

Dinsmôre

LTC Debt Collections

How to improve accounts receivable while avoiding unlawful medical debt collections practices.

FEBRUARY 16, 2024



Keep an eye on AR

-Maintain oversight of billing and collections processes.

-Make sure charges are accurate.

-Monitor collection of accounts, timely.

-Have procedures to timely and accurately bill appropriate payers.

-Have systems in place to notify each payer so they know and understand what is owed and when.

AR Policy Check Up

1. Follow timeline for procedures, by payer.
2. Assign responsibilities; train.
3. Explain outstanding AR and next steps, in writing.
4. Review aged accounts and next steps, monthly.

The ability to collect starts in the admissions process.

A main culprit for AR, and bad debt, is lack of timely follow-up on outstanding claims. This is especially true with regard to Medicaid pending and private pay.

That said, there is recourse, and a fallback strategy, is using:

1. Discharge.
2. Legal collections against residents and third parties (generally only liable if they used or transferred resident funds for their own benefit instead of turning them over for cost of care).

Beware though that recently "responsible party" clauses in many admission agreements became an area of focus for the CFPB, and the CFPB strongly urges nursing facilities to reexamine these clauses in their admissions agreements to make sure they comply with federal law, and to revise the agreements by removing "responsible party" clauses that are illegal.

Nonpayment?

Consider issuing discharge notice.

Non-payment occurs **when the resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility.** See 42 CFR § 483.15(c)(1)(i)(E).

Nonpayment?

What if the resident does not submit an application for Medicaid benefits?

Consider discharge.
Non-payment applies **when the resident has not submitted the necessary paperwork for third party payment.** Id.

Nonpayment?

What if Medicaid denies the resident's claim, and the resident still hasn't paid?

Consider discharge notice. Non-payment applies "**after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay.**" Id.

Nonpayment?

Can a resident be discharged for nonpayment while their Medicaid eligibility is pending?

No. "**The resident cannot be discharged for nonpayment while a determination on the resident's Medicaid eligibility is pending.**" See State Operations Manual, F622, Nonpayment as Basis for Discharge.

Facility-initiated Discharge for Nonpayment

Whose responsibility is it to notify the resident of his or her change in payment status?

The facility's. Further, **"the facility should ensure the resident has the necessary assistance to submit any third party paperwork."** Id.

Facility-initiated Discharge for Nonpayment

Can the facility discharge the resident for nonpayment where the resident's representative has failed to pay?

Yes. **"In situations where a resident representative has failed to pay, the facility may discharge the resident for nonpayment[.]"** Id.

Facility-initiated Discharge for Nonpayment

Is there any evidence of exploitation or misappropriation of the resident's funds by the resident representative?

If so, the facility should take steps to notify the appropriate authorities on the resident's behalf, before discharging the resident. Id.

Facility-initiated Discharge for Nonpayment

What if a resident's initial Medicaid application was denied but appealed. Is the resident still considered to be in nonpayment status?

No. An appeal suspends a finding of nonpayment. Id.

Facility-initiated Discharge for Nonpayment

Whose responsible is it to notify the resident of their change in payment status? The facility's.

Facility-initiated Discharge for Nonpayment

Whose responsibility is it to ensure the resident has the **necessary assistance** to submit any third-party paperwork? The facility's.

Facility-initiated Discharge for Nonpayment

How does the facility ensure the resident has the "necessary assistance" to submit any third party paperwork?

Display in the facility written information, and provide to residents and applicants for admission, oral and written information about how to apply for and use Medicare and Medicaid benefits, and how to receive refunds for previous payments covered by such benefits.

42 CFR § 483.10(g)(13) and (17).

Facility-initiated Discharge for Nonpayment

What types of written information should the facility provide?

Facility staff may use written materials issued by the State Medicaid agency and the Federal government relating to these benefits. See State Operations Manual, F579, Guidance § 483.10(g)(13).

Facility-initiated Discharge for Nonpayment

How can facilities fulfill their obligation to **orally** inform residents or prospective residents about how to apply for Medicaid or Medicare?

By assisting them in working with the local Social Security Office or the local unit of the State Medicaid agency. Id.

