

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN HEALTH CARE ASSOCIATION,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	
)	
DONNA E. SHALALA, <i>et al.</i>)	
)	Civil Action No. 1:99CV01207 (GK)
<i>Defendants,</i>)	(Judge Gladys Kessler)
and)	
)	
NATIONAL CITIZENS' COALITION FOR)	
NURSING HOME REFORM)	
1424 16th Street, N.W., Suite 203)	
Washington, D.C. 20036-2211)	
)	
<i>Intervenor.</i>)	
)	

ANSWER OF INTERVENOR

Pursuant to Fed. R. Civ. P. 24, the National Citizens' Coalition for Nursing Home Reform 1424 16th Street, N.W., Suite 203, Washington, D.C. 20036-2211, has moved to intervene in this action in support of defendants. Pursuant to Fed. R. Civ. P. 24 (c) and U.S. District Court Rule 108 (j), NCCNHR sets forth the defenses for which intervention is sought:

1. The Medicare and Medicaid Acts authorize the Secretary of the United States Department of Health and Human Services (the Secretary) to promulgate rules authorizing per instance civil money penalties (CMPs) against nursing facilities that harm residents' health, welfare, and safety or violate residents' rights.

2. In order to protect physically and mentally frail and dependent nursing home residents, it was in the public interest to issue final regulations authorizing the imposition of per instance

civil money penalties against nursing homes that are not in compliance with Medicare and Medicaid requirements. While NCCNHR strongly supports the Administrative Procedure Act's (APA) notice of proposed rulemaking requirements, in this case, the defendants were fully justified in utilizing the good cause exception to advance notice and comment rulemaking requirements because further delay in imposing per instance civil money penalties against facilities that harm residents or violate residents' rights would be contrary to the public interest.

NCCNHR answers the allegations of the Complaint as follows:

1-2. The allegations in ¶1 and ¶2 are statements of law, legal conclusions, or requests for relief to which no response is required; to the extent any answer is required, the allegations are denied.

3.- 6. Admit.

7. The allegations in ¶7 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

8. Admit.

9. Plaintiff names Nancy-Ann Min DeParle, sued in her official capacity only, as the Administrator of HCFA. At this time, Michael Hash is Acting Administrator of HCFA.

10 - 11. Admit.

12.- 13. The allegations in ¶ 12 and ¶ 13 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

14.-17. Admit.

18. While the Secretary may conduct onsite inspections, it is primarily the various states which are responsible for conducting periodic onsite inspections (i.e., surveys) of non-state facilities to determine whether they meet federal certification requirements and thus are eligible to

participate in the Medicare and Medicaid programs. The Secretary is responsible for certifying the compliance of State nursing facilities. 42 U.S.C. § 1395i-3(g), §1396r(g). Deny any remaining allegations.

19. Admit that the Secretary contracts with various states and the District of the Columbia to conduct Medicare and Medicaid surveys on her behalf. 42 U.S.C. § 1395aa. Intervenor is without knowledge or information sufficient to admit or deny that the Secretary makes certification determinations for most facilities based upon the recommendations of the state survey agencies.

20. Admit.

21.- 24. The allegations in ¶ 21 - ¶ 24 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

25. Intervenor admits that remedies are tied to whether or not the facilities deficiencies immediately jeopardize the health or safety of its residents. Plaintiff cites “H.R. 100-391 (Vol. II) at 476 (Medicaid), 942 (Medicare).” The legislative history contained in H.R. No. 100-391 at page 476 relating to Medicaid is in Vol. I of the report, and the legislative history relating to Medicare at page 942 is in Vol. II of the report. All other allegations contained within ¶ 25 are denied.

26. The allegations in ¶ 26 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

27. Admit.

28. Admit that pursuant to the enforcement provisions of the Medicare and Medicaid Acts, the Secretary and HCFA established a "grid" to categorize deficiencies. The rest of the averments in ¶ 28 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

29. - 31. The allegations in ¶ 29 - ¶ 31 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

32. Deny. HCFA and states must apply one or more of the remedies in Category 1 to an isolated deficiency or pattern of deficiencies that present “No actual harm with potential for more than minimal harm that is not immediate jeopardy.”

