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Long-Term Care Newsletter

Congress Wants to Change Nursing Home Industry

By Joseph A. Wilkins, Partner

On August 2, 2007, the bipartisan bill titled the Long-Term Care Quality and Modernization Act of 2007 was introduced. According to the sponsoring Senators, "...this legislations addresses several complications that the nursing home profession is experiencing such as workforce shortages, advances in medical technology, and management funding."

If passed, the Long-Term Care Quality and Modernization Act of 2007's intent is to modernize Medicare payments by updating criteria for the payment system. The Medicare payment system will be updated on an annual basis to include changes in the ever-evolving standard medical care. For example, the bill includes a provision to update payment policies regarding cancer treatment. It also would require the Centers for Medicare & Medicaid Services to clarify to providers and beneficiaries that Medicare will directly pay providers for MRIs, radiation therapy, some chemotherapy medicines, and all ambulance service.

Under current law, Medicare pays up to $1,780 per year, per beneficiary, for physical, speech and occupational therapy through a process that covers certain outpatient services not ordinarily reimbursed by the program. However, this process expires at the end of this year. The bill would extend the process for two years and commission a study to determine how to improve the payment system for therapy services.

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A Report to the National Practitioner Data Bank Can Be Challenged

By Sally A. Rasmussen, Partner

Certain medical professionals must be reported to the National Practitioner Data Bank upon the occurrence of designated events, such as when a payment is made for a medical malpractice claim or when a medical professional voluntarily relinquishes privileges at a hospital or surgical clinic while under investigation relating to professional competence or conduct.

A medical professional who feels he or she has been wrongly reported to the Data Bank has a right to challenge such a report. Reports to the Data Bank are governed by federal law, specifically, the Health Care Quality Improvement Act (HCQIA). Reporting parties are responsible for the accuracy of their reports and they are responsible for knowing when a report must be made.

A report can be challenged for either of two reasons: (a) it is factually inaccurate; or (b) it relates to an event which is not reportable under the HCQIA. If a medical professional wishes to challenge a report, he or she must submit a "Subject Statement" outlining the factual inaccuracies in the report or the reasons why the event is not reportable under federal law. The professional must also make a request to the reporting party within 30 days

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Knudsen Law Firm

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Attorneys at Knudsen Law Firm specialize in all aspects of Healthcare Law.

We hope you enjoy the inaugural issue of our newsletter and find the information useful to your practice.

Appointment of Guardians and/or Conservators for Nursing Home Residents
By Jocelyn W. Golden, Associate

Facilities often serve residents who cannot make reasonable decisions about their own care or make payment arrangements. When this situation occurs, a court petition for appointment of a guardian or conservator for such an incapacitated individual may solve these problems. A guardian makes responsible decisions for the care of an incapacitated person, such as where the person should reside, arranges for medical care, protects the individual's personal effects, and obtains governmental benefits that the individual may be entitled . A conservator serves to make decisions regarding the individual's property or income.

To obtain an appointment as guardian or conservator, an interested party must file a petition with the county court where the incapacitated person resides. The petition should state the reasons why the incapacitated person can't make responsible decisions for his or her care. If an emergency exists, the interested party may ask that a temporary guardian or conservator be appointed for a 90 day period before a hearing can be held. A hearing is then set by the county court judge for presentation of evidence of the incapacity of the individual and for the credentials of the potential guardian and conservator to be appointed. Priority for appointment is given to family members or someone previously nominated to serve. Nebraska law states it is unlawful for any agency or any manager, owner, administrator, or employee of any nursing home, assisted-living facility, or institution of persons that are physically or mentally handicapped, infirm, or aged to be appointed guardian of an incapacitated person that may be living in or receiving care in such a facility in the State of Nebraska. However nursing homes and assisted living facilities can move for the appointment of an independent guardian or conservator to assist with the needs of the resident.

Notice of the hearing must be given to the incapacitated person's parents, spouse, and adult children. The court may appoint a separate attorney to represent the incapacitated person, may appoint a "visitor" for observation, and may request a medical examination to verify the incapacity. The incapacitated person is also entitled to receive notice of the hearing, be present at the hearing, and present evidence. Once the hearing is held, the court decides whether the appointment is the least restrictive alternative available for providing continuing care or supervision. If the court orders the appointment, the appointed guardian and conservator must file an acceptance of the duties and powers of the appointment with the court that pledges he or she will comply with the law. The court may also require a bond or training for the appointed guardian and conservator.

The guardian and conservator must make decisions that are in the best interests of the incapacitated person. Guardianships and conservators may be especially helpful if no family members exist or volunteer to arrange for the continued care of the resident at a facility. When an incapacitated person is no longer able to care for themselves, the appointment of a guardian and conservator ensures that the person will be cared for and not fall through the cracks. If an incapacitated person is living at an assisted care facility, a guardian and conservator can ensure that the person stays in an environment that is consistent and safe.

Data Bank (continued from pg. 1)

that the report be corrected or voided.

If the reporting party does not correct or void the report, the professional can request "Secretarial Review" from the Secretary of the United States Department of Health and Human Services. At this stage, both parties can submit documentary evidence and legal argument in support of their respective positions. Once the evidence has been submitted, the Secretary will issue an opinion as to whether the event was reportable, and, if so, whether the report is factually correct. If either party is dissatisfied with the decision of the Secretary, the decision can be appealed to the federal district court under the Administrative Procedures Act.

