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Hospitals Shouldn't Get to Choose Their Competition

A South Carolina legal fight highlights the damage done to patients by certificate-of-need laws.

By Marcelo Hochman and Daryl James

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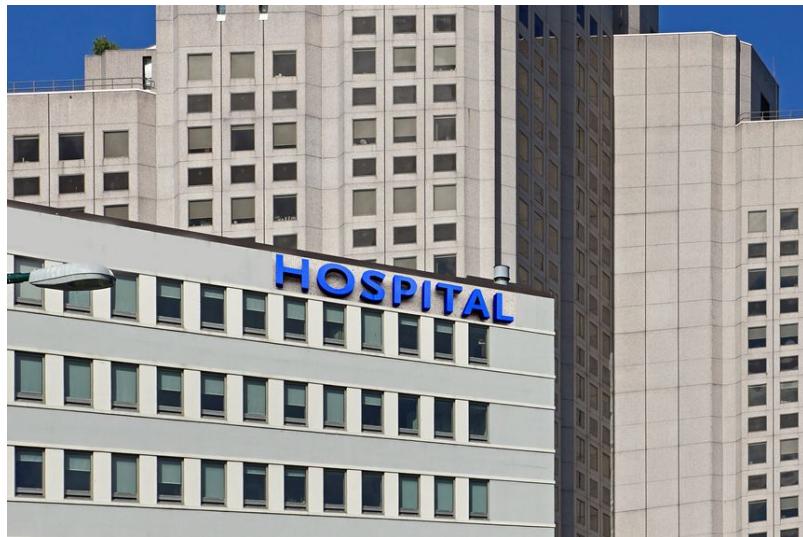


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Somebody call an eye doctor. Two of South Carolina's largest hospital systems have gone to war over allegations of unfair trade practices, and neither side can see the hypocrisy.

A lawsuit brought by the Medical University of South Carolina accuses Trident Medical Center and its affiliate company, Tennessee-based HCA Healthcare, of "wholesale poaching" and "conspiracy." Specifically, MUSC says Trident raided its head-and-neck cancer treatment unit in 2021 and lured away several top doctors.

Trident issued a statement in response, saying it merely wants to provide "exceptional care" for patients. A \$1.7 million settlement with MUSC removed the doctors from the lawsuit. The next chapter in the feud will play out between the hospitals in South Carolina's Court of Common Pleas.

Despite the noble sentiments about playing fair and putting patients first, one inconvenient truth will hang over the proceedings: Like most other big hospital systems,

MUSC and Trident both benefit from a regulatory scheme that hinders potential competitors from entering the healthcare market.

Any time a provider wants to open or expand medical services in South Carolina, it must prove to the state's satisfaction that a shortage of those services exists. If applicants succeed, their prize is a government permission slip called a certificate of need. Thirty-eight states and the District of Columbia impose similar requirements.

Unlike other forms of regulation, these laws don't purport to protect public health and safety. The goal is to protect those who already have certificates of need from those who don't—creating an elite club of industry insiders shielded from competition.

Membership has its privileges, but hospital lobbyists play down the two-tier system of haves and have-nots. Instead, they claim that limiting competition somehow improves healthcare quality, lowers costs, increases access, expands choice and creates an incentive to provide charitable care.

None of these five outcomes has ever materialized. Yet the American Hospital Association and its state affiliates have spent decades convincing lawmakers to ignore the basic rules of economics. Restaurants, gyms, dry cleaners and other business types must compete with all comers, but regulators pick winners and losers in healthcare.

Many states, including South Carolina, go further. They invite such incumbents as MUSC and Trident to intervene on their own behalf, giving them a direct say in who can operate on their turf. Three recent cases from the Institute for Justice, a public-interest law firm that opposes certificate-of-need laws, show how the power imbalance favors incumbents.

Baptist Health, a \$2 billion conglomerate, challenged the application of Dipendra Tiwari in Kentucky. He and a partner, both Nepali immigrants, simply wanted to open a home health agency to serve Himalayan refugees in a language they could understand. Their application was denied in 2019, and they lost a court challenge in 2021.

Meanwhile in Iowa, Mercy Medical Center challenged the application of Lee Birchansky, an eye doctor who wanted to open an outpatient surgery center. Dr. Birchansky eventually prevailed, but not without a 20-year struggle. In nearby Nebraska, several companies challenged the application of Marc N'Da, an African immigrant who wanted to start a medical transportation service. The state told him no in 2020, forcing him to fight back in court.

Such fledgling entrepreneurs make easy targets. But industry insiders also go head to head when the stakes are high. Landmark Medical Center and other providers banded together in 2020 to block Illinois-based Seasons Hospice from entering Rhode Island during the early months of the pandemic. At least one Rhode Island executive talked openly about the true motive for opposition: money. “Seasons’ entry would result in reduced patient service revenue to existing providers,” she testified.

Some states have started dialing back the protectionism. Tennessee and Montana passed partial repeals of their certificate-of-need requirements in 2021; South Carolina has a chance to go bigger in 2022. Lawmakers in Columbia are debating total repeal. If the measure passes, South Carolina would join California, Texas and 10 other states that ditched certificates of need years ago.

Big hospital systems hate these reforms. No matter what they say in public about fair trade, they don’t come to the table as honest brokers. If lawmakers put on their glasses, they will see the hypocrisy.

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