33.-38. The allegations in ¶ 33 - ¶ 38 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

39. Admit.

40.- 41. The allegations in ¶ 40 - ¶ 41 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

42. Admit that defendants published the per instance CMP Rule as a final rule with comment period on the grounds that it was "in the public interest." Admit that defendants waived notice of proposed rulemaking. Deny the remaining allegations.

43. Intervenor is without knowledge or information sufficient to admit or deny the allegations in ¶ 43.

44. Deny that in this case defendants are “run[ning] roughshod over administrative procedural safeguards [which] will set a bad precedent for future rulemaking as it applies to long term care facilities.”

45. - 52. The allegations in ¶ 42 - ¶ 52 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

53. - 55. Intervenor is without information or knowledge sufficient to admit or deny the allegations in ¶ 53 -¶55.

56. Admit.

57. - 58. The allegations in ¶ 57 and ¶ 58 are statements of law or legal conclusions to which no response is required; to the extent any answer is required, the allegations are denied.

59. Admit that at 64 Fed. Reg. 13,359 defendants stated that "[t]here should be no additional cost to the provider" as a result of the CMP Rule, that they "do not know the impact of this rule on nursing homes," and that "[w]hile it may be argued that the per instance civil money penalty will be more heavily utilized than the per day civil money penalty, we have no data to support that perspective." Deny the remaining allegations.

60. Admit that at 64 Fed. Reg. 13,360, defendants stated that the CMP Rule does not affect rural hospitals but provide no data or analysis to support this determination.

61. Intervenor is without information or knowledge sufficient to admit or deny the allegations in ¶ 61.

All allegations of the complaint which plaintiffs characterized as facts that have not been specifically admitted or otherwise answered are hereby denied.

COUNT I

DECLARATORY JUDGMENT

(Answers to plaintiff's allegations of violations of the Medicare and Medicaid Acts)

62. In answer to ¶ 62, Count I of the Complaint, wherein plaintiff repeats and realleges each and every allegation contained in ¶ 1 through ¶ 61 of the Complaint, intervenor admits, denies, and alleges to the same effect and in the same manner as intervenor previously did in response to the specific paragraphs.

63. Deny.

64. Deny.

65. Admit.

66. Deny.

67. Deny.

68. Deny. The per instance CMP Rule may adversely affect SNFs and NFs represented by AHCA and its State Affiliates, but only if and when those SNFs and NFs are cited as being out of compliance with program requirements and the States and HCFA choose to impose per instance CMPs. Moreover, the per instance CMP rule will positively affect the quality of care provided to residents in those facilities.

69. The per instance CMP may be applied to nursing homes that harm residents' health, welfare, and safety or violate residents' rights more frequently than the existing per day CMPs, but only if and when those SNFs and NFs are cited as being out of compliance with program requirements and the States and HCFA choose to impose per instance CMPs. Deny the remaining allegations.

70. Admit.

71. - 73. NCCNHR is not seeking intervention to address issues of jurisdiction, and therefore neither admits or denies the allegations contained within ¶71- ¶ 73.

COUNT II

DECLARATORY JUDGMENT

(Answers to plaintiff's allegations of violations of the Administrative Procedure Act)

74. In answer to ¶ 74, Count II of the Complaint, wherein plaintiff repeats and realleges each and every allegation contained in ¶ 1 through ¶ 73 of the Complaint, intervenor admits,

denies, and alleges to the same effect and in the same manner as intervenor previously did in response to the specific paragraphs.

75. Deny.

76. Deny.

77. Deny.

78. Deny. The per instance CMP Rule may adversely affect SNFs and NFs represented by AHCA and its State Affiliates, but only if and when those SNFs and NFs are cited as being out of compliance with program requirements and the States and HCFA choose to impose per instance CMPs. Moreover, the per instance CMP rule will positively affect the quality of care provided to residents in those facilities.

79. Admit that the per instance CMP may be applied to nursing homes that harm residents' health, welfare, and safety or violate residents' rights more frequently than the existing per day CMPs, but only if and when those SNFs and NFs are cited as being out of compliance with program requirements and the States and HCFA choose to impose per instance CMPs. Deny the remaining allegations.

