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THE ADELMAN ADVANTAGE

by Rebecca Adelman

The Patient Protection and Affordable Care Act – Part 1: Nursing Home Transparency Means Improvement to What?

On March 23, 2010, President Obama signed comprehensive health care reform, the Patient Protection and Affordable Care Act (the “PPACA”), as amended by the Health Care and Education Reconciliation Act, into law. The PPACA will have far-reaching implications for long-term care facilities. Part I of this article highlights key provisions of the PPACA that will most directly affect nursing homes particularly of Title VI, Subtitle B “Nursing Home Transparency and Improvement” (“Transparency Act”). Part II will focus on the “Elder Justice Act” (“EJA”) and one of the most significant features of the EJA which imposes notification and reporting requirements on individuals affiliated with a nursing home.

In litigation, nursing homes are being served with discovery requesting the information mandated by the new disclosure requirements under the Transparency Act including the identity of each member, director or other “additional disclosable party”. The liability exposure for many related entities is thus increased. Nursing homes must have an understanding of the legislation and develop a plan for meeting the requirements even though there remains uncertainty about the PPACA and the special provisions related to long-term care facilities. Nursing home transparency will improve Plaintiff’s litigation model but little else.

Improving Transparency of Information - The Transparency Act incorporates many of the provisions contained in earlier legislation known as the Nursing Home Transparency and Improvement Acts. The legislation is intended to expand public disclosure about the ownership and operations of Medicare Skilled and Medicaid Nursing Facilities in an effort to make facilities and their owners/operators more accountable. The Transparency Act also is designed to increase penalties for noncompliance, require improved staff training and enhanced quality of care. The relevant proposed rules regarding disclosure summarizes how the nursing home residents and “an even larger number of their family members, friends, and relatives must be able to count on nursing homes to provide reliable care of consistently high quality.”

Citing a 2007 New York Times article analyzing trends at nursing homes purchased by private investment groups, CMS present findings (also referencing the 2010 Congressional Report “Nursing Homes: Complexity of Private Investment Purchases Demonstrates Need for CMS to Improve the Usability and

Completeness of Ownership Data”) that nursing homes acquired by private investment firms quickly cut costs and experience a decline in quality of care. Further citing the 2007 Congressional hearings seeking information on investor-owned nursing homes, CMS references the findings by Congress that “legal schemes were being used by investment firms to shield themselves from liability and, in effect, to deny residents and their families legal remedy against nursing homes.” Thus in addition to the ownership information on nursing homes using the Medicare Provider Enrollment, Chain, and Ownership Systems (PECOS) and the Online Survey Certification and Reporting System (OSCAR), CMS proposes revised reporting requirements in order to implement section 6101 of the PPACA.

The public disclosure of nursing home owners and operators and other individuals and entities that are defined in the Transparency Act will likely increase these parties’ exposure to litigation even if the party has no role in the management or control or delivery or monitoring of the quality of care at the facility. There are many concerns with the Transparency Act as addressed at the conclusion of this section related to the terms and definitions and the need for clarification by CMS. Understanding the implications of the Transparency Act will allow owners and operators and “additional disclosable parties” to be ready for the unforeseen consequences in the future.

Expanded Reporting Requirements (Section 6101) - The proposed revisions to existing reporting requirements that SNFs and nursing facilities must disclose at the time of enrollment and when any change in ownership occurs will include:

- A. Disclosure of Ownership and Additional Disclosable Parties

Under existing law, on CMS form 855A, Medicare providers, including SNFs, are required to disclose:

- 1) Any person or entity that owns directly or indirectly an ownership interest of 5% or more;
- 2) Officers and directors (if a corporation) and partners (if a partnership); and
- 3) Holders of a mortgage, deed of trust, note or other obligation secured by the entity or the property of the entity.

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Meet Dart Chart Systems

Innovative Milwaukee based Software Company provides a solution for today's biggest challenges facing our nation's nursing facilities

There are many businesses that claim they can help a nursing facility's bottom line, which under close scrutiny, fall well short of delivering on this promise. Then there are the folks at Dart Chart Systems who bring years of experience and a track-record of proven success.

Dart Chart Systems began operation in 1997 and provides revenue management solutions, management reporting tools and an array of services that are extremely welcome today as many of our nation's nursing facilities grapple with the recent CMS SNF PPS final rule and its inherent 11.1% reduction in rates.

In a nutshell, Dart Chart helps facilities document its care and services to properly capture (in the correct categories) all of this information. The benefit: to make sure you aren't missing any reimbursement revenue you're due, a fact especially important in light of the above mentioned CMS Final Rule.



“The key component of our software is that we’re constantly updating it,” explains Bernard Hoffmann, Dart Chart’s co-founder and Chief Executive Officer. “We’re constantly on the reviewing side of what’s coming down by Medicare as far as the rules and regulations, and changes that occur. We usually have our products developed well in advance of that effective date which is usually October 1.”

