific geographic area and hopefully to control health care costs.*
2. *Congress found the federal CON law to be a failure and in 1987 repealed it. Fourteen states have subsequently repealed their state laws. Washington state has not.*
3. *State-level CON laws protect favored interests from normal competition and deprive patients of access to health care choices.*
4. *Studies show that CON laws increase the cost and decrease the access to health care.*
5. *Washington state officials should repeal our CON law.*

Introduction

Medical Certificate of Need (CON) laws have existed since the mid-1960s. They are a classic example of government intervention and central-planning of the health care delivery system. Their stated purpose is to hold down costs and at the same time provide more charity care. They operate by requiring doctors, hospitals and clinics to receive government permission before providing more health care services in a given region. Thirty six states, including Washington, have CON laws.

History

New York state passed the first CON law in 1966. Businesses, insurers, consumers and providers came together to study the need for additional hospital beds. The group determined there was a surplus of beds and recommended state officials restrict further hospital expansion with special legislation.¹ The law made it illegal to add beds to an existing hospital or to treat patients in a new facility without first gaining permission from state officials.

The federal government became involved in 1972 when Congress amended the Social Security Act to require all states to review new health care construction projects that exceeded \$100,000 in value. Failure to comply with this rule would result in the federal government withholding Medicare and Medicaid money from the offending state.

In 1974, because of exploding costs in health care, Congress passed the National Health Planning and Resource Development Act (NHPRDA). This law established a comprehensive federal health care CON regulation, with the penalty for a state's non-compliance being forfeiture of federal Medicare and Medicaid dollars.²

The policy goals of NHPRDA were two fold – to limit the number of health care facilities available to patients in a specific geographic area and,

1 "Certificate of Need: State health laws and programs," National Conference of State Legislatures, September, 2015 at <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>

2 National Health Planning and Resources Development Act (NHPRDA) of 1974, Section 2(a)(1), see Public Law 93-641.

because of more volume and higher payments directed to existing facilities, provide more charity care at those hospitals and clinics allowed to operate in an exclusive area.

States were encouraged to establish their own CON programs and all 50 states complied.

By 1982, however, the federal government realized the national CON law was not saving money, but was restricting care and limiting available health services for patients. No increase in charity care occurred. Recognizing this failure, Congress repealed the federal law in 1987 and subsequently 14 states repealed their individual CON laws. Washington state is one of 36 states that retained its CON law and maintains it today.³

CON law in Washington state

The CON process is controlled by the Washington State Department of Health. Here are the specifics from its website:⁴

Program Overview

The Certificate of Need program is a regulatory process that requires certain healthcare providers to get state approval before building certain types of facilities or offering new or expanded services.

The Certificate of Need process is intended to help ensure that facilities and new services proposed by healthcare providers are needed for quality patient care within a particular region or community.

Basically, a CON review is required for any new medical facility or any addition of treatment capacity of an existing hospital or clinic. For example, a new hospital or the addition of licensed beds at an existing hospital requires CON approval.

A CON is also required if an existing facility wants to add a specialized treatment service such as heart surgery or organ transplantation.

Specific details can be found on the Washington State Department of Health website under “Certificate of Need.”

In 2015, the Department conducted 31 Determinations of Reviewability and 38 Certificate of Need Evaluations. There is carryover from year to year, but these numbers are representative of activity over the past few years.

3 “Certificate of Need: State health laws and programs,” National Conference of State Legislatures, September, 2015 at <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>.

4 “Certificate of Need,” Washington State Department of Health at <http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/CertificateofNeed/DecisionsandEvaluations> accessed on January 20, 2016.

Recent CON repeal bills introduced in Washington state

A number of bills to repeal or modify the CON process were introduced in the past six legislative sessions in Washington state. Following is a brief summary of these proposed bills.

2011-2012 Sessions

- SB6054 – Eliminating the CON limitations, except for hospitals.
- SB5340 – The CON must be denied if the proposal is likely to promote unnecessary, excessive utilization of a service in a geographic area, as defined by state regulators.

2013-2014 Sessions

- SB5017 – Eliminating the CON limitations, except for hospitals. This bill was subsequently amended to eliminate the CON limits for nursing homes only.
- SB5586 – Extend the CON review process to the “full range of medical services,” including abortions and assisted suicide.

