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Virginia Supreme Court Addresses Nursing Facility Certificate of Public Need Issue

For the first time in nine years the Virginia Supreme Court has issued an opinion in a COPN case. The Virginia Supreme Court has only accepted two COPN cases in the past ten years, and in *Va. Dep't of Health v. NRV Real Estate, LLC*, 2009 Va. LEXIS 74, its most recent analysis of the COPN law and State Health Commissioner's statutory authority, the Court has issued a useful and straightforward opinion.

Factual and Procedural Background

In June 2004, a hospital with 21 beds certified by Medicaid as nursing facility beds, gave notice of its intent to decertify the beds to the Department of Health (the "Department"). Soon after, the hospital entered into an agreement with NRV Real Estate, LLC ("NRV") by which it would transfer the beds to NRV. NRV planned to apply for a COPN to relocate the beds to an existing, free standing nursing facility. In September 2004, the hospital both de-certified and de-licensed the 21 beds. About ten months later, NRV filed its COPN application requesting authorization to relocate the beds, relying on the statutory "12 Month Rule." [1] The Department refused to accept NRV's application, stating in a letter to NRV that no nursing facility beds existed to transfer and that NRV's application constituted an application for new nursing facility beds for which no Request for Application had been issued.[2] NRV appealed the Department's decision to the circuit court, and the circuit court upheld the Department's case decision.

On appeal, the Virginia Court of Appeals reversed the circuit court and the Department, finding that the Department's interpretation of the 12 Month Rule to exclude nursing home beds would lead to an "absurd result." The Court of Appeals found the Department acted arbitrarily and capriciously in rejecting NRV's application and failed to distinguish its own prior precedent. The court remanded the case back to the Department to reconcile its conflicting precedent.

[1] The 12 Month Rule generally provides that for certain statutorily designated clinical services, no COPN is required to provide the service if it has been provided by the facility within the previous 12 months. Va. Code § 32.1-102.2(5) (Definition of "Project").

[2] Unlike other COPN-reviewable services, requests for new nursing facility beds may only be reviewed in response to a Department-issued Request for Application. Va. Code § 32.1-102.3:2(A).

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But in an opinion issued on June 4, 2009, the Virginia Supreme Court reversed the Court of Appeals, concluding that the applicable statute containing the 12 Month Rule is unambiguous and that "the list of services entitled to the benefit of the 12 month rule … does not include nursing home beds". *Op*. at 8. In so holding, the Court applied a long standing rule of statutory construction which recognizes that because the legislature chooses its words with care, "the mention of specific items in a statute implies that all items omitted were not intended to be included". *Id.* Finally, the Court held that the Department did not act arbitrarily in applying the statute; even if it had erroneously applied the statute in the past, a prior erroneous interpretation "can never cause the subsequent adoption of a correct application of the law to be arbitrary and capricious." *Op*. at 9. That is, "if an agency has acted in error, it has no obligation to continue to err in perpetuity." *Id.* Thus, the Department did not have discretion to "add" nursing home beds to the list of services to which the 12 Month Rule applies; only the Board of Health may do so through the adoption of regulations.

The "Twelve Month Rule" does not apply to nursing facility beds, and by extension, does not apply to hospital beds.

The "12 Month Rule" is found at Va. Code § 32.1-102.1(5) and applies to certain designated specialty clinical services. In relevant part, the Code defines a reviewable "Project" as the

> introduction into an existing medical care facility of any new cardiac catheterization, [CT] scanning, gamma knife surgery, lithotripsy, [MRI], [MSI], medical rehabilitation, neonatal special care, obstetrical, open heart surgery, [PET] scanning, psychiatric, organ or tissue transplant service, radiation therapy, nuclear medicine imaging … substance abuse treatment or such other specialty clinical services as may be designated by the Board by regulation, **which the facility has never provided or has not provided in the previous 12 months.**

So, for the listed specialty clinical services, a COPN is required if the service has never been provided or if it has been provided but not in the preceding 12 months. For example, a hospital may have offered CT scanning services at one time, but if it stops providing CT scanning services for a period of more than 12 months, it must seek COPN approval to re-institute the service. Unlike hospital and nursing facility beds, medical care facilities with specialty clinical services designated in the 12 Month Rule, may cease providing those specialty services and reactivate them without COPN approval if done within 12 months.

In *NRV*, because nursing facility beds are not listed in Va. Code § 32.1-102.1(5) as subject to the 12 Month Rule, the hospital's surrender of its license for 21 beds, and de-certification of the beds became fatal to their proposed relocation. Absent COPN approval of new beds, no beds existed to relocate. This was problematic because in the nursing facility context, new nursing home beds may only be approved if a Request for Application is issued by the Department. Because hospital beds are also not listed as a specialty clinical service subject to the 12 Month Rule, the Court's opinion applies equally to licensed hospital beds.

Practical Application

In view of the Supreme Court's decision, nursing facilities and those seeking to acquire nursing facility

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beds in Virginia must be careful to submit and receive a decision on COPN applications to relocate existing beds before de-licensing them.

Likewise, and as specifically discussed in *NRV*, hospital SNF units (which are typically licensed hospital beds certified to receive nursing facility reimbursement) must not de-certify their SNF beds before COPN approval is obtained for a proposed relocation. Otherwise, like the hospital in *NRV*, the hospital will be left with only licensed hospital beds, not nursing facility beds.

In short, licensed beds must exist at the time a COPN application for their relocation, is filed and reviewed. While NRV argued that the hospital had only "suspended operation" of the beds, the reality was that the beds had been de-certified and surrendered to the Department through de-licensure. The prior precedent cited by *NRV* was easily distinguishable because in every prior case, the beds at issue remained in the Department's inventory as licensed nursing facility beds at the time the COPN was filed, and were thus, not "new" beds subject to the RFA process.

Once a COPN is obtained, beds may be de-licensed and/or de-certified but the COPN must remain valid and the approved project to relocate must be completed within the life-cycle of the COPN (three years or a longer period if approved by the Commissioner through the COPN extension process). If the COPN is revoked or expires and the beds have been de-licensed, the beds no longer exist.

Contrary to the Court of Appeals opinion and to the doomsday argument made by NRV, the temporary closure of nursing facility beds for cleaning or other "interruptions" in service will not extinguish them for licensure or COPN purposes. The operative question is whether the beds remain licensed and are actively providing nursing facility services. On brief, counsel for the Department argued that in certain situations a nursing facility may seek a variance to avoid having to surrender its license, but that was not the approach taken by NRV or the hospital in this case.

If you have any questions about the opinion made by the Virginia Supreme Court, or this client advisory, please contact Jeannie Adams, Tom Hancock , Emily Towey or Michelle Calloway by telephone at (804) 967-9604 or by email at jadams@hdjn.com, thancock@hdjn.com, etowey@hdjn.com or mcalloway@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

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Richmond 4701 Cox Road Suite 400 Glen Allen, VA 23060 PO Box 72050 Richmond, VA 23255-2050 O (804) 967-9604	Fairfax 3975 Fair Ridge Road Suite 475 South Fairfax, VA 22033 O (703) 591-3440
Harrisonburg 3210 Peoples Drive Harrisonburg, VA 22801 O (866) 967-9604	Virginia Beach One Columbus Center 283 Constitution Drive Suite 301 Virginia Beach, VA 23462 O (757) 321-6555
Lewisburg, WV 210 West Randolph Street Lewisburg, WV 24901 O (866) 967-9604	Franklin, TN 725 Cool Springs Blvd. Suite 600 Franklin, TN 37067 O (866) 967-9604

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