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HARTER SECREST & EMERY SECURES VICTORY AT SECOND CIRCUIT COURT OF APPEALS FOR NEW YORK HEALTH FACILITY CLIENTS

Ruling allows facilities to challenge federal Medicaid rules in federal court

Rochester, New York, April 29, 2021 – In a precedent-setting opinion, the United States Court of Appeals for the Second Circuit ruled that a group of long-term care facilities in New York State can proceed in federal district court to challenge a final administrative rule from the U.S. Department of Health and Human Services (HHS) that the plaintiffs believe directly violates the federal Medicaid Act.

The successful appeal was argued by Brian M. Feldman, a partner at Harter Secrest & Emery LLP, a full-service business law firm with offices throughout New York, with the assistance of Harter Secrest & Emery attorneys Lauren R. Mendolera and Kristian D. Walker.

"This is a significant victory for long-term care organizations," Feldman said. "This precedent-setting decision opens the door for facilities to protect themselves, with pre-enforcement lawsuits, from rulemaking that violates Medicaid Act provisions."

HHS's Centers for Medicare and Medicaid Systems (CMS), working with and through state health agencies, conducts regular surveys of nursing and long-term care facilities to ensure compliance with quality standards required to participate in the Medicare and Medicaid programs. Survey results can impact a facility's Five Star Quality Ratings, which are published to help guide consumer choice, and can also impact a facility's reimbursements through various state Medicaid programs. Congress previously mandated that all facility surveys be conducted by a team that includes at least one registered nurse.

Yet, in 2017, HHS promulgated a final rule stating that certain compliance surveys did not require the participation of a registered nurse, effectively amending federal law. HHS proposed the rule to counter an Administrative Law Judge (ALJ) decision successfully obtained by Harter Secret & Emery for its client, Avon Nursing & Rehabilitation. In that proceeding, the ALJ concluded that a survey conducted without

a registered nurse was both counterproductive and illegal. Following that decision, HHS codified its position in the final rule.

Avon Nursing & Rehabilitation, joined by a host of other facilities, challenged the rule in the U.S. District Court for the Southern District of New York in Manhattan and sought to prevent the rule's implementation. The district court initially ruled that lacked subject matter jurisdiction to reach the merits. Yesterday's published opinion by the U.S. Court of Appeals for the Second Circuit reverses that decision, ruling that federal district courts may bring Medicaid rule challenges, even as to facilities dually participating in both Medicaid and Medicare. In a decision authored by Circuit Judge Michael H. Park and joined by Circuit Judges Robert A. Katzmann and Raymond J. Lohier, Jr., the Second Circuit vacated the district court's dismissal and remanded the case for a decision on the merits.

Feldman said he looked forward to asking the district court, on remand, to strike the regulation at issue as contrary to the plain text of the Medicaid Act. "Every day, facilities live up to their obligations under the Medicaid Act to keep registered nurses on site," he said. "This lawsuit seeks to ensure that the government lives up to its corresponding obligation under the Medicaid Act to include registered nurses on survey teams inspecting facilities' compliance. We look forward to getting to the merits of this case to guarantee that survey teams are staffed by qualified professionals— including registered nurses, as Congress has mandated—for the benefit of our clients and their residents alike."

Harter Secrest & Emery has long been a leader in representing health care organizations, including nursing facilities, confronting government overreach. For decades, the firm has represented nursing facilities successfully challenging illegal Medicaid rules in the New York State courts, ultimately helping facilities recover more than $250 million. The *Avon* decision ensures that nursing homes and other health care organizations can now challenge federal rules issued in violation of the Medicaid Act.

Harter Secrest & Emery Health Care attorneys work with health systems, hospitals, nursing homes, clinics, physicians and other health care facilities, agencies and professionals to provide guidance on day-to-day operational, business and regulatory issues, and in responding to administrative and court proceedings related to, among others issues, compliance and regulatory matters, False Claims Act and whistleblower lawsuits, and New York State Medicaid reimbursement challenges.

About Harter Secrest & Emery LLP

Harter Secrest & Emery LLP is a full-service business law firm providing legal services to clients ranging from individuals and family-owned businesses to Fortune 100 companies and major regional institutions. With offices in Buffalo, Rochester, Albany, Corning, and New York City, New York, the firm is

a recognized leader in litigation, corporate, employee benefits, environmental and land use, health care, higher education, immigration, intellectual property, labor and employment, real estate, and trusts and estates law. Harter Secrest & Emery has 36 *U.S. News - Best Lawyers*® 2021 "Best Law Firms" top tier metropolitan practice group rankings—more Western New York rankings than any other law firm. The firm has been honored by *Chambers USA* for Corporate/M&A, Environment, Labor & Employment, Litigation, Immigration and Real Estate law and 49 attorneys are recognized as *The Best Lawyers in America*© for 2021. For more information visit www.hselaw.com.

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