Facility-initiated Discharge for Nonpayment

Are facilities responsible for orally providing detailed information about Medicare and Medicaid eligibility rules?

No. Facilities are not responsible for orally providing detailed information about Medicare and Medicaid eligibility rules. Id.

Facility-initiated Discharge for Nonpayment

Is simply providing a phone number sufficient in assisting the resident or the resident representative? No, just giving a phone number is insufficient. Id.

Facility-initiated Discharge for Nonpayment

If the resident is not able to communicate informed consent, and if there is no representative payee, or if the representative payee is not paying the bill, what else can the facility do to?

Again, document how you: (a) informed the resident of the change in payment status, (b) ensured the resident had assistance to submit third party paperwork, (c) considered whether report was required to state survey agency and/or law enforcement. Evaluate status of current agent and receiver from Social Security, and whether change is in order. Ombudsman Advocacy Toolbox, Action Steps. Assess for legal collections.

Appeal of discharge due to nonpayment?

Does the resident have the right to appeal a facility-initiated discharge? Yes, through an administrative hearing.

*Strict adherence to state and federal requirements is required including but not limited to valid reason, effective date, location of transfer, detailed plan, right of appeal, and notices.

Freedom from abuse, neglect, and exploitation.

The resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation.

42 CFR § 483.12.

The regulations limit the circumstances under which a facility can initiate a transfer or discharge, thus protecting nursing home residents from facility-initiated transfers and discharges which violate federal regulations. The resident is essentially being moved from his/her home. Without a safe location, and strict compliance with the regulatory requirements, a facility-initiated discharge arguably would deprive a resident of his or her rights.

Before facility-initiated discharge...

Hold care conference with resident and family to resolve or mitigate problem (also to provide a defense to a later potential citation under F622 or F623).

Get second opinion from legal counsel if facility-based personnel are too close to the situation. A new set of eyes might be more objective.

Consult with ombudsman (who will staunchly support resident), but will also understand the regulatory basis for a discharge based on nonpayment.

Consult with a state regulator who may be able to provide technical assistance if there are legitimate questions with compliance with the regulations.

Reach out to APS or HHS when the resident's health and safety are at risk through no fault of facility staff.

Bring in law enforcement if the resident was physically injured by family or subjected to endangerment. Only consult law enforcement if there is a serious and legitimate basis that the resident is in trouble.

Before facility-initiated discharge...

Bring in other family members (in addition to the resident representative), or family members already identified, because sometimes another set of eyes on conduct at issue can be helpful.

Consider involving outside care providers like a PCP, or consulting physician, or home-based caregiver, who may have a prior relationship with resident or family.

Seek assistance from MCO caseworkers on finding alternative placement that is covered.

Confirm admissions paperwork, marketing/referral forms, policies and procedures on admissions, transfer, and discharges are up to date for resident and for others at facility.

Consider legal action to remove the resident's agent if that agent is not acting in the resident's best interests, e.g., by court order directing POA to act (rescinding authority, ordering to turn over funds, removing as guardian, or appointing alternate guardian).



A strong AR collections process can protect current assets:

When 30 days has passed without payment:

1. Issue discharge notice.
2. Send notice of overdue payment.
3. Prepare for collections action.

To assess viability of collections action assemble signed admissions agreement, agent's authority, statement owing, facesheet with contact information, business office notes on collaborations with resident and/or family regarding nonpayment and/or Medicaid eligibility, and financial information. Also, confirm resident/family is satisfied with services provided.

Typical collections actions for nonpayment (fact specific)

AGAINST RESIDENT:

- Breach of contract or account stated and notice of judgment lien securing debt by real estate
- After death, file statement of claim in probate estate; collect

AGAINST THIRD PARTY:

- Breach of contract claim for failure to use resident's funds to pay for care
- Voidable Transactions Act claim

Advocacy groups have warned caregivers to keep a lookout for these red flags:



Some nursing homes and debt collectors are billing and suing caregivers (and relatives and friends) for the residents' cost of care based on admissions contracts, which is fine (as a last resort), but ...

CFPB has listened to these warnings.

Also, often during admissions, caregivers are often asked to sign admissions agreements that are lengthy and confusing, and caregivers often don't even know what they're signing.

