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# Legal Update: What's New For Skilled Nursing Facilities?

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- Eric focuses his practice on representing all types of health care providers, He has successfully tried numerous cases to verdict. He also represents health care professionals in matters with the State and Federal government agencies including the New York Department of Health, Office of Medicaid Inspector General, Medicaid Fraud Control Unit and Justice Center.
- Eric also assists health care providers with risk management issues including developing and implementing policies and procedures, conducting internal investigations and dealing with privacy issues.
- He has published many articles and given numerous lectures in the area of healthcare law such as mandated reporting, medical charting, conducting internal investigations and nursing home negligence.

# Overview

- **HIPAA Update**
- **Arbitration**
- **Resident Grievance Rights**
- **Concerns about Impact of CMS Facility Assessment**
- **Action At the County Level**
- **Civil Lawsuit**

# SNF HIPAA Enforcement

- Theft of employee iPhone issued by Catholic Health Services of Philadelphia, parent management and IT company for 6 affiliated nursing homes (a Business Associate)
- iPhone not encrypted or password protected
- 412 individuals affected
- Social security numbers, diagnosis and treatment info, medical procedures, names of family members, and medications disclosed

# SNF HIPAA Enforcement

- Catholic Health had no policies addressing:
  - Removal of mobile devices containing PHI from its facility
  - What to do in event of security incident
  - No risk analysis
  - No risk management plan

# SNF HIPAA Enforcement

- Monetary payment of \$650,000
- Corrective action plan
- Monitoring by HHS-OCR for 2 years
- Key factor in determining penalty:  
Catholic Health provides unique and much-needed services in Philly to elderly and individuals with DD and HIV/AIDS

# HIPAA Audits

- Phase 2: (July, 2016 – present) Enhanced protocols and adding business entities to the audit program
  - OCR will review the policies and procedures of Covered Entities and their Business Associates to determine compliance with Privacy, Security, and Breach Notification Rules
  - Between 200-250 audits

# HIPAA Audits

- How are providers selected?
  - Covered Entities and Business Associates were sent a request for contact information.
  - Received a pre-audit questionnaire to assist OCR in creating a potential audit subject pool.
  - Auditees selected through a random sampling process and were notified of their participation.

# OCR 2016 HIPAA Desk Audit Guidance on Selected Protocol Elements

Element #	Audit Type	Section	Key Activity	Audit Inquiry	Document Request List	Question / Answers
P55	Privacy	§164.520 (a)(1) & (b)(1)	Notice of Privacy Practices Content requirements	Does the covered entity have a notice of privacy practices? If yes, verify the current notice contains all the required elements. • Header	Upload a copy of all notices posted on website and within the facility, as well as the notice distributed to individuals, in place as of the end of	Q: Do you wish to receive pictures of the Notices hanging on the walls in addition to receiving the uploaded paper copies? A: Yes. Please ensure that the text is readable.

## Most of the audits will be desk audits

- Provide documents electronically.
- Auditors will review documentation and share draft findings with the entity.
  - After receiving the draft report, auditees have 0 business days to send comments.
  - Final audits will be completed 30 business days after the auditee's response.
- A third set of audits may occur onsite, where a broader scope of HIPAA requirements will be examined.

# HIPAA Audits

## After the audit

- In the event of serious compliance issues, OCR may investigate further with a compliance review
- OCR will not post a listing of audited entities or the findings in a way that identifies the audited entity, but OCR may be required to release certain material under the Freedom of Information Act (e.g., notification letters)

# Nursing Home Arbitration?

**In November of last year, a portion of the new CMS regulations were scheduled to go into effect that prohibited nursing homes from entering into any and all binding arbitration agreements with a resident, or a resident's representative, until an actual dispute arose between the parties.**

# Nursing Home Arbitration?

**The CMS regulation was more extensive than anticipated. It stated the following:**

- **A nursing home cannot require a resident to sign a binding arbitration agreement as a condition of admission.**
- **A nursing home can ONLY ask a resident to sign a binding arbitration agreement after a dispute arises AND the agreement must be limited to the specific dispute that has already occurred.**
- **The nursing home must first fully explain the agreement to the resident and/or to the resident's designated representative.**

