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FEDERAL JUDGE ISSUES FINAL ORDER REQUIRING HOME HEALTH AGENCIES TO PROVIDE ADVANCE WRITTEN NOTICE OF INTENDED ADVERSE ACTION

In a case filed in 1998, a federal court in Hartford, Conn. has now conclusively held that the Secretary of Health and Human Services is responsible for ensuring that home health agencies (HHAs) provide advance written notice to Medicare beneficiaries when an HHA plans to cut back or terminate services. *Lutwin v. Thompson* (formerly *Healey v. Shalala*), No. 3:98CV00418(DJS) (D.Conn., Dec. 6, 2004). The order, a declaratory judgment, applies nationwide, as the case was brought and certified as a nationwide class. The court declined to issue an injunction, as it stated that it had "no reason to doubt that the Secretary will not comply with a declaratory judgment as expeditiously as possible."

Earlier in the litigation the district court had issued a similar declaratory judgment (see 2000 WL 303439 (D.Conn. 2000)), but had permitted the Secretary to carve out a significant exception. Under that exception, HHAs were not required to issue the written notice if the reason for the intended action was for something other than a coverage decision. 186 F.Supp.2d 105 (D.Conn. 2001). The Second Circuit Court of Appeals, however, reversed, stating that the Medicare statute "require[s] notice whenever an HHA reduces or terminates home health services – regardless of whether the reason for that change is a Medicare coverage determination, lack of physician certification, an HHA's unwillingness to provide services for business reasons unrelated to coverage, or sheer caprice." 361 F.3d 146, 158 (2d Cir. 2004).

Although the Court of Appeals had instructed the district court on remand to consider the possibility of injunctive relief, the district court decided to issue another declaratory judgment. The language of the decision makes clear, however, that the district judge expects the Secretary to comply with the declaratory judgment. The order states that plaintiffs "have a legal right to a written … [p]re-deprivation statement before an HHA reduces or terminates its services (except de minimis alterations in services); … [e]xplanation of the circumstances in which a beneficiary has the right to have a demand bill submitted; and … [d]isclosure of information regarding a patient's right to appeal." The order is effective immediately.

The *Healey/Lutwin* litigation had also raised the question of whether the guarantees of due process entitled Medicare home health patients to pre-deprivation review, but the district court and the court of appeals had previously ruled against plaintiffs on that point. The most recent order deals exclusively with the right to notice.

Further information on the case and the order is available from plaintiffs' counsel at The Center for Medicare Advocacy: Gill Deford at (860) 456-7790 or gdeford@medicareadvocacy.org and Sally Hart at (520) 327-9547 or shart@acdl.com. The plaintiffs were also represented by other public interest and private attorneys around the country.