Some admissions agreements say a caregiver must pay the resident's bill if the resident can't afford to.

This is generally illegal.

See CFPB Circular and Issue Spotlight, and Joint Letter from CFPB and CMS, 9/8/22, [infra](#).

Circular

cfpb Consumer Financial Protection Bureau
1700 G Street NW, Washington, D.C. 20552

Circular 2022-05
September 8, 2022

Consumer Financial Protection Circular 2022-05

Debt collection and consumer reporting practices involving invalid nursing home debts

September 8, 2022

Question presented

Can debt collection and consumer reporting practices relating to nursing home debts that are invalid under the Nursing Home Reform Act violate the Fair Debt Collection Practices Act (FDCPA) and Fair Credit Reporting Act (FCRA)?

Response

Yes. Under the Nursing Home Reform Act, a nursing facility may not condition a resident's admission or continued stay on receiving a guarantee of payment from a third party, such as a relative or friend. Contractual provisions that violate that prohibition are illegal and unenforceable. As detailed in this Circular, certain practices related to the collection of nursing home debts that are invalid under the Nursing Home Reform Act and its implementing regulation violate the FDCPA and FCRA.

Issue Spotlight

CONSUMER FINANCIAL PROTECTION BUREAU | SEPTEMBER 2022

Nursing home debt collection

Issue spotlight

cfpb Consumer Financial Protection Bureau

CFPB Joint Letter with CMS



NOTIFICATION LETTER

ATTENTION: Nursing facilities and debt collectors
 DATE: September 8, 2022
 SUBJECT: Nursing facility debt collection practices

The Consumer Financial Protection Bureau (CFPB) and the Centers for Medicare & Medicaid Services (CMS) remind you of your responsibilities under the Nursing Home Reform Act (NHRA), Fair Debt Collections Practices Act (FDCPA), and Fair Credit Reporting Act (FCRA).

TITLE 42—THE PUBLIC HEALTH AND WELFARE § 1395i-3

(5) Admissions policy

(A) Admissions

With respect to admissions practices, a skilled nursing facility must—

- (ii) not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility.

Nursing Home Reform Act (NHRA)

NHRA, enacted in 1987, **prohibits nursing facilities from requesting or requiring a third-party guarantee to a nursing facility as a condition of admission or continued stay.**

42 U.S.C. §§1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii), Medicare and Medicaid, respectively; 42 C.F.R. §483.15(a)(3).

Nursing home contracts with residents that violate NHRA and its implementing regulations are unenforceable.

Fair Debt Collections Practices Act (FDCPA)

FDCPA **prohibits use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt."**

Seeking repayment of a debt that violates NHRA violates FDCPA.

Debt collectors that allege that a family member or friend engaged in financial wrongdoing, without having any basis for the allegation, also violate FDCPA.

Fair Credit Reporting Act (FCRA)

Finally, **"Reporting that a third party owes a debt to a nursing facility for the costs of a resident's care when the debt is based on an illegal contract clause may demonstrate that furnishers lack reasonable written policies and procedures regarding the accuracy and integrity of information they furnish,"** in violation of FCRA.

"Diagnosis: Debt," aired on NPR



"pernicious strategy"

"level of aggression ... severely increasing"

- *nursing homes slip the admissions agreements into papers that family members sign when an older parent or sick friend is admitted,*
- *people are told they must sign, which violates federal law, or*
- *sometimes there is barely any discussion.*

CFPB heard testimony from elder law advocacy groups

Nursing homes frequently manage the Medicaid application process, but sue third parties for the cost of care when the resident's Medicaid application is denied, even when the denial may be due to the nursing home's own error.

