



Sixth Circuit Upholds Kentucky CON Law

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Providers across North Carolina are watching with interest the constitutional challenge to our state's Certificate of Need (CON) Law and the ongoing saga of a potential legislative repeal of portions of South Carolina's CON Law. Arguments over the North Carolina CON Law will be heard at the Court of Appeals in Raleigh on March 23, and South Carolina's House will likely act on a partial repeal later this Spring. In the meantime, what can observers learn from the recent court opinion on the Kentucky CON Law? The following summarizes how a federal court handled the case when two denied CON applicants took on Kentucky's CON Law.

In February 2022, the Sixth Circuit Court of Appeals upheld Kentucky's CON Law against a challenge from two individuals denied a CON for a home health agency. The challengers claimed the CON Law violated their Fourteenth Amendment right to earn a living, served only as an illegitimate protection of incumbent providers and lacked a rational basis. The Sixth Circuit rejected the challenge and affirmed the lower court decision to uphold the CON Law.

The court's opinion began by examining the nature of Kentucky's CON Law, which requires applicants to demonstrate a public need for services in an area to avoid "overinvestment" and "maldistribution" of health care facilities. The court observed that 35 states have some form of CON Laws and at least 16 states have CON Laws governing the development of home health care services. The court observed that no court, to its knowledge, has ever invalidated a state CON Law under a Fourteenth Amendment rational basis analysis.

Under Kentucky's regime, anyone seeking to establish a "health facility" or to undertake substantial changes to a facility must first obtain CON approval. Applications are reviewed with opportunities provided for affected persons – often competitors – to request a hearing. In Kentucky, the state looks at several factors in its CON Reviews.

In the case before the court, the challengers sought to establish a home health care company with a unique focus on services for Louisville's Nepali residents and submitted a CON Application for Review. A competitor argued the application did not meet applicable requirements, no response to the criticisms was offered and the state denied the application. Instead of following the usual path of requesting a

challenge to the adverse decision in state court, the challengers filed a lawsuit claiming the CON Law, as applied, violated the Fourteenth Amendment.

The crux of the challengers' case was the claim that the CON Law imposed substantive restrictions on their individual liberties, specifically their right to engage in a chosen occupation. Laws affecting an individual's liberty to work only violate due process if those laws impose a burden without "any rational basis." The Sixth Circuit observed that a "rational basis" analysis calls for a "light judicial touch." If some plausible reason exists for the law, the law must stand even if it is argued that the law is unfair, unjust or unwise.

Ultimately, the Sixth Circuit gave Kentucky's CON Law a passing grade. The court found that matching services with the levels of need in a market could allow providers to operate efficiently and offer quality services. The court hastened to add that it was not in its province to opine on the wisdom of the law nor its job to "balance" the advantages and disadvantages of the law.

The court noted that, with a limited universe of CON-approved providers in a market, providers could benefit from certain economies of scale and maintain utilization levels that allow them to effectively serve patient needs. In the end, a legislator could perceive a rational connection between CON restrictions and cost-efficient operations. And the court was unable to find Kentucky's CON Law to be singularly "protectionist" noting that the law could be said to potentially advance legitimate interests.

The court's twenty-page decision is replete with deference to the CON Law based on the rational basis standard; according to the court, with the bar admittedly set low, the Kentucky CON Law had enough to withstand challenge.

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