

# GEORGIA'S CERTIFICATE OF NEED (CON) PROGRAM

House Rural Development Council

Georgia Southern University

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# Independent Doctors Mission

- The members of Indoc are independent physician medical groups across the State of Georgia
- The members include Southcoast (Savannah), Harbin Clinic (Rome), and Hughston Clinic (Columbus).
- The mission is to represent the interests of independent medical groups and support efforts to create opportunities for patient-physician focused care
- Indoc supports CON reform to allow more opportunities for patient choice for care and pathways to receive that care

# Indoc Formation

- The genesis of Indoc was the recognition by independent physician groups that massive consolidation of medical care by hospital systems was driving out independent medical groups and reducing patients choice for care
- The CON law was designed in the 1970's when the medical system was inpatient hospital centric
- The current medical system has transformed in ways no one expected 40 years ago and procedures that use to require many days in the hospital are now done as outpatient with the patient going home within hours.
- Payers will not pay for hospital stays for many procedures any longer
- The CON law has not changed to recognize these changes but must

# Real World Impacts

- Hughston Clinic applied for a CON to build an ASC for its own patients and was denied by DCH
- Hughston physicians purchased a hospital across the river in Alabama as a direct result
- A definition of cardiac catheterization from twenty years ago is being used by DCH to deny cardiologists who do electrophysiology (pacemakers) from opening an ASC even though they are implanted in operating rooms at hospitals and Medicare pays for them as surgical procedures not catheterization

# Origin of CON

- 1974: National Health Planning & Resource Development Act
- Required CON laws to be adopted by each state because providers paid based on costs. The more you spent the more you got from Medicare. CON was required to avoid overbuilding if no need for new facilities.
- There was no other reason for the CON laws

# Georgia CON

- 1979: GA's CON Program Enacted
- Goal: Reduce government costs by preventing unnecessary duplication of services
- Concept: Because government is paying for new facilities it needed a mechanism to limit the number
- **Same** CON law with only 2 significant amendments (1991 and 2008) for the last 35 years

# Federal Law Repealed

- 1987: Repeal of the National Health Planning & Resource Development Act of 1974
  - Cost reimbursement no longer exists
  - Facilities started being required to cover their own costs and be paid based on fees
  - Payment is now based on pay for specific treatment
  - CON reduced supply of competitors in the market driving prices for health care higher
  - States could repeal the law at anytime
  - Existing facilities did not want repeal because they were protected from competition

# Georgia CON Today

- Georgia CON covers all types of health care facilities including hospitals, nursing homes, home health, surgery centers, open heart, neonatal, psychiatric beds, inpatient rehabilitation, radiation therapy and PET.
- No new facility covered by CON can open without a CON from the Department of Community Health (“DCH”)
- Existing facilities cannot relocate without a CON from DCH
- Competitors are allowed to oppose any CON and many CONs are opposed by competitors in order to avoid additional competition
- CON requires a variety of materials including architecture plans, financial feasibility studies, proof of funds, data analysis and many other things. The cost just to file can easily cost \$50,000 to \$100,000 and if there is opposition and appeals from the DCH decision it can easily cost an applicant \$300,000 - \$400,000
- Many CONs are delayed by competitors simply to delay the new competitor in the market

