

“Improving Health Care: A Dose of Competition”

An Analysis of the FTC/DOJ Report

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There is continuing debate over Certificate of Need (“CON”) health policy regulations in the various state legislatures. CON regulations require the establishment of *need* through an application process prior to a provider obtaining approval for the provision of new or expanded health facilities, services, and equipment. Thirty-six (36) states currently have some form of CON regulations for healthcare facilities. The crux of the argument over CON has traditionally appeared to center on whether it has been effective in reducing healthcare costs or has merely limited access to healthcare services by restricting competition and encouraging oligopoly control of markets.

Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) Hearings on Health Care and Competition Law and Policy

In November, 2002, FTC Chairman, Timothy J. Muris, announced that the FTC would hold joint hearings with the DOJ on competition in healthcare in 2003.¹ On July 23, 2004, following the conclusion of the hearings lasting over six (6) months, the FTC and DOJ (“agencies”) issued a joint report on July 23, 2004, entitled “*Improving Health Care: A Dose of Competition*” in which the agencies recommended that states decrease barriers to entry into provider markets. The agencies encourage states to reconsider whether CON programs “best serve their citizens’ health care needs.”²

Following testimony at numerous hearings from industry representatives and legal, economic, and academic experts on the healthcare industry and health policy, the agencies concluded that the burdens placed on competition by CON programs “generally outweigh” its “purported economic benefits.” The agencies suggested that instead of reducing costs, there is evidence that CON programs actually drive up costs by “fostering anticompetitive barriers to entry.”³

The agencies expressed concern that CON programs drive up healthcare costs because they depress supply and protect healthcare providers from competition. The agencies expressed further concern that CON programs prevent entry into the market by entities that can provide higher quality care, and contended that CON programs may delay the

¹ “FTC Chairman Announces Public Hearings on Health Care and Competition Law and Policy to Begin in February 2003” Federal Trade Commission, www.ftc.gov/opa/2002/11/murishealthcare.htm (Accessed 8/5/04).

² “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, 7/04, Executive Summary, p. 22.

³ “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, 7/04, ch. 8, pg. 1-2.

introduction of new technology. In support of their conclusions, the agencies relied upon empirical studies that showed CON programs generally failed to control costs and actually result in higher healthcare costs.⁴

Ambulatory Surgery Centers

Twenty-seven (27) states have CON regulations for Ambulatory Surgery Centers (ASC).⁵ ASCs perform surgical procedures on patients not requiring an inpatient stay in a hospital.⁶ The agencies stated their belief that ASCs are beneficial for consumers and that state CON laws pose an anticompetitive barrier to entry. In response to ASC provider allegations that general hospitals have attempted to use CON laws to prevent ASCs from entering the market, the agencies commit to “aggressively pursue” activities of anticompetitive conduct. However they acknowledged that antitrust laws do not prevent individual hospitals from unilaterally approaching state governments in connection with CON proceedings.⁷

During the late 1980s, the FTC issued several studies on CON and stated that, “Market forces generally allocate society’s resources far better than decisions of government planners.”⁸ Further, the FTC recommended that the states remove their CON regulations. In a letter to Virginia officials they stated, “any potential benefits of CON regulation are likely to be outweighed by the adverse effects of such regulation on competition in health care markets. Consequently, CON regulation is likely to harm consumers on balance by increasing the price, and decreasing the quality, of health services in Virginia.”⁹

Therefore in light of these previous FTC pronouncements, it remains to be seen what impact this report will actually manifest on the continuing existence or enforcement of state CON legislation. Nonetheless, this Federal report is perhaps, the most significant development in the last several years in the ongoing battle to eliminate CON and support a level playing field for market competition in healthcare.

For a copy of “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, link to:

<http://www.ftc.gov/opa/2004/07/healthcarerpt.htm>

⁴ “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, 7/04, ch. 8, pg. 4.

⁵ “National Directory of Health Planning, Policy and Regulatory Agencies” American Health Planning Association, 2004, pg. 79. <http://www.ahpanet.org/Images/CONmatrix2004.pdf>

⁶ “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, 7/04, ch. 3, pg. 24.

⁷ “Improving Health Care: A Dose of Competition” A Report by the Federal Trade Commission and the Department of Justice, 7/04, ch. 3, pg. 27.

⁸ Press Release from the Federal Trade Commission, August 10, 1987

⁹ Press Release from the Federal Trade Commission, August 10, 1987