The beauty of using the Dart Chart program is that all a nursing facility needs is access to the internet. The state-of-the-art software then works its magic. However, from the company’s point-of-view it’s not a matter of just giving you their software and wishing you the best.

“We take our relationships with our clients very seriously” Hoffmann states. “We literally come in and spend quite a bit of time in your facility training your staff and educating them on how to use our system, based on your needs and your way of doing business. Plus we train on all three of your shifts so it’s not like you have to bring everyone in your building together at a time not convenient for them. We also pride ourselves in doing great follow-ups. We’re not ones to sell you a product and then you never see or hear from us; we become a partner with our clients to make sure you succeed.”

This follow-up includes the people at Dart Chart continuously monitoring the data you input to make sure there are no inconsistencies in the scoring, and if their staff sees something they question they’re on the phone with you right away asking questions.

“For example,” Hoffmann cites, “we call and discover that perhaps you’ve had a change in staff that needs to be trained in the software, or ask you if you’re getting different kinds of residents? This is the kind of information which helps us keep you moving in the right direction.”

As they say- the proof is in the pudding. “Dart Chart has proven to be a very valuable resource for our facilities,” offers Joel VanEaton, an MDS/PPS Consultant to a dozen nursing homes in Tennessee and Kentucky and a contributing writer

to this publication. “In terms of saving time, maximizing our facilities reimbursement revenue and streamlining documentation procedures, Dart Chart’s software has been a great investment.”

Dart Chart takes advantage of today’s modern technology, yet in such a way that coupled with the company’s hands-on approach you don’t have to look at the computer as a piece of equipment from Mars if you’re not computer-savvy. Because of this, facilities can get away from mounds of paperwork and old-fashioned spreadsheets ... an outdated method of documentation that carries with it the risk of mistakes which translate into not getting all the reimbursement dollars your facility deserves.

With the 11.1% rate reduction on everyone’s mind Dart Chart Systems has become a more valuable resource than ever.

“With our capture system and the data we’re receiving from our client nursing facilities, we’ve discovered that the 11% percent reduction is reduced dramatically,” Mr. Hoffmann mentions. “In the last couple of weeks there has been a great level of interest from those in long-term care about what we have to offer.”

Because of Dart Chart’s forward thinking philosophy, the company has also taken an industry-wide leadership position in crucial areas nursing facilities face. Case in point: the change-in-therapy and the new OMRA’s out there.



“These were announced back in April of this year,” explains Linda Kunz, Ph.D., President of Dart Chart Systems, “and because we have the only system that lets you look at the complete and comprehensive RUG each and every day, and was already doing this, we were uniquely positioned to refine the analytics for the purpose of COT. As a result we can make sure you’re doing this the right way.”

Having this data, and then being able to use it for the betterment of your facility’s residents, and your own bottom line are the keys to why Dart Chart has hit a home run with its clients. What’s more, as times change and in particular CMS comes up with new rules, clients know that have someone that’ll stand by their side.

“I can’t help but think back to early April when things such as the COT’s and the EOTR’s were coming,” comments Dr. Kunz, “one of our clients was asked by someone if they knew about it and they said: ‘I’ve heard about it but I know that Dart Chart’s going to take care of me.’ Our clients rely on us and we don’t take this trust lightly.”

As nursing facilities look to the future, those buildings that are valued partners of Dart Chart Systems realize that they’re not facing the daily challenges of caring for residents and operating under a solid financial footing on their own. Dart Chart is there, every step of the way, offering expert system solutions to ensure they continue to get credit for all the care they provide.

To discover more about Dart Chart Systems please visit www.dartchart.com or call them toll-free at 1-888-210-3200. Tell them you heard about them in LTC Professional.

The Transparency Act expands the information required to be disclosed to include:

- 1) The identity of each member of the governing body;
- 2) Each officer, director, member, partner, trustee, or “managing employee”;
- 3) Each “additional disclosable party”; and
- 4) The “organizational structure” of each “additional disclosable party” to the facility and the relationship to one another.

The new term “additional disclosable party” means any person or entity who:

- a) Exercises operational, financial, or managerial control over a facility or part of a facility, or provides policies and procedures or financial and cash management services for its operations;
- b) Leases or subleases property to the facility, or owns a whole or part interest of at least 5% of the value of the property (including a mortgage, deed, note or other obligation that is secured by the entity or any of the property or assets); or
- c) Provides management or administrative services, management or clinical consulting services, or accounting or financial services.

Note: Nursing homes will be required to disclose third parties who provide the services listed in section c) which can include accountants, payroll services, nurse and policy consulting companies and potentially many others. It will be difficult to reasonably know without guidance from CMS which associated parties are subject to the disclosure requirements.