# Georgia 1991 CON Changes

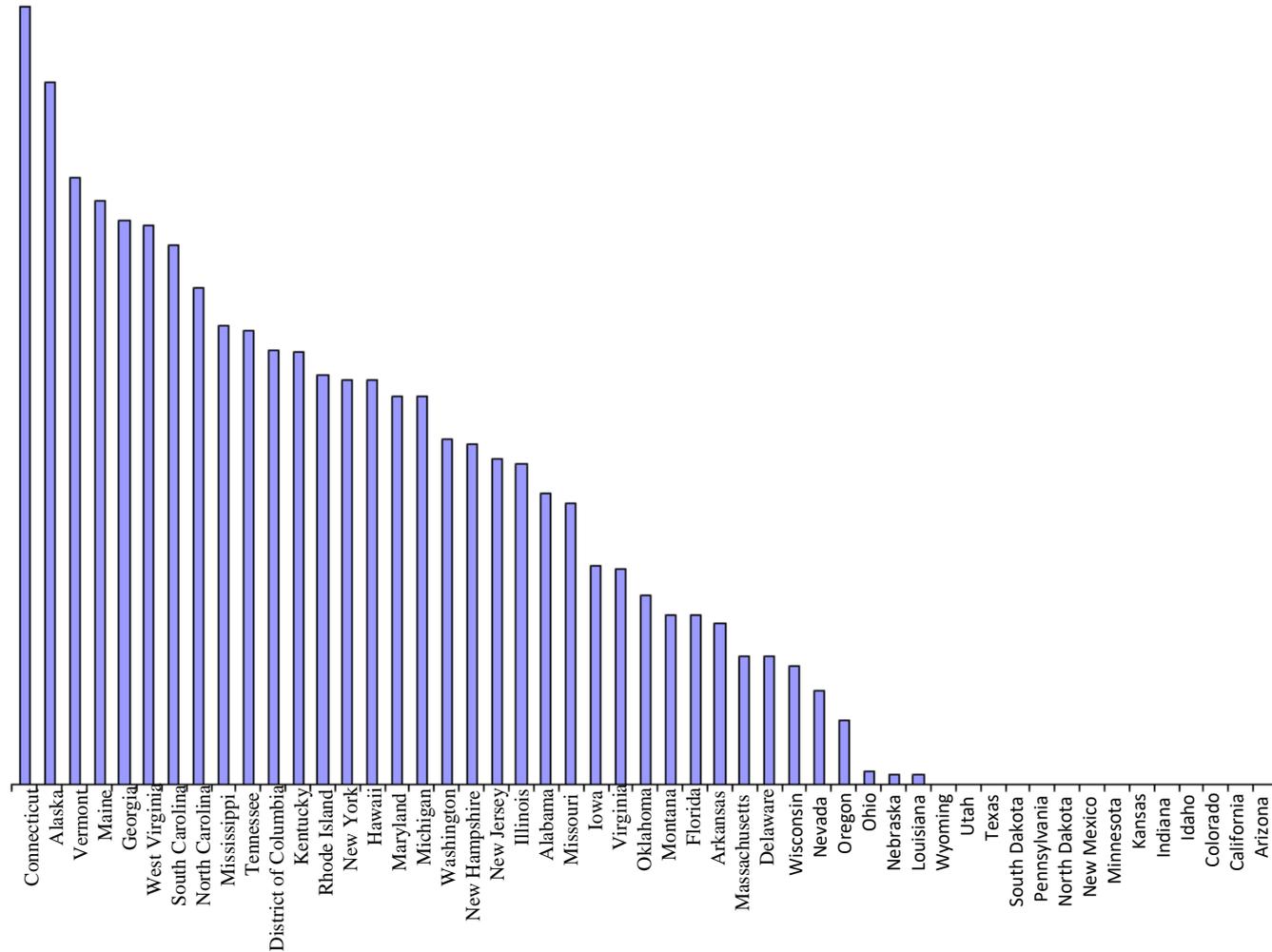
- 1991 – CON law was modified to allow single specialty ambulatory surgery centers owned by a physician group to open without a CON if the cost is under the limit (1 million dollars)
- Surgery Centers started becoming important to the health care system because they handle low risk, low cost procedures and can be done easily and quickly by physicians in their own surgery centers
- DCH requires these centers to obtain a Letter of Non-reviewability (“LNR”). The doctors must meet certain criteria such as the surgery centers is next to their office.

