Certificate of need: Evidence for repeal

Certificate of Need (CON) laws have failed to achieve their intended goal of containing costs.

- "There is little evidence that CON results in a reduction in costs and some evidence to suggest the opposite."[1]
- "Certificate of need has attracted many empirical studies. They find virtually no cost containment effects. However, they do show higher profits and restricted entry by for-profit hospitals, hospital systems, and contract management firms."[2]
- "The rather exhaustive literature on CON yields virtually no evidence that is has controlled health care costs. However, it has kept hospital "profits" high and restricted the entry of new hospitals, hospital systems, and contract management firms."[3]
- "The weight of the research evidence shows that CON has not restrained overall per capita health care spending."[4]
- "Not only have CON laws been generally unsuccessful at reducing health care costs, but they also impose additional costs of their own."[5]

CON laws may increase costs.

- "CON laws had a positive, statistically significant relationship to hospital costs per adjusted admission. Findings suggest not only that CON do not really contain hospital costs, but may actually increase them by reducing competition."[6]
- "[F]or the most resource intense diagnoses that account for the greatest amount of resources, increased CON rigor is associated with higher costs."[7]
- "Across all markets, states ranked as having the most rigorous CON regulation (tier 2) have statistically significantly less competition than non-CON states. […] Lower levels of competition are associated with higher costs."[8]

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[1] Christopher J. Conover & Frank A. Sloan, *Evaluation of Certificate of Need in Michigan*, Center for Health Policy, Law & Management., Duke University (May 2003).
[2] Michael A. Morissey, *State Health Care Reform: Protecting the Provider, in* American Health Care: Government, Market Processes, and the Public Interest 243-66 (Roger D. Feldman ed., Transaction Publishers 2000).
[3] *Id*.
[4] Washington State Joint Legislative Audit and Review Committee, Effects of Certificate of Need and Its Possible Repeal iii, 6-10 (1999).
[5] Federal Trade Commission & Department of Justice, Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform (Sept. 15, 2008).
[6] Patrick A Rivers, Myron D. Fottler & Mustafa Z. Younis, Abstract, *Does Certificate of Need Really Contain Hospital Costs in the United States?* 66 Health Education Journal 3, 229-44 (Sept. 2007).
[7] Center for Health Services Research, Georgia State University, Report of Data Analyses to the Georgia Commission on the Efficacy of the CON Program 7-9 (Oct. 2006).

- "The [CON] mechanism serves to prevent or delay the entry of new sources of supply. The empirical evidence suggests that as a result of CON, hospital costs are no lower and may be higher. Prices are higher."[9]

- "At a minimum, it seems fair to conclude that direct CON effects on costs are not negative"[10]

CON laws are anticompetitive and a barrier to entry.

- "CON acts as an artificial barrier to entry stifling competition and innovation in the healthcare market. The onerous cost and process of undergoing CON review has a distinct chilling effect on those seeking to undertake modernization, specialization and efficiency in healthcare."[11]

- "CON regimes prevent new health care entrants from competing without a state-issued [CON], which is often difficult to obtain. This process has the effect of shielding incumbent health care providers from new entrants. As a result, CON programs may actually increase health care costs, as supply is depressed below competitive levels."[12]

- "CON may have increased costs because it protected incumbent organizations from the competition of new entrants into the market."[13]

CON laws are susceptible to abuse by creating opportunities for anticompetitive behavior.

- "CON programs risk entrenching oligopolists and eroding consumer welfare."[14]

- "[W]hen there is no price competition [because of the existence of CON], there is no incentive to reduce costs for the existing facilities nor is there incentive to improve the quality of care. Not only does this lead to higher healthcare costs but it also limits patient choice."[15]

- "CON has taken on particular importance as a way to claim territory."[16]

- "Hospitals also cited tracking CON applications as a way to "keep tabs" on competitors and block new entrants."[17]

- "[The] "haves" – hospitals with significant market share and resources – use the CON process to prevent outsiders from entering the state entirely."[18]

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[8] *Id*.
[9] Morissey, *supra* note 2.
[10] David S. Salkever, *Regulation of Prices and Investment in Hospitals in the United States, in* Handbook of Health Economics 1527 (Culyer & Newhouse eds., Elsevier Science vol. 1B, 2000).
[11] Senate Interim Committee on Certificate of Need, State of Missouri, Report of the Senate Interim Committee on Certificate of Need 13-14 (Dec. 2006).
[12] Federal Trade Commission & Department of Justice, Improving Healthcare: A Dose of Competition (July 2004).
[13] Joyce A Lanning, Michael Morrisey & Robert L Ohsfeldt, *Endogenous Hospital Regulation and its Effects on Hospital and Non-Hospital Expenditures*, 3 Journal of Regulatory Economics 2, 137-54 (1991).
[14] FTC & DOJ, *supra* note 12.
[15] State of Missouri, *supra* note 12.
[16] Tracy Yee et al., *Health Care Certificate-of-Need Laws: Policy or Politics?* Research Brief 4, National Institute for Health Care Reform (May 2011).
[17] *Id*.

- "[H]ospitals initially had mixed views about the benefits of CON but banded together to support the process after realizing it was a valuable tool to block new physician-owned facilities."[19]

CON programs can impede patient choice.

