



## Virginia's Certificate of Public Need Law is Here to Stay (For Now)

By: Jamie Baskerville Martin & Jennifer Ligon

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Virginia's Certificate of Public Need (COPN) law has been the subject of considerable debate in the General Assembly, in the media, and in federal court. At least for now, the discussion at the judicial level has ended, with the United States Court of Appeals for the Fourth Circuit rejecting two medical care providers' claims that Virginia's law is unconstitutional.

The latest judicial challenge to Virginia's COPN law began in 2012, when Colon Health Centers of America, LLC, and Washington Imaging Associates ? Maryland, LLC, d/b/a Progressive Radiology filed suit against the Commonwealth of Virginia, claiming that Virginia's COPN law is unconstitutional in a number of respects. Colon Health and Progressive Radiology both complained that the COPN law had unfairly thwarted their business plans in Virginia. Colon Health had partnered with several Virginia gastroenterology practices in an effort to obtain COPNs for CT scanners that could be used for so-called "virtual colonoscopies." Those applications were denied by the State Health Commissioner, who concluded that the proposed projects would not meet a public need. Progressive Radiology, based in Maryland, positioned itself as a diagnostic imaging provider that would like to enter the Virginia market but was concerned about the challenges the COPN law would present to its efforts.

Colon Health and Progressive Radiology, represented by the libertarian-leaning interest group Institute for Justice, initiated the litigation by requesting a declaration that Virginia's COPN law is unconstitutional because it violates the Dormant Commerce Clause and the Fourteenth Amendment's Equal Protection, Due Process and Privileges or Immunities Clauses. Since 2012, the case has gone from the District Court to the United States Court of Appeals, back to the District Court and through an extensive discovery process, and, most recently, back to the appellate level.

The District Court's first consideration of the litigation was a victory for the Commonwealth; that court dismissed all of Colon Health's and Progressive Radiology's claims, finding that the COPN law advances legitimate government interests and does not substantially burden interstate commerce. The COPN opponents appealed and secured a partial victory in their first trip to the Court of Appeals. That Court affirmed the lower court's dismissal of the Fourteenth Amendment claims, finding that the

appellants failed to plausibly rebut the Commonwealth's asserted justifications for the COPN program, but reversed the lower court's dismissal of the Dormant Commerce Clause Claims. In accordance with that ruling, the parties undertook an extensive discovery process in an effort to adduce evidence on whether the COPN law imposes an undue barrier to market entry by out-of-state entities. One result of the discovery process was a finding that the approval rates for in-state and out-of-state applicants were virtually identical. Colon Health and Progressive Radiology persisted in their claims that out-of-state providers face undue barriers, claiming that the evidence supported higher COPN success rates for "incumbent" providers who already had services in the state. The appellants challenged whether the COPN law produced sufficient local benefits to justify such barriers.

The District Court, after considering the evidence produced in discovery, concluded that no such special barrier exists. Colon Health and Progressive Radiology again appealed. On January 21, 2016, the U.S. Court of Appeals for the Fourth Circuit upheld Virginia's COPN law, finding that it neither discriminates against interstate commerce in purpose or effect nor places an undue burden on interstate commerce<sup>[1]</sup>

In affirming the District Court's ruling, the Fourth Circuit concluded that "both the [COPN] application process and its end result in Virginia showed no appreciable difference in the treatment of in-state and out-of-state entities."<sup>[2]</sup> Although the Fourth Circuit unequivocally stated that the COPN law is constitutional, the Court noted that weighing the policy implications of the COPN law is the role of the legislature, not the judiciary. "Legislators, not jurists, are best able to compare competing economic theories and sets of data and then weigh the result against their own political valuations of the public interests at stake."<sup>[3]</sup> The Court recognized, though, that there are policy reasons that the legislature rationally could find to support the COPN law, including containing health care costs, enhancing the quality of health care services, and ensuring access to health care for underserved and indigent populations.

Virginia is one of 36 states with some form of COPN law. In Virginia, the COPN law requires owners of certain medical care facilities to obtain approval from the State Health Commissioner prior to implementing certain projects such as building a hospital, adding an operating room or purchasing certain diagnostic imaging equipment.

Although the COPN battle on the judicial front is quiet for now, COPN continues to be a subject of vigorous legislative debate. In the current session of the Virginia General Assembly, legislators have proposed several bills that could alter the future of the COPN program in Virginia. The scope of the proposed legislation ranges from changes in the COPN review process to a significant reduction in the types of endeavors subject to the law. The COPN-related legislation will be the subject of a future Williams Mullen Alert.

[1] Colon Health Ctrs. v. Hazel, No. 14-2283 (4th Cir. Jan. 21, 2016).

[2] Id. at 15.

[3] Id. at 26.

## Related People

- Jennifer Ligon ? 804.420.6423 ? [jligon@williamsmullen.com](mailto:jligon@williamsmullen.com)
- Jamie Baskerville Martin ? 804.420.6407 ? [jbmartin@williamsmullen.com](mailto:jbmartin@williamsmullen.com)

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