# 2008 Georgia CON Changes

- 2008 – CON law was modified:
- to allow one destination cancer hospital to obtain a CON;
- to require new LNR ASCs to make indigent/charity commitments and do Medicaid and increase the limit to 2.5 million;
- to shorten the timeline to go through the CON appeal process; and
- to allow only hospitals and physician practices to be exempt from CON for MRI and CT for costs of less than 1 million
- Multi-specialty groups like members of Indoc do not qualify for exemption

# CON In Georgia

**Georgia's  
CON  
Laws Are  
Among  
The  
Strictest**



# MANY CALLS FOR CHANGE

- 1988: FTC Letter to GA Sen. Culver Kidd (Noting the “ineffectiveness of CON laws in promoting the welfare of health care consumers”)
- 2004: FTC & DOJ Publish “A Dose of Competition” (“...CON programs are not successful at containing health care costs, and that they contain serious anticompetitive risks...”)
- 2007: DOJ Testimony to the GA Special Committee of CON (CON laws create barriers to beneficial competition)
- 2008: DOJ Testimony to the FL Senate HHS Appropriations Committee (“The proposition that competition cannot work in healthcare is simply not true.”)

# Evidence Shows CON Does not Work

- The regulation of supply through mechanisms such as CON may have made sense when reimbursement was cost-based and 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 in managed-care networks and then for plans' patients.”

Federal Trade Commission and DOJ, Improving Healthcare: A Dose of Competition (July 2004)

# Why Does CON Remain Law

- “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.”

Michael Morrissey, *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)

# The Patient Suffers

- “Across all markets, states ranked as having the most rigorous CON regulation (tier 2) have statistically less competition than non-CON states [...] Lower levels of competition are associated with higher costs.”\*
- “CON programs tend to be influenced by political relationships, such as a provider’s clout, organizational size, or overall wealth and resources, rather than policy objectives.”\*\*

\*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)

\*\* Tracy Yee et. al., *Health Care Certificate of Need laws: Policy or Politics?* Research Brief 4, National Institute for Health Care Reform (May 2011)

# CON Subverted

1979 - CON was required to reduce excessive capital investments driven by the “cost-plus” model of reimbursement that no longer exists.

2018 - CON today is used to block lower cost competitors from opening and causing higher costs. All Georgia residents pay the price including Medicaid and SHPB.

# CON Was Never Intended for These

## **CON WAS NEVER INTENDED TO ADDRESS THESE ISSUES:**

- Cross-subsidize care – hospitals say they need all good paying patients to cover their losses on other patients
- Force Georgia residents to the highest cost alternatives for care instead of allowing them to chose their provider
- Decide who will get State protection for their business and give those companies the right to block competition
- Require patients and insurers to pay higher prices because there is less competition

# Free Market Principles Apply to the Health Care Industry

*“The proposition that competition cannot work in healthcare is simply not true.”*

- Healthcare is a Multi-billion dollar industry and a huge part of the American economy
- Demand for lower costs and a non-institutional, friendly, convenient setting for surgical care drove the growth of Ambulatory Surgery Centers.
- Other Examples:
  - Pharmaceuticals
  - Urgent Care Centers
  - Retail Clinics
  - Elective Surgeries

# CON: MONEY LOST

Georgia's CON program prevents the competitors that will lower costs.

- Medicare could save \$15 billion for CYs 2012-2017 if HOPD rates were the same level as ASC rates
- Medicare beneficiaries could save up to \$4 billion for CYs 2012-2017 if HOPD rates were the same as ASC rates.

# CON FAVORS ONE BUSINESS OVER ANOTHER

- Many Existing Providers are not for profit and are effectively government sponsored entities. They don't pay any taxes ( real estate or income).
- They have spent multi-millions building new buildings and increasing their market share by acquiring doctors and competitors at the same time complaining about their ability to stay in business and need CON to protect them.
- They have committed to being not for profit but assert the law should require that they get all of the patients also.