80. Deny.

81. Deny.

82. Deny.

83. Admit.

84. - 86. NCCNHR is not seeking intervention to address issues of jurisdiction, and therefore neither admits or denies the allegations contained within ¶84- ¶ 86.

COUNT III

DECLARATORY JUDGMENT

(Answers to plaintiff's allegations of violations of the Administrative Procedure Act)

87. In answer to ¶ 87, Count III of the Complaint, wherein plaintiff repeats and realleges each and every allegation contained in ¶ 1 through ¶ 86 of the Complaint, intervenor admits, denies, and alleges to the same effect and in the same manner as intervenor previously did in response to the specific paragraphs.

88. Deny. The per instance CMP Rule may adversely affect SNFs and NFs represented by AHCA and its State Affiliates, but only if and when those SNFs and NFs are cited as being out of compliance with program requirements and the States and HCFA choose to impose per instance CMPs. Moreover, the per instance CMP rule will positively affect the quality of care provided to residents in those facilities.

89. Admit that the per instance CMP may be applied to nursing homes that harm residents' health, welfare, and safety or violate residents' rights more frequently than the existing per day CMPs but only if and when those SNFs and NFs are cited as being out of compliance with program requirements and the States and HCFA choose to impose per instance CMPs. Deny the remaining allegations.

90. - 95. NCCNHR is not seeking intervention to address issues of the Regulatory Flexibility Act, and therefore neither admits or denies the allegations contained within ¶ 90- ¶ 95.

96. - 98. NCCNHR is not seeking intervention to address issues of jurisdiction, and therefore neither admits or denies the allegations contained within ¶ 96- ¶ 98.

COUNT IV

DECLARATORY JUDGMENT

(Answers to plaintiff's allegations of violations of the Medicare Act)

99. In answer to ¶ 99, Count IV of the Complaint, wherein plaintiff repeats and realleges each and every allegation contained in ¶ 1 through ¶ 98 of the Complaint, intervenor admits, denies, and alleges to the same effect and in the same manner as intervenor previously did in response to the specific paragraphs.

100. - 102. Deny the allegations in ¶ 100 - ¶ 102.

103. Admit.

104. - 106. NCCNHR is not seeking intervention to address issues of jurisdiction, and therefore neither admits or denies the allegations contained within ¶ 104- ¶ 106.

AFFIRMATIVE DEFENSES

1. The Medicare and Medicaid Acts authorize the Secretary to promulgate rules authorizing per instance CMPs against nursing facilities that harm residents' health, welfare, and safety or violate residents' rights.

2. In order to protect physically and mentally frail and dependent nursing home residents, it was in the public interest to issue as a final rule with comment period regulations regarding the imposition of civil money penalties on nursing homes that are not in compliance with Medicare and Medicaid requirements.

CONCLUSION

Therefore, NCCNHR respectfully requests the Court to:

- (1) deny all Plaintiff's requests for relief:
- (2) allow NCCNHR recovery of its costs in this action:
- (3) order such other and further relief as the Court may deem just and appropriate.

Date: July 19, 1999

Respectfully submitted,

Bruce Vignery, D.C. Bar No. 297911
Sarah Lenz Lock, D.C. Bar No. 459347
Dorothy Siemon, D.C. Bar No. 447754

AARP Foundation Litigation
601 E Street, N.W. A4-170
Washington, D.C. 200149
(202) 434-2060

Toby Edelman, D.C. Bar No. 202622

National Senior Citizens Law Center
1101 14th St., N.W. Suite 400
Washington, D.C. 20005
(202) 289-6976

Attorneys for NCCNHR

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer of Intervenor was sent by first class mail, postage prepaid, this 19th day of July, 1999 to the following counsel:

Brian Kennedy
Federal Programs Branch, Civil Division
U.S. Department of Justice
P.O. Box 883
Benjamin Franklin Station
Washington, DC 20044

Thomas C. Fox
Tamara V. Scovill
REED SMITH SHAW & McCLAY, LLP
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
(202) 414-9200

Sarah Lenz Lock