

Competition and Certificate-of-Need Laws

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John Garen

BB&T Professor Emeritus of Economics, University of Kentucky

and

Board of Scholars, Bluegrass Institute for Public Policy Solutions

Disclaimer

The assessments and views expressed here, and in my companion report, are my own and should not be perceived as representing those of my former employer, the University of Kentucky.

The benefits of competition

- Economic analysis finds the competition is an important force in markets to generate lower prices, better quality, and more efficiency.
- Any interference with the competitive process is presumptive harmful. Certificate-of-need (CON) law fit as a presumptively dubious interference since it impedes entry of additional providers into markets.
- However, this presumption may be rebutted in particular cases with sufficient evidence and reasoning to overturn it.
- My assessment is, after reviewing the evidence, the arguments in favor of CON do not rebut its anti-competitive harmfulness.

Legal, governmental, and private institutions that support market competition in healthcare

- Reputation-building by providers with consumers.
- Legal liability for negligent treatment of patients and negligent selection and supervision of employees.
- A well-functioning legal system that effectively sorts the legitimate malpractice claims from the false ones.
- Malpractice insurance with incentives for insurers and the insured to promote quality care.
- Certifications for healthcare professionals that assist providers in vetting employees.
- The evidence implies that CON laws generally do not augment or support these practices and institutions.

Evidence regarding the effects of CON

Appropriate methodologies of studies

- Comparison of states without CON to states with CON, or with and without the relevant aspects of CON.
- Adjust or control for relevant differences across states, e.g., per capita income, poverty rate, cost-of-living, other demographics.
- Allow each state its own baseline and examine changes after CON is removed. Compare to changes in other states.

Overall Findings

Two excellent overviews:

- Federal Trade Commission (FTC)/Department of Justice (DOJ), 2016: https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-federal-trade-commission-antitrust-division-u.s.department-justice-certificate-need-laws-south-carolina-house-bill-3250/160111ftc-doj-sclaw.pdf.
- Institute for Justice, 2023: <https://ij.org/report/striving-for-better-care/applying-for-a-certificate-of-need/>.

Specific Findings

- Does CON reduce healthcare costs?

No, not in general. Most studies find the CON does not restrain items such as per diem, per case, or per capita hospital costs and often increase costs.

- Does CON promote more healthcare provision?

The evidence implies “no.” E.g., the Institute for Justice (2023) review of 80 studies shows that 63 indicate a reduction in supply and 11 show no change. This implies things such as, on a per capita basis, fewer hospital beds, fewer admissions, fewer physicians, fewer imaging services.

Specific Findings, cont'd.

- Does CON improve healthcare availability to the underserved?

No, studies find no clear pattern of more access to the underserved in CON states.

FTC/DOJ (2016) write: “Although advocates of CON laws might seek to promote indigent care, the evidence does not show that CON laws advance that goal.”

- Does CON improve the quality of healthcare provision?

No, most studies show diminished or unchanged quality of care in CON states, as measured by items such as re-hospitalization and mortality rates.

FTC/DOJ (2016) conclude: “The weight of this research has found that repealing or narrowing CON laws is generally unlikely to lower quality, and may, in fact, improve the quality of certain types of care.”

Does CON help address market “imperfections?”

- Under-informed consumers
- Government and/or third-party insurance
- Other federal/state regulation; insurance constraints

- Does the entry-limiting activity of CON laws help with these issues?

There is no clear reason how this helps consumers with decision-making or eases the handling of other regulations, and the evidence suggests that this does not improve quality.

Conclusion

- The arguments made to justify CON do not stand up to careful examination, i.e., the entirety of the evidence.
- The benefits of competition and entry into healthcare markets is not rebutted.
- Every state's situation, including Kentucky's, is unique.
- But the weight of evidence implies that Kentucky would be well-served by the improved access to healthcare that is stimulated by the removal of CON.