There are serious ramifications for medical professionals who are reported to the Data Bank. For instance, information from the Data Bank is accessible to state licensing boards and health care entities. When certain medical professionals seek licensure, employment or privileges, a query to the Data Bank is made for information concerning the professional. For this reason, a professional who is the subject of a Data Bank report should give consideration to challenging the report if there is any question about whether it is accurate or whether the event is reportable. The challenge should be made as early in the process as possible.

Article Investigates Quality of Care in Private Investor Owned Nursing Facilities

By Tammy Schroeder, Paralegal

In a September 29, 2007, article in the New York Times Charles Duhigg analyzed trends at nursing homes bought by private investment groups using information obtained from the Centers for Medicare and Medicaid Services. Mr. Duhigg looked at more than 1,200 nursing facilities that had been purchased by large private investment groups since 2000 along with more than 14,000 other nursing homes comparing the investor owned homes against national averages in multiple categories.

The New York Times report states that when these nursing homes are acquired by the private investors, costs are often reduced, profits increased and then the facilities quickly resold for considerable gains. In his analysis of data collected by government agencies from 2000 to 2006, Mr. Duhigg found that residents in those nursing homes are worse off on average than they were prior to the private investment group buying the nursing home.

The nursing home facilities purchased by private investment groups often have cut expenses and staff, sometimes falling below the minimum legal requirements. For example nursing homes acquired by large investment companies prior to 2006 scored worse than the national averages in 12 out of 14 indicators used by regulators to track ailments of long term care residents; however prior to those purchases the homes were scoring at or above the national averages.

In the past, when there was understaffing or declines in care, nursing homes were sued by resident's families or fined by regulators. However, these new private investment groups have structured themselves in such a way as to make it hard for plaintiffs to determine who is actually in control of the nursing home.

Cost cutting has become an issue at large investment group owned homes as they lay off nurses and other staff which are essential to resident safety. Mr. Duhigg's analysis showed that 60 percent of the homes purchased by large investment groups from 2000 to 2006 cut the number of clinical registered nurses, sometimes even below the levels required by law. In 19 percent of those homes staffing has remained relatively constant but, still often below national averages and in 21 percent staffing rose significantly but even those were typically below national averages. At other nursing homes staffing has fallen much less or has grown.

The Department of Health and Human Services stated in 2002 that most nursing home resident's needed at least 1.3 hours of care a day from a RN or LPN and according to data the average home was close to meeting that standard last year. However, nursing homes owned by large investment companies usually only provided only an hour a day of care according to The Times' article. Federal and state regulators have stated that it is these cuts that help to explain why there has been a rise in quality of care deficiencies in nursing home chains acquired by private investment groups between 2000 to 2006. Many Plaintiff's law firms are aware of this article and are using its information to target privately owned nursing home chains with liability suits.

Recently quality of care issues have gotten national attention from the press (and therefore plaintiff's law firms). Two recent articles are noteworthy.

Worst Nursing Homes in the U.S. Outed

By Tammy Schroeder, Paralegal

The Centers for Medicare and Medicaid Services has released its list of fifty-four nursing homes that the government has deemed to be the worst in their states. These 54 facilities are among more than 120 that have the designation of "special focus facility" which is a term used by CMS to indicate that a facility requires more oversight, meaning that states usually conduct inspections at 6 month intervals rather than the usual once a year. The 54 facilities are not only considered special focus but also show a lack of improvement from their previous survey.

Senator Herb Kohl, D-Wisc., stated that the purpose of naming the facilities was to make sure residents received better quality care or the opportunity to move elsewhere. Sen. Charles Grassley, R-Iowa, believes this list is an incentive to facilities to get off the list.

All nursing homes receiving federal payments are inspected once a year and surveyors determine if the facility meets safety and quality of care standards. Normally facilities getting a special focus designation do show improvement as federal data shows that about half those designated improve their quality of care significantly in 24-30 months.

No Nebraska facilities were named on the CMS list. For a complete listing of the 54 nursing homes go to http://www.cms.hhs.gov/CertificationandCompliance/12_NHs.asp#TopOfPage .

"...the purpose behind having the names of the facilities was to make sure that residents received better quality care..."

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The Long-Term Care Quality and Modernization Act of 2007 would extend the exceptions process for the therapy caps, which limit Medicare coverage of outpatient rehabilitation services to $1,780 for physical therapy and speech language pathology combined and $1,780 for occupational therapy services. The therapy caps were originally adopted by Congress in the Balanced Budget Act of 1997.

Another provision is designed to promote investment in long term care facilities' health information and technology by giving a 20% credit for investment in computers, software, and other related equipment. The goal of IT investment would be to expand access to tele-health services, allowing nursing home residents to remain at their facilities without facing the expense and health risks of being transported to hospitals and doctors' offices. Tele-health allows certain medical services to be provided via computer or video-conferencing.

If the Long-Term Care Quality and Modernization Act is adopted it would establish a 15 year time frame for modernizations and improvements to long term care facilities. The Long-Term Care Quality and Modernization Act will also amend the Nurse Reinvestment Act to permanently eliminate the exclusion on loan repayment for nurses employed by for-profit nursing facilities. The bill also plans to fund a national nursing database to help forecast future nursing demands.

The legislation would also create a five-state, two-year demonstration program to jointly train providers and state surveyors on Medicare's regulations governing nursing facilities. The demonstration project would allow states to train surveyors and providers jointly as policy and regulations are changed. According to the bill's sponsors, the pilot project aims to promote "transparency and compliance" with quality of care requirements.