Aimed to halt a 'Cold War' of hospital spending, CON laws could see renewed scrutiny after pandemic

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State laws designed to limit new hospitals and beds are likely to face renewed scrutiny after the end of the coronavirus pandemic, in which crushing demand for services has outstripped supply in some regions, particularly New York.

In 35 states and the District of Columbia, before a new healthcare facility can be built or expanded or even cease operations in some places, administrators must prove there is a "need" in the community to gain approval. These Certificate of Need or CON laws were originally intended to protect against adding unnecessary cost into the healthcare system by barring duplicative services or facilities.

But with desperate health systems turning to dormitories, parking lots and New York City's Central Park to construct emergency hospital beds, the laws originally spurred by the federal government may face further pushback.

Maureen Ohlhausen, a former FTC commissioner, told Healthcare Dive that any sort of hurdle to expanding medical care or services that faces undue regulatory burdens is going to be "heavily scrutinized" after this pandemic.

"One of the things that we're seeing now is how markets need flexibility, they need to have some redundancy built in to respond," Ohlhausen said.

Over the years, antitrust experts have questioned the need for CON laws, and both the FTC and DOJ have called for states to repeal them, arguing they protect big incumbent systems and do

more harm than good. The scope of the CON regulations varies widely by state, but broadly, the laws limit the number of healthcare facilities and services in a given region.

Congress passed a law in 1974 that required states to draft CON laws in exchange for additional federal funds. Every state except Louisiana had a certificate of need program by the early 1980s.

The idea was that duplicate services in markets created waste and extra cost, so the intent was to prevent healthcare facilities from popping up on every corner.

The laws were aimed at what was perceived as "a Cold War of spending among hospitals," Rick Watters, a St. Louis-based attorney who specializes in healthcare and CON law, told Healthcare Dive. If one hospital bought a big ticket item, a competitor had to follow so it could market and advertise that it too had the latest and greatest technology, he explained.

"The theory was that competition didn't work in the healthcare field. Let's regulate it," Watters said.

But some antitrust experts say while the law was well-meaning, it ultimately benefits entrenched and legacy providers that can also push against applications for new facilities — or, in short, new competition.

"For the new entrant, they're not necessarily in the market and may not have the same political influence and connections," Ohlhausen said. "Certificate of need laws raise this problem where you essentially have not the market deciding if there is a need but giving the ability for competitors to decide whether they need a new rival in the marketplace."

Still, some caution that there are other forces at play than CON when it comes to the lack of hospital beds to respond to this crisis, arguing it's a much more nuanced issue.

"You can't blame it at all on CON," attorney Mark Silberman, chair of Benesch's healthcare practice, told Healthcare Dive.

Shifting dynamics in the industry force hospitals to close, particularly in rural areas. And hospital beds have been declining over the years as facilities close and consolidate as advancements in care push more treatment outside of the hospital to outpatient facilities.

There were more than 1.3 million hospital beds in 1980, the year many CON laws came online, according to the National Center for Health Statistics. That number plummeted to about 899,000 beds in 2015.

Just last year, nine states modified portions of their CON laws, according to the National Conference of State Legislatures. Worried about equal access to care in rural and underserved regions, a Georgia House committee had advocated for the repeal of CON and favored switching to a licensing and accreditation program designed to tackle those inequity issues.

In Watters' experience in the St. Louis region, it's been a fight to get new hospitals in well-heeled areas or those with higher rates of commercial insurance. But he faced no opposition when seeking approval for a new hospital in a lower-income area in the city of St. Louis.

If anything, Silberman says this pandemic may highlight the need for better designed CON programs that are focused on health planning and less bureaucratic.

"Let's be very honest right now, what are the core principles of the CON program? Ensuring access to care and quality services without increasing cost, especially for indigent and underserved communities. Is there anyone who thinks that there are indigent, underserved communities that have too many resources or have too much access to care?" Silberman said.