Concerns over care homes' potential breaches of consumer law

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The Competition and Markets Authority ("CMA") has now published the initial findings of its Market Study launched in December 2016 to examine whether the residential care sector is working well for elderly people and their families. Along with the publication of these findings, it has announced that, as a result of information received during the study, it has opened a consumer protection case to investigate its concerns that some care homes may be breaking consumer law. In its Care Homes Market Study Update Paper, the CMA reveals its concerns that certain providers may, for example, be charging fees after a resident has died and large upfront fees.

The CMA has powers to enforce a range of consumer protection law, including the Consumer Protection from Unfair Trading Regulations 2008. The regulator's powers include criminal prosecution, however it is generally more likely to use its civil powers. In each case the breach must affect, or have the potential to affect, consumers generally or a group of consumers and the CMA must follow the principles of good regulation such that enforcement action is proportionate, consistent, targeted, transparent and accountable. Enforcement action may only be appropriate where, for example, breaches of legislation point to systemic failures in a market, there is a need to secure compensation for consumers or where changing the behaviour of one business would set a precedent.

The CMA is currently focussing its consumer protection investigation on the charging of large upfront fees and the charging of fees after death. The regulator is using its powers to obtain further evidence from a number of providers and has indicated that it will take consumer enforcement action if it finds breaches of consumer law. Providers should note that consultation with the businesses involved must generally take place before court proceedings are issued (unless immediate action is vital to safeguard the interests of consumers) and undertakings may be accepted instead of court proceedings being issued.

Although the current investigation is focussed on a limited number of concerns, it should be noted that the CMA has identified a number of other issues in respect of which enforcement action may be taken in the future. Some of the CMA's concerns include:

- a lack of indicative pricing information on care home and provider websites: the CMA is particularly concerned about the lack of information on weekly fees charged to self-funders;

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- large upfront deposits: the concern is that large amounts may be held by providers, however, there is no specific regulatory requirement for those sums to be safeguarded against the risk of insolvency;

- other upfront charges such as administration charges or management fees;

- extra charges: these are described by the CMA as “hidden extra charges” for things such as chiropody, hairdressing, toiletries or surcharges for processing payments and concerns have been expressed that there is a lack of clarity about these charges before residents move into care homes;

- prospective residents and their families are not given sufficient time to consider the terms and conditions of care home contracts properly and contracts vary greatly and may not always be user friendly;

- some contracts do not clearly set out guarantors’ liability and the CMA will be exploring the use of guarantors further;

- instances where top up fees are being paid directly to care homes without the agreement of the local authority and instances where there have been unexpected and/or large fee increases;

- there are different approaches between providers to the treatment of NHS Funded Nursing Care contributions and self-funding residents’ fees and it is not clear how this is impacting on self-funding residents;

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- some nursing homes are asking residents in receipt of NHS Continuing Healthcare funding to pay top-up fees towards the cost of their care package; and

- care home contracts contain widely drafted termination clauses which may impact unfairly on residents.

The CMA is inviting comments on its Care Homes Market Study Update Paper from interested parties. The deadline for submission of responses is 5 July 2017 and these can be emailed to carehomes@cma.gsi.gov.uk.

In light of the fact that the CMA may extend the scope of its consumer protection case to cover some of the issues highlighted above, we would urge providers to review their practices and seek specialist legal advice in relation to their care homes contracts.

We can provide specialist legal advice to providers who wish to review their contracts to ensure they comply with consumer protection legislation and other regulatory requirements. We also advise on all aspects of regulatory enforcement proceedings. If you wish to discuss the implications of the CMA's Care Homes Market Study and what it means for you, please contact Laura Guntrip, Partner in our Healthcare team.

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