

Blog Post

Florida Court Affirms Rejection of CON of a Hospice Operator's Application, Despite a "Regional Monopoly"

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Florida's First District Court of Appeals has affirmed a decision by the Florida Agency for Health Care Administration (AHCA) that denied an application by Compassionate Care Hospice of the Gulf Coast (CCH) to open a hospice in Sarasota County.

(*Compassionate Care Hospice of the Gulf Coast v. State of Florida*, No. 1D16-5062, Fla. Dist. Court of Appeals). Notably, AHCA denied CCH's request despite noting that there is currently only one hospice operator in Sarasota County (Tidewell Hospice), and thus acknowledging that Tidewell has a 'monopoly' on such services in the area.

The Court's review of AHCA's decision focused on the provisions of the Florida Certificate of Need (CON) statute, a state law that requires prior approval by the State of Florida of an entity's plans to open a hospice (as well as other healthcare facilities, including hospitals) in Florida. At present, over 30 states have similar CON statutes requiring that an entity obtain state approval prior to opening a new healthcare facility. Despite their prevalence, the [Federal Trade Commission](#) has consistently advocated for the repeal of these laws, contending that they create barriers to entry that potentially deprive consumers of the benefits of healthcare. For example, earlier this year, in comments to the Alaska Legislature, the FTC stated that CON laws "interfere with market forces" and that they "shield incumbent

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healthcare providers from competition from new entrants and innovations in healthcare delivery, which means consumers lose these benefits.”

Typically, an applicant seeking a CON must demonstrate that there is an unmet need in the community for the services it wishes to provide. For CCH, this was a challenge, given that the AHCA issued a report in 2014 indicating that, despite the fact that there are no hospice operators in Sarasota County other than Tidewell, there was no need for any additional hospices in the area. Accordingly, CCH focused on additional language in the Florida CON statute that provides that the AHCA’s decisions should be made in a manner that “discourages regional monopolies and promotes competition,” and argued that this language should compel the AHCA to grant the CON, regardless of the AHCA finding that there was no need for additional hospice facilities in the County.

Ultimately, despite acknowledging Tidewell’s monopoly in the Sarasota market, the First District Court of Appeals refused to overturn the AHCA’s decision. In reaching this decision, the Court noted that the CON law fails to provide “a specific weight [to be] assigned to each factor” in the analysis, and thus the AHCA’s decision to deny the CON, given the failure to show an unmet need for such services, was “plausible.” In short, as summarized by the Court: “In the end, we cannot overturn the denial of CCH’s request to serve the Sarasota hospice market simply because the record establishes that a regional monopoly exists and that competition would be fostered by entry.” In the past, there have been efforts in Florida to modify and/or repeal the State’s CON laws. Whether this ruling will have an impact on such efforts, going forward, remains to be seen. Stay tuned.

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