# Nursing Home Arbitration?

## Also...

- **The arbitration agreement must specifically provide for the selection of a neutral arbitrator who is agreed upon by both parties.**
- **A resident's continuing right to remain in the nursing home must not be contingent on the resident signing the agreement.**
- **There must be clear evidence that the resident, or their legal representative, entered into the agreement knowingly and voluntarily.**

# Nursing Home Arbitration?

## The Legal Challenges to the “Ban”

- **Shortly before the regulation was scheduled to go into effect, the America, Health Care Association (AHCA) led a class action lawsuit against the rule in Federal District Court in Mississippi.**
- **The basis for the lawsuit is that CMS (1) overstepped its statutory authority by effectively creating legislation on the issue AND (2) violated the Federal Arbitration Act.**
- **CMS argued that it did not “BAN” arbitration agreements but merely provided a financial incentive to nursing homes not to use them. Seriously!**
- **WHITE HOUSE MEETING. CMS essentially repealed the ban.**

# Nursing Home Arbitration?

## THE MISSISSIPPI LAWSUIT

- **The Judge issued a 40 page decision granting the plaintiff's request for a temporary restraining order (TRO) preventing the new rules from being implemented until a final decision is made on the lawsuit.**
- **THIS WAS VERY SIGNIFICANT because a TRO is not supposed to be granted unless that party seeking it establishes a "likely chance of success" of winning the case.**
- **CMS appealed the judge's decision BUT THEN WITHDREW THE APPEAL.**

# Nursing Home Arbitration?

## PREDICTION

- Is this over? Maybe!
- Important is that the federal government has consistently expressed its “like” for arbitration agreements. In fact, on May 3<sup>rd</sup>, the Supreme Court declined to review a Pennsylvania action that enforced a different arbitration clause involving a nursing home.
- However, plaintiffs lawyers from all over the country are still organizing. These lawyers would LOVE for the ban to take effect. They are well funded and organized.

# Nursing Home Arbitration?

## POLICY ARGUMENTS FOR AND AGAINST ARBITRATION AGREEMENTS

### FOR:

- The arbitration process is much less costly.
- The arbitration process is much faster, which is important given the advanced age and health of the residents.
- The arbitration process allows for the actual parties to fully participate, including negotiating the eventual resolution.

### AGAINST:

- Arbitration agreements are “hidden” deep within admission agreements and the resident’s do not even realize they are signing them.
- Arbitration agreements are signed under duress during a difficult time in the resident’s and family’s life.
- Civil litigation is a good thing because it helps improve the quality of care at “poor” facilities.\*\*\*

# Nursing Home Arbitration?

## **\*\*\*TRUTH ABOUT LAWSUITS AGAINST NURSING HOMES**

- A 2011 study published in the New England Journal of Medicine compared nursing homes with the best ratings, as given by state regulators, to nursing home with the worst ratings.
- The study then compared those ratings to see how many times each facility was sued.
- The conclusion reached was that the best performing nursing homes were sued only marginally less than the worst performing nursing homes. In other words, there is no correlation between good care and avoiding lawsuits.

# Resident Grievance Rights

Another part of the new CMS regulations (Section 483.1) requires facilities to establish a detailed policy and process for residents to voice grievances without reprisal or fear of discrimination. Grievances must be promptly resolved and can include anything related to:

- 1. Care and treatment issues.**
- 2. Behavior of staff and other residents.**
- 3. “Other concerns” regarding their stay.**

# Resident Grievance Rights

## The Grievance Policy must:

- Notify residents individually or via postings of the right to file a grievance orally or in writing.
- Identify the designated “Grievance Official”.
- Allow for grievances to be filed anonymously.
- Ensure a reasonable expected time frame for completing the process.
- **Allow the resident to obtain a written decision.**
- **Provide contact information for the state agency(s) where grievances can be filed.**

# Resident Grievance Rights

## The Facility must also:

- Take IMMEDIATE action to prevent potential further violations.
- Report to the proper authorities as required by law.
- Maintain all evidence demonstrating the results of all grievances for no less than **3 years** from issuance of the grievance decisions.