Note: The term “managing employee” is broadly defined as an individual who directly or indirectly manages, advises or supervises any element of the practices, finances or operations of the facility. The Transparency Act definition of a “managing employee” would include a consultant who advises or supervises any element of the practice or operations of the facility. Clarification is necessary and this definition could include consultants who have no decision-making responsibility related to the daily implementation of policies and procedures.

The term “organizational structure” includes:

- 1) A corporation and its officers, directors, and shareholders who have at least a 5% ownership interest;
- 2) A limited liability company and its members and managers, including their percentage of ownership interest;
- 3) A general partnership and its partners;
- 4) A limited partnership, including partners who have at least 10% ownership;
- 5) A trust and its trustees;
- 6) An individual and contact information for the individual; and
- 7) Any other person or entity HHS requires (to be made known to the public within 1 year after the date on which the final regulations are promulgated).

Note: In past litigation, nursing homes have been required to disclose the identity of the members of the “governing body” as each facility must have a “governing body” per the Federal Regulations. Defense counsel has historically objected to disclosing expanded organizational structure information on the grounds of relevancy. These expanded reporting requirements of the Transparency Act are now being used by Plaintiff’s attorneys in discovery requests and while defense counsel will continue to advance objections on relevancy, these objections are made weaker by the mandatory reporting requirements. Plaintiff’s counsel argue that the information is required for licensure and for federal funding and is thus relevant to the determination of who is managing, controlling, operating and

developing policies for the nursing home. It is likely we will see an increase in litigation against the “additional disclosable parties” in the future.

Note: This reportable information must be readily available upon request by regulators including CMS/HHS, the state and ombudsmen.

Other Nursing Home Provisions – There are numerous other provisions related to nursing homes contained in the Transparency Act, however, their evaluation is beyond the scope of this article. An honorable mention is owed to the requirement that, *within one year of enactment*, the facility must be able to produce to the public any documents from the past three years regarding surveys, certifications and complaint investigations and post notice that these documents are available.

Note: Organizations must have effective “litigation hold” policies and policies related to document retention. Documents in this three year time frame will likely be the subject of requests for production of documents by Plaintiff’s attorneys in litigation.

Conclusion and Impact on Facility and Litigation - The expanded reporting requirements and increased scrutiny in long-term care may result in increased patient care litigation. The information accessible to the public will be the categories of information upon which Plaintiff’s attorney will focus. While defense counsel will continue to advance objections and seek protections from the Court, Plaintiff’s attorney will have information that has up to now been essentially protected and not disclosed absent compelling reasons. There are many concerns and uncertainties about the Nursing Home Transparency Act. In order to assure organizations that they have met their legal requirements and the impact the information may have in future litigation, a review by legal counsel is recommended.

Ms. Adelman is the Principal of Adelman Law Firm, PLLC in Memphis, Tennessee and has concentrated her practice in healthcare, and nursing home and medical malpractice defense litigation for the past 22 years. She also provides medico-legal consulting services and educational programming to the healthcare industry. She is licensed in Tennessee, Mississippi, Arkansas and Illinois. The firm is proud to be of counsel to Quintairos, Prieto, Wood & Boyer, P.A. and together provide services to our national and regional clients. rebecca@adelmanfirm.com

LTC Professional Contest Answers, Winners & Their Prizes:

From Chip Kessler- Thanks for your great response to last month’s contest. The three “difference’s” were:

1. Year on the masthead was 2021 (should be of course 2011)
2. My cat Bathsheba was pictured atop my column rather than me (she’s much better looking)
3. Postage meter stamp on back cover done differently

Now to our winners (in the order that they responded back with the correct answers):

1st Place (\$500 worth of Staff Training/Development Programs from Extended Care Products): Melissa Murphy, Administrator, Pine Knoll Nursing & Rehab, Carrollton, GA

2nd Place (\$250 worth of Staff Training/Development Programs from Extended Care Products): LaFonda Robbins, HR Director, Katherine’s Place at Wedington, Fayetteville, AR

3rd Place (\$100 worth of Staff Training/Development Programs from Extended Care Products): Tom Casey, Administrator, Taylor Nursing Home, Auburn, IN

Look for more contests in future issues!

LTC Professional **Not Coming Addressed to You Personally?**

We want to make sure you are personally getting this newsletter each month, not just have it forwarded to you because you're now holding down the position of a predecessor! Let us know you now are on the job. E-mail your name, facility/company name and address to chip@ecpnews.net & we'll update our records. Just put LTC Professional on the e-mail subject line and we'll take care of the rest.

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- *How are we documenting results of COT assessments for future audits?*
- *What are we doing to mitigate our loss of the 11.1% rehab RUG decreases?*

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