- "Curtailing [of] services or facilities may force some consumers to resort to more expensive or less-desirable substitutes, thus increasing costs for patients or third-party payers."[20]

- "In some instances, CON rules are used to restrict access by preventing the development of new facilities."[21]

- "[O]btaining CONs for new technology may take upward of 18 months, delaying facilities from offering the most-advanced equipment to patients and staff. Such issues also reportedly affect providers' ability in some states to recruit top-tier specialist physicians."[22]

- "CON appears to improve inner city access at the expense of access in suburban areas, hence elimination of CON could create financial difficulties absent an alternative mechanism […] that would more equitable distribute the burden of uncompensated care."[23]

There is little evidence that CON laws improve healthcare quality.

- "CON is becoming clearly less relevant as a cost containment mechanism. Primary justification for CON, therefore, must rest on its ability to improve or maintain quality and/or access to care."[24]

- "The evidence is weak regarding the ability of CON to improve quality by concentrating volume of specialized services. CON does not provide an ongoing mechanism to monitor quality."[25]

- "[R]esearch findings are inconclusive regarding the ability of CON to improve quality by concentrating volume of specialized services at certain facilities."[26]

- "[W]e find no evidence that cardiac CON regulations lower procedural mortality rates for [cardiac surgery] interventions."[27]

- "It may make little sense to rely on CON to carry out quality assurance functions that might be better approached by more direct and cost effective means such as regulation and licensing and/or outcome reporting to the public."[28]

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[18] *Id*.
[19] *Id*.
[20] FTC & DOJ, *supra* note 12.
[21] Washington State, *supra* note 4.
[22] Yee et al., *supra* note 16.
[23] Conover & Sloan, *supra* note 1.
[24] Conover & Sloan, *supra* note 1.
[25] Washington State, *supra* note 4.
[26] Conover & Sloan, *supra* note 1.
[27] Vivian Ho, Meei-Hsiang Ku-Goto, & James G. Jollis, *Certificate of Need (CON) for Cardiac Care: Controversy over the Contributions of CON*, 44 Health Services Research 2, 483-500 (Apr. 2009).
[28] Conover & Sloan, *supra* note 1.

There is little evidence that CON laws improve access to care.

- "CON may have a beneficial impact on access to care for the uninsured and underinsured, but the evidence is thin and if true, such an impact is relatively modest in the context of [Michigan's] 1 million uninsured."[29]

- "CON has limited ability to impact the overall cost of health care or to address issues raised by care for the uninsured and underinsured."[30]

- "Washington's CON law has had no effect on improving access."[31]

Repealing CON laws does not lead to a surge in healthcare costs

- "There is no evidence of a surge in acquisition of facilities or in costs following removal of CON regulations."[32]

- "State legislators have little to fear in the way of cost consequences from the repeal of CON laws. […] CON laws are not an effective means of limiting Medicaid expenditures."[33]

- "[S]tates that dropped CON experienced lower costs per patient for [certain cardiac procedures]. Average Medicare reimbursement was lower […] in states that dropped CON. The cost savings from removing CON regulations slightly exceed the total fixed costs of new [cardiac surgery] facilities that entered after deregulation."[34]

CON laws represent a failed public policy

- "The regulation of supply through mechanisms such as CON may have made sense when most reimbursement was cost-based and thus there was incentive to expand regardless of demand but they make much less sense today when hospitals are paid a fixed amount for services and managed care forces them to compete both to participate in managed-care networks and then for the plans' patients."[35]

- "With its roots on the rapidly disappearing cost-based, third party reimbursement mechanisms of the past, CON is becoming clearly less relevant as a cost containment mechanism."[36]

- "The continued existence of CON and, indeed, its reintroduction and expansion despite overwhelming evidence of its ineffectiveness as a cost control device suggest that something other than the public interest is being sought."[37]

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[29] *Id*.
[30] *Id*.
[31] Washington State, *supra* note 4.
[32] Christopher J. Conover & Frank A. Sloan, *Does Removing Certificate-of-Need Regulations Lead to a Surge in Health Care Spending?* 23 Journal of Health Policy and Law 3, 455-81 (1998).
[33] David C. Grabowski, Robert L. Ohsfeldt, & Mark A. Morrisey, *The Effects of CON Repeal on Medicaid Nursing Home and Long-Term Expenditures*, 40 Inquiry 2, 146-57 (2003).
[34] Vivian Ho & Meei-Hsiang Ku-Goto, abstract, *State Deregulation and Medicare Costs for Acute Cardiac Care*, 70 Medical Care Research Review 2, 185-205 (Apr. 2013).
[35] FTC & DOJ, *supra* note 12.
[36] Michigan Department of Community Health, The Michigan Certificate of Need Program 12 (Feb. 2005).

- "CON programs tend to be influenced heavily by political relationships, such as a provider's clout, organizational size, or overall wealth and resources, rather than policy objectives."[38]
- "[CON laws] undercut consumer choice, stifle innovation, and weaken markets' ability to contain health care costs. Together, we [DOJ/FTC] support the repeal of such laws, as well as steps that reduce their scope."[39]
- CON "has elicited a remarkable evaluative consensus -- that it does not work."[40]

For additional information please contact Annalia Michelman, JD, Legislative Attorney at (312) 464-4788 or annalia.michelman@ama-assn.org.

[37] Morissey, *supra* note 2.
[38] Yee et al., *supra* note 16.
[39] FTC & DOJ, supra note 5.
[40] Patrick John McGinley, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a 'Managed Competition' System*, 23 Fla. St. U. L. Rev. 1, 141-57 (Summer 1995).