# Resident Grievance Rights

## Huge Concern!

The final report/decision will provide a road map for plaintiffs' attorneys and government investigators, as it will most likely not be privileged and confidential.

### **The Final Report/Decision Must Include:**

1. Date grievance received and decision was issued.
2. Steps taken to investigate,
3. Summary of pertinent findings and conclusions.
4. Statement as to whether grievance was confirmed.
5. Corrective actions taken or will be taken.

# CMS Facility Assessment

## WHAT IS IT



- CMS intends the facility assessment to form the basis for long term care facility resource planning and utilization including deployment of sufficient direct care staff with appropriate competencies to meet each resident's unique needs.
- It is considered the “cornerstone” of CMS's new requirements.

# CMS Facility Assessment

## **It is intended to be used by facilities to:**

- Determine staffing requirements.
- Establish a QAPI (Quality Assurance and Performance Improvement).
- Conduct emergency preparedness planning and training.
- Inform facility decisions about several new requirements like providing behavioral health services, trauma-informed care, providing culturally competent care based the facility's ethnic and religious populations, training needs, and other facility operations.

# CMS Facility Assessment

**The assessment must consider the following elements:**

1. The facility's resident population.
2. The facility's resources.
3. The facility-based and community-based risk assessment approach, utilizing an all hazards approach.

# CMS Facility Assessment

## CONCERNS ALREADY IDENTIFIED

- The New F-Tag could be overused and abused by surveyors.
  - One isolated incident can easily result in two deficiencies.
  - F-Tags may often come with an “immediate jeopardy” level of severity with a corresponding fine of up to \$20,628, **WITHOUT** an opportunity to cure.

# CMS Facility Assessment

## Continued...

- The assessments can be a roadmap for plaintiff's attorneys.
  - A facility's weaknesses and "shortcomings" are highlighted and outlined in a single convenient document.
  - It can be used to "prove" the facility was "on notice" of the problem.
- It is unclear if the assessments will be deemed privileged and confidential pursuant to federal and/or NY law.
  - AHHA recommends considering having these prepared by your attorney or under their direction, so you can invoke the attorney/client privilege.

# “Action” at the County Level

- **Erie County** recently announced it was taking action to help improve the quality of care at nursing homes.
- On July 7, 2017, the Erie County Executive signed “**Ruthie’s Law**” which requires nursing homes, located in Erie County, to notify a resident’s family within one hour of determining the resident suffered injuries severe enough to require hospital care.
- **Ruthie’s Law** also requires nursing homes, located in Erie County, to disclose their DOH scores to every applicant seeking placement at their facility.
- **Ruthie’s Law** also requires the nursing homes, located in Erie County, to provide injury and fatality data to the Erie County Commissioner of Social Services.

# “Action” at the County Level

## Who was Ruthie?

- Ruth Murray was a nursing home resident with Alzheimer’s disease who sustained serious injuries after being assaulted by another resident when she mistakenly walked into the other resident’s room. She died 3 days later from her injuries.
- Her family alleged that they were not informed about the severity of Ruthie’s injuries until several hours later by hospital physicians.
- There was much media coverage about the incident.
- The nursing home was fined \$10,000 by the DOH.

# “Action” at the County Level

- Ruthie’s Law was announced with much fanfare, with a press conference that included many state and local politicians. The local paper covered it with a bent of how great it will be.
- Nursing home trade organizations were quick to act, including LeadingAge New York and the New York State Health Facilities Association, writing a letter to the County Executive citing **Section 2812 of the Public Health Law** which prevents counties, towns, villages and cities from enacting or enforcing regulations and standards applicable to nursing homes.