2015-2016 Sessions

- HB1357 – Eliminate the CON limits for kidney disease treatment centers.
- HB2099 – Eliminate the CON limits for kidney disease treatment centers in rural counties.
- SB5149 – If a third party appeals a CON approval and the appeal is denied, the third party is responsible for attorney fees and any costs associated with delay in new hospital construction.
- HB2212/SB6086 – Exempting hospitals that receive capitol funds to operate new involuntary psychiatric services from CON requirements.

To date, HB2212/SB6086 is the only CON-related bill that has been passed by the legislature and signed into law.

Policy analysis

The argument in support of the Certificate of Need concept was that the federal government, through Medicare and Medicaid, has paid for health care in the U.S., and this funding, in turn, gave the government the justification to limit the expansion of the health care system through CON laws. The CON limits, however, artificially create monopolies and restrict access to health care for patients, leading to Congress’s repeal of the national CON law in 1987.

Certificate of Need limits still restrict access for patients, however, in states like Washington that still have these laws in force. Over 60 percent of all Americans do not have government-paid health insurance, yet CON laws have an adverse effect on everyone.

The evidence is now clear that CON laws increase the cost of health care. Researchers Stratmann and Russ at George Mason University found that lack of normal competition raised the price of medical care and reduced the availability of hospital beds and medical equipment.⁵ An earlier study found almost a 14 percent increase in per patient health care costs in states with CON laws.⁶ The Kaiser Family Foundation reported that health care costs are 11 percent higher overall in states with CON laws compared to states without the restrictive law.⁷

Over the decades, at both the federal and state levels, there has been no evidence that CON laws increase the availability of charity care.⁸

The following is a direct quote from the Department of Justice and the Federal Trade Commission when the agencies commented on Virginia's CON law repeal on October 26, 2015:⁹

“The evidence suggests that certificate-of-need laws have not served consumers well...They raise the cost of investment in new health care services and can shield incumbents from competition that would benefit consumers and lower costs. By reexamining the certificate-of-need process state policymakers have an opportunity to invigorate competition in this important sector, to the benefit of patients, employers and other health care consumers.”

The federal review also raised important questions about how state CON laws encourage cronyism and favoritism in selecting who is allowed to legally provide care for patients:

“Incumbent providers may use CON laws when seeking to stop or delay entry by new competitors. CON laws can also deny consumers the benefit of an effective remedy for antitrust violations and can facilitate anticompetitive agreements.”

Conclusion

With 50 years of real-world experience, the evidence is now clear that neither federal or state-level CON laws reduce health care costs. They do, however, reduce patient access to care.

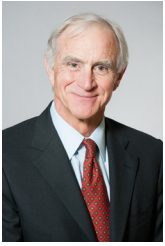
5 “Do certificate of need laws increase indigent care?,” by T. Stratmann and J. Russ, Mercatus Center, George Mason University, July, 2014 at <http://mercatus.org/sites/default/files/Stratmann-Certificate-Need.pdf>.

6 “Endogenous hospital regulation and its effects on hospital and non-hospital expenditures,” by J. Lanning, et. al., *Journal of Regulatory Economics*, June, 1991 at <http://link.springer.com/article/10.1007%2FBF00140955>.

7 “Health care expenditures per capita by state of residence,” The Henry J. Kaiser Family Foundation, 2009 at <http://kff.org/other/state-indicator/health-spending-per-capita/>.

8 “Do certificate of need laws increase indigent care?,” by T. Stratmann and J. Russ, Mercatus Center, George Mason University, July, 2014 at <http://mercatus.org/sites/default/files/Stratmann-Certificate-Need.pdf>.

9 “Department of Justice and Federal Trade Commission support reform of Virginia laws that curb competition, limit consumer choice and stifle innovation for health care services,” Justice News, The United States Department of Justice, October 26, 2015 at <http://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-support-reform-virginia-laws-curb-competition>.



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Congress repealed the federal CON law, finding it to be a failure. States without CON laws provide high-quality care to patients at no greater average costs than other states. Defenders of the remaining states with CON laws seem to place a desire to maintain government control over the health care system above the concerns of patients to have ready access to care.

As more patients use high-deductible health insurance plans and thereby use more of their own money, they should have more choices and better access to health care. Expanded access, increased price competition and greater medical choice would serve the public interest by allowing new health care services to be provided in communities where they are needed most. Washington's CON law has not achieved its original purpose, but it does serve to protect favored interests from normal market competition at the expense of health care consumers. For these reasons, the bureaucratically-restrictive and long-outdated CON law in Washington state should be repealed.