

## Virginia's Certificate of Need Laws May Stay, Fourth Circuit Says

Article By:

Lisa A. Peterson

---

On January 21, the U.S. Court of Appeals for the Fourth Circuit upheld Virginia's Certificate of Need (CON) laws, ruling that the scheme does not illegally discriminate against out-of-state health care providers. *See Colon Health Ctrs. v. Hazel*, No. 14-2283 (4th Cir. Jan. 21, 2015).

In Virginia, and the 35 other states with CON laws, health care facilities are required to obtain government approval before establishing or expanding certain medical facilities and undertaking major medical expenditures. CON laws require applicants to show sufficient public need for the expenditure in question and thereby attempt to reduce healthcare costs by preventing excess capacity and unnecessary duplication of services and equipment.

The plaintiff-appellants in the case were two out-of-state outpatient providers that sought to open facilities to provide medical imaging services in Virginia. Their request for a CON for new CT scanners and MRI machines was denied. The plaintiff-appellants subsequently challenged the laws as putting an undue burden on interstate commerce in violation of the dormant commerce clause. The Fourth Circuit affirmed the district court's ruling that the CON requirement neither discriminated against nor placed an undue burden on interstate commerce because both in-state and out-of-state providers were required to abide by the CON requirement.

Previously, in October 2015, the Federal Trade Commission (FTC) and U.S. Department of Justice's Antitrust Division (DOJ) issued a joint statement urging Virginia to consider changes to its CON laws. Both agencies argued that CON requirements create significant competitive concerns by suppressing supply and misallocating resources. Moreover, FTC and DOJ said the requirements have not been shown to lower costs or improve the quality of care for consumers. The agencies said that CON requirements can hinder "the efficient functioning of health care markets" by allowing an existing provider to file challenges to prevent or delay competition from a rival. Additionally, they may enable anticompetitive agreements among providers to pursue CON approval for separate services. The Fourth Circuit's recent opinion may lessen the likelihood that the FTC or DOJ would separately challenge Virginia's CON laws, but the agencies are likely to remain active in speaking out against CON requirements in Virginia and elsewhere.

National Law Review, Volume VI, Number 26

Source URL: <https://natlawreview.com/article/virginia-s-certificate-need-laws-may-stay-fourth-circuit-says>