# “Action” at the County Level

## Additional actions taken by Erie County

- The County Executive also issued a new executive order that creates a website publicizing information about all nursing homes located in Erie County. The public can use the site to access “rankings” and “scores” assigned by the DOH. The site will also list past infractions of the nursing home.

# “Action” at the County Level

## Additional actions taken by Erie County

- The County Executive is also lobbying and organizing NYS legislators to pass new laws, at the State level, increasing the amount of fines the DOH can issue to nursing homes for repeat violations and for incidents that result in a resident’s serious injury and/or death.

# “Action” at the County Level

## PREDICTIONS

- Much of the County’s proposed actions will be defeated in court due to Section 2812 of the Public Health Law. However, this litigation will be costly and likely result in several appeals, as the trial level judges will be swayed by public sentiment.
- Counties all over the State will take similar action and will organize to put pressure on at the state level to pass even more nursing home regulations and harsher penalties.

# “Action” at the County Level

## WHAT DOES THIS ALL REVEAL?

- Nursing homes continue to lose the public relations battle to well funded interest groups often led by plaintiffs’ lawyers. Those of us who live in Erie County see the commercials daily from Brown Chiari, LLP, as well as the slanted media coverage.
- Politicians will vote for increased regulations and fines because it’s the popular thing among voters.
- New York State will never have a cap on awards in civil lawsuits, particularly those involving nursing homes.
- Which takes us back to the importance of arbitration agreements!!

# Issue of Admissibility of Previous State Actions in a Civil Lawsuit

## *Mazella v. Beals*

- **FACTS:** The plaintiff alleged that her husband received substandard medical treatment resulting in his suicide. She specifically alleged that Dr. William Beals negligently prescribed Paxil without adequately monitoring her husband's condition for more than a decade. Interestingly, Dr. Beals acknowledged that his care was below accepted medical standards but argued his negligence in no way caused the husband's death.
- **RESULT:** The jury disagreed with Dr. Beals and found in favor of the plaintiff. Dr. Beals appealed.

# Issue of Admissibility of Previous State Action in a Civil Lawsuit



## *Mazella v. Beals*

- **RESULT:** The Court of Appeals ordered a new trial for Dr. Beals after finding:
  - (1) The consent order was not probative of the issue of whether Dr. Beals caused Mr. Mazella death; and
  - (2) Any relevant information that was contained within the OPMC order was significantly outweighed by the prejudicial effect it had on the Jury. The Court emphasized that ***it is improper to try to prove a person did something wrong, on a specific occasion, by establishing he did the same thing wrong on previous but unrelated occasions.***

# Issue of Admissibility of Previous State Action in a Civil Lawsuit



## *Mazella v. Beals*

- **ISSUE ON APPEAL**: Dr. Beal's most compelling argument on appeal was related to what he claimed was an improper admission, into evidence, of a previous consent order between himself and the OPMC.
  - The Consent Order stemmed from previous OPMC charges that were strikingly similar to those alleged in this case. The OPMC alleged that Dr. Beals negligently prescribed medication to 13 patients without properly evaluating and monitoring them. One of those patients was Mr. Mazella. Dr. Beals consented to the OPMC findings as to all patients EXCEPT for Mr. Mazella given the existence of the civil lawsuit brought by his wife.
  - The Consent order was admitted into evidence by the Trial Judge over the objections of Dr. Beals' attorney.

# Issue of Admissibility of Previous State Action in a Civil Lawsuit

## *Mazella v. Beals*

- **WHY THIS IS SIGNIFICANT TO NURSING HOMES:**

(1) We can use this decision, in civil litigation, to argue that previous DOH findings are not relevant and, as such, should not be admitted into evidence at trial.

(2) We can try to argue that such findings are not subject to discovery, such as asking about them at depositions. This is unlikely given New York's broad discovery rules.

(3) The decision came from New York's highest court, the Court of Appeals. As such, it must be followed by all other New York Courts, including administrative courts.

# Thank You!

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