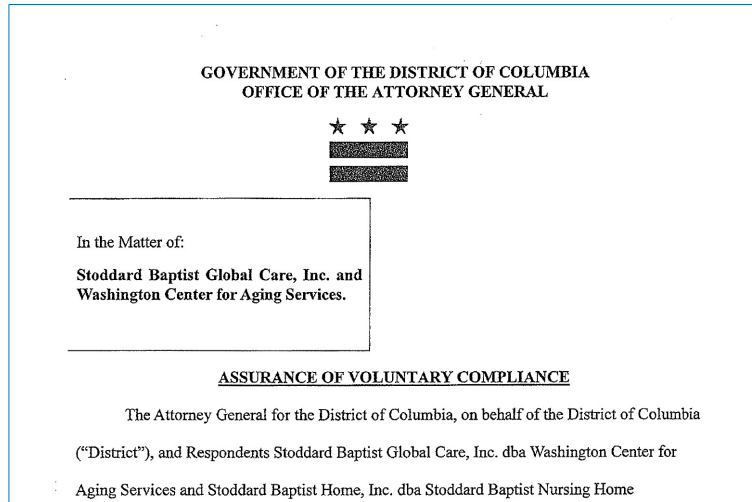
Related clauses require third parties to promise that the resident has not made any disqualifying transfers of their assets within the Medicaid lookback period and try to hold third parties personally responsible if these transfers took place before the resident was admitted, regardless of the third party's actual knowledge or authority over those transfers.

Area of focus and enforcement, DC Office of Attorney General

To stop **deceptive billing practices**, the DC OAG ordered Washington Center for Aging Services and Stoddard Baptist Nursing Home to:

1. Update the Admission Agreement to make clear that non-residents are not financially responsible for residents' bills and to allow residents to pay without setting up direct deposit.
2. Change collection letter language to ensure it does not implicitly or explicitly say that non-residents are personally liable to pay for resident's care.
3. Cease debt collections and terminate lawsuits that seek money from non-residents to pay for residents' care.
4. Provide restitution to any non-resident discovered to have made payments to the nursing facilities as a result of litigation filed by the homes, or incurred attorney's fees in defending against such litigation.
5. Pay \$20,000 to the District for costs and civil penalties.

Washington, DC OAG Order:



Area of focus and enforcement, CFPB, CMS, and state-level agencies:

CFPB Director Rohit Chopra encouraged families to file complaints with his agency and at the state level.

Chopra also asked nursing homes to "confidentially inform" state or federal enforcement agencies about the illegal practices of others to help "address the range of harms associated with medical debt," he said.

Nursing facilities that violate the nursing home reform act can be subject to enforcement action by state agencies and by the CMS, whose director co-signed the joint letter sent to nursing homes.

Area of focus and enforcement, CFPB:

CFPB can obtain "any appropriate legal or equitable relief with respect to a violation of [f]ederal consumer financial law," including, but not limited to:

1. Rescission or reformation of contracts
2. Refund of money or return of real property
3. Restitution
4. Disgorgement or compensation for unjust enrichment
5. Payment of damages or other monetary relief
6. Public notification regarding the violation
7. Limits on the activities or functions of the person against whom the action is brought
8. Civil monetary penalties (which can go either to victims or to financial education)

Area of focus and enforcement, CMS

Violations of the NHRA may subject a nursing home facility to enforcement action by CMS and various state agencies, using guidance in the CMS State Operations Manual to cite deficiencies.

Using deceptive and illegal admission agreements that misrepresent relevant law arguably deprives residents of their rights.

Area of focus and enforcement, F620

§483.15(a)(3) Third Party Guarantee of Payment

The facility must not request or require a third party to accept personal responsibility for paying the facility bill out of his or her own funds as a condition of admission, expedited admission, or continued stay in the facility.

However, the facility may request and require a resident representative with legal access to the resident's funds available to pay for facility care to access and use the resident's money or other assets to pay for care, as authorized by law. The facility may request and require this representative to sign a contract, without incurring personal liability, to provide the facility with payment from the resident's income or assets. A third party guarantee is not the same as a third party payor, e.g., an insurance company; and this provision does not preclude the facility from obtaining information about Medicare or Medicaid eligibility or the availability of private insurance. The prohibition against third-party guarantees applies to all residents and prospective residents in all certified long term care facilities, regardless of payment source. *State Operations Manual, Appendix PP - Guidance to Surveyors for Long Term Care Facilities (Rev. 211, 02-03-23)*

Area of focus and enforcement, F620

PROCEDURES EMPLOYED BY SURVEYORS:

Record Reviews

Review the facility admissions package, including admissions policies, and contracts to determine if they contain any of, but not limited to, the following: ... Requirements or requests for a third party guarantee of payment as a condition of admission or expedited admission.

