

Court Hears Constitutional Challenge to Certificate of Need Law

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Raleigh, N.C. On Friday, February 27, 2009, the Wake County Superior Court heard arguments in a case challenging certain constitutional aspects of North Carolina's Certificate of Need (CON) Law. Two attorneys of the North Carolina Institute for Constitutional Law (the "Institute"), Robert F. Orr and Jason Kay, are working with the attorneys of Nelson, Mullins, Riley and Scarborough to bring the case on behalf of two medical providers, Hope-A Women's Cancer Center in Asheville and Raleigh Orthopaedic Clinic in Raleigh.

The constitutional challenge boils down to three issues involving the State Medical Facilities Plan (the "Plan"). The comprehensive annual Plan determines whether and where many new medical services will be offered. In this way, the Plan rules the fate of many private medical practices who request State permission to provide new health services to North Carolina citizens. Hope wants to provide a breast MRI machine for its breast cancer patients. Raleigh Orthopaedic wants to provide same-day surgery services for its patients. The Plan blocks them from providing those services because they are deemed by the Plan not to be needed at this time.

The Plan is produced by individuals appointed to the State Health Coordinating Council (the "Council") and approved by the Governor. The 29 members of the Council, often employed by competing health care institutions, decide whether or not physicians or other medical providers will be permitted to offer new institutional health services in competition with those already provided. The Council is not subject to the State Ethics laws.

At the heart of the case is the practically unlimited discretion the Council has in deciding who gets to offer new health care services. No substantial, objective guidance is provided to the Council in developing the Plan. More importantly, because of a series of interrelated laws, the decisions of the Council are not reviewable in any court or administrative tribunal.

As alleged by the Plaintiffs, the CON laws combine to create a system that permits a potentially self-interested body of individuals to prevent medical providers from competing with incumbent providers. In making decisions regarding what medical services will be "needed" in the coming year, members of the Council do not have to disclose -- or avoid making -- any decisions that are or may be based even in part on the profits of their employers. Since the need determinations in the Plan are not subject to challenge in court, the medical providers are stuck with the decisions of their potential competitors and are left without a forum to challenge those decisions.