# Protecting Revenue of Incumbents Does Not Justify CON laws

- CON was never designed to cure all social ills
- Non-economic goals can be addressed through other means that do not impose higher costs on patients and block competition
- Legislature never intended to turn over health care to a few large hospital systems in the state and adopt laws that effectively protect them from competition.
- High costs of healthcare inhibit new businesses from opening or moving

# Acquisition of Physicians Cause Higher Prices

- CON effectively allows Hospital systems to obtain market share by acquiring physician practices
- Cost for the same exact service jumps because hospitals can charge more. Recent studies show that 40% higher costs in hospital owned facilities as compared to physician owned.
- Economists identify consolidation of health care providers as major issue for higher costs.

# Rural Hospitals

- Rural hospital closure is a national problem
- CON in Georgia has not protected them
- How can CON change to allow better opportunities for care to Georgia residents
- CON changes should focus on services that would create more opportunities for investment and patient choice across the state including in rural areas
- No changes to home health or skilled nursing facilities (almost all federal and state payers)

# Proposed Amendments

- Allow physician groups to open ancillary services including surgery centers, radiation therapy (cancer care), imaging under CON exceptions
- Under LNR program, physicians are forced to build centers just for their own doctors and patients which is why you have a lot of small centers;
- Allow multi-specialty groups to build surgery centers, allow single specialty centers to combine which will allow more efficient cost effective care
- SB 157 proposed allowing only multi-specialty groups with at least 25 physicians to build ASCs which would mitigate against overbuilding

# Rural Hospitals Should be Allowed to JV

- CON law can create more flexibility in urban areas and be more restrictive in rural areas – not sure rural areas need to be protected entirely
- Rural hospitals have facilities that need updating and maintenance
- Allow them to work with physicians or other entities to manage a service or lease a wing of the facility without getting CON
- Need is to preserve emergent care and routine medical care. They need revenue from services that physicians can bring to the community. An office by itself will not work – the doctors and hospital need to have the procedures performed there

# Rural Healthcare

- The goal should be to allow flexibility for each area to attract doctors and other investors to rural areas
- The current system does the opposite
- The current rural facilities do not have the resources to transform
- The need is for ER stabilization units and medical care
- Complicated surgeries and treatment migrate to urban areas

# Micro Hospitals

- The CON law was amended last year to allow a rural hospital to be acquired by another hospital to repurpose as a micro hospital
- Defined as having at least two beds and no more than seven beds and is open 7 days a week to provide stabilization services
- Does not qualify as a hospital for Medicare purposes
- Does not resolve the issue

# Anchor Ambulatory Village

- Allow rural hospitals to focus on services that need hospital such as substance abuse and psychiatric care (many of obtained CONs for that service).
- Allow ambulatory care services to be located near them including physician owned surgery centers. Would encourage physicians to locate an office there and do procedures in the community
- Non-hospital services are lower costs for payers and patients
- ASC outperform hospitals on infection control\*

\*Journal of the American Medical Association (2014)

# Reform CON To Allow More Opportunity

- The CON law does not advance patient care
- It prohibits competition and patient choice
- Rural patients are required to travel to urban hospital systems for care
- Allow more physician owned services and more flexibility to partner with hospitals
- All the providers to work together on a solution
- Need more facilities in the rural areas but cannot get a CON to do it

# Urban vs. Rural

- Law could allow more competition for outpatient procedures in urban areas and maintain some restrictions in rural
- Require any new surgery center in a rural area to offer partnership with local hospital
- Allow exceptions for urban based services if they offer access to rural care (transportation services).

# Conclusion

- Georgia's CON laws foster the shifting of health care services from low cost providers to the most expensive settings.
- CON holders expand their facilities and services, and the cycle of ever-increasing health care prices continues.
- Competitors provide quality care in a cost effective manner and should be allowed to compete.
- CON should be reformed to promote the provision of quality health care in the least costly setting.

# Questions or Comments