Interviews

Ask resident and/or their representative if there were any preconditions or requirements for admission, such as a third party guarantee of payment[.]

Area of focus and enforcement, CMS enforcement actions could lead to penalties:

1. Civil money penalties
2. Termination of the provider agreement
3. Denial of payment for all Medicare and/or Medicaid individuals by CMS
4. Denial of payment for all new Medicare and/or Medicaid admissions
5. State monitoring
6. Temporary management
7. Transfer of residents
8. Transfer of residents with closure of facility
9. Directed plan of correction
10. Directed in-service training
11. Alternative or additional state remedies approved by CMS

Area of focus and enforcement, Consumer lawsuits under FDCPA:

Consumers can also sue debt collectors for FDCPA violations in any appropriate U.S. district court or other court of competent jurisdiction. The consumer has one year from the date on which the violation occurred to start such an action. A debt collector found to have violated the FDCPA can be liable for:

1. Any actual damages sustained because of that failure
2. In an individual action, punitive damages as allowed by the court, up to \$1,000
3. In a class action, up to \$1,000 for each named plaintiff and an award to be divided among all members of the class of an amount up to \$500,000 or 1 percent of the debt collector's net worth, whichever is less
4. Costs and a reasonable attorney's fee in any such action

Area of focus and enforcement, Consumer lawsuits under FCRA:

The CFPB also enforces the Fair Credit Reporting Act (FCRA), which prohibits furnishing inaccurate information to any consumer reporting agency after receiving notice from a consumer that the information is inaccurate. Debt collectors can also violate the FCRA when they rely on illegal responsible party clauses to report that a third party owes a debt to a nursing facility for the costs of a resident's care. FCRA violations can subject a debt collector to statutory damages of \$100 – \$1,000 per violation.

What is a "responsible party" clause?

The recent warning from the CFPB and CMS focused on clauses in admission contracts that require caregivers to be a "responsible party" for the resident's costs of care, or otherwise subject the caregiver to financial liability should the admitted resident incur a debt.

- *Responsible for what?*
- *Am I agreeing just to be a contact person?*
- *Am I supposed to make care decisions?*
- *Will I incur financial liability for the cost of care here?*
- *I do want to know what's going on. And I don't want to be labeled as irresponsible.*

Federal law is clear: The NHRA prohibits nursing facilities from requesting or requiring that a third party personally guarantee payment to the facility as a condition of a resident's admission or continued stay in the facility.

What is a "responsible party" clause, cont.

Advocacy groups say:

- *Any such clause is presumptively illegal and unenforceable.*
- *Only the resident should sign the agreement.*
- *Do not to sign agreements with such clauses.*
- *You are within your rights to refuse to sign.*
- *Strike out any language that purports to impose a financial obligation on a responsible party.*
- *Clearly specific that where you do sign you are signing just for the resident as "agent for the resident [named...]" or "guardian of the resident [named...]" only.*
- *You can ask to modify the agreement so that you are only agreeing to commit the resident's funds for payment (if you have the authority to do so).*

Centers for Medicare & Medicaid Services, HHS § 483.15(a)(3)

§ 483.15 Admission, transfer, and discharge rights.

(a) *Admissions policy.* (1) The facility must establish and implement an admissions policy.

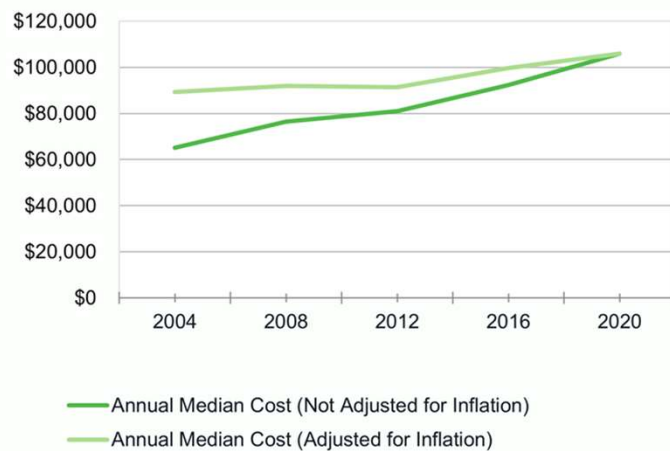
(3) The facility must not request or require a third party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility. However, the facility may request and require a resident representative who has legal access to a resident's income or resources available to pay for facility care to sign a contract, **without incurring personal financial liability**, to provide facility payment from the resident's income or resources.

What is a valid "responsible party" clause, cont.

The prohibition doesn't apply when a third party has access to the resident's funds, has agreed to pay those funds for the cost of care, and fails to do so despite an obligation to do so.

Thus, the Act can both prohibit mandatory third party guarantees and also ask legal representatives to sign admissions contracts pledging the use of the resident's funds for payments.

What prompted the warning? Rising cost of nursing care.



What prompted the warning? Uncertainty.

Most older adults are not insured against the costs of long-term care.

- *My Dad had dementia upon entering the first nursing home, so someone had to sign for him, which was me. Only his funds were supposed to be used to pay the nursing home, not mine...*
- *I ended up getting sued for my Dad's nursing home bill, even with the [multiple] insurances... I signed [a settlement agreement] under duress because of a threat of garnishment for the entire amount.*

What prompted the warning? Impact on would-be beneficiaries of Medicaid, safety net of last resort

- *The nursing home sent my name to the collection agency as if this was a debt accumulated by me. Now the debt collector is jeopardizing my credit with my mother's bill which was suppose[d] to be taken care of by Medicaid and Medicare. The statement from the debt collection company is in my name, with my address... The attachments clearly show that these are not my bills.*

What prompted the warning? Lack of choice.

I didn't really have a choice. This was the only nursing home within 100 miles. We don't have any family or friends around here. This was the only nursing home with a bed.

Who knows what I signed. I didn't have a chance to ask questions much less negotiate.

Even if I had time to read it, I don't think I'd understand it anyway. I am sure of one thing: I was signing as emergency contact for mom. Maybe I was supposed to bring some of mom's information for Medicaid. I know for sure I was not assuming responsibility for payment by signing.

Nursing homes fired back.

"The issue arises when family members want to shield the estate from appropriate debt collections, and don't pay what they are able to from the patient's funds or estates."

"Care isn't free and someone has to pay for it."

Nursing homes fired back. How is a resident's money diverted?

Our biggest concern is collecting appropriate net monthly income from patients, including things such as Social Security and other third-party payments.

If somebody has Social Security and they're in a nursing home, it should go to the nursing home.

"A lot of people see that Social Security come in and think, 'That's our money.' No, it's not your money. It can run about \$25,000 a year. This is an outrage. It's your mother's and it needs to go to the provider."

Still some family members will willfully ignore their obligation to use the resident's funds to pay for their nursing care.



Evidence

Did the agreement require third party to sign a guarantee for the resident's cost of care?

-Stop, and revise agreement.

Did the agreement require third party to use resident's funds to pay for his/her care?

-Confirm access.

Did resident have funds to pay the facility?

-Confirm availability.

Evidence

Did facility ask third party to facilitate payment for care?

-Confirm requested, statement sent, on notice

Did third party divert resident funds (or transfer property)?

-Next.

Did third party divert resident funds (or transfer property) **after** admission?

-Assemble evidence (diversion of funds before admission is insufficient).

Side note on agency law...

AGENT:

Person who acts for another.

-For example, a resident's appointed representative like power of attorney, guardian, limited guardian, or conservator.

-An agent shall act in accordance with the principal's best interest, in good faith, and loyally for the principal's benefit, and judicial relief may be available to construe POA, review agent's conduct, and/or grant appropriate relief.

RESPONSIBLE PARTY:

Person acting for himself/herself.

-Signing the contract as "responsible party" means assuming the obligations of the "responsible party" as set forth under the contract; **these obligations often extend well beyond a person's role as the resident's agent.**

-It means a person had accepted the terms of the contract; he/she did *not* sign solely as agent for resident.

Legal theories for relief against third-parties

-Breach of contract (focusing on third party's failure to use resident's funds to pay for care), or claims under Voidable Transactions Act (aka "fraudulent conveyance" or "fraudulent transfer" laws).

-Attorney's fees and interest are generally recoverable if the contract provides for it.

But nursing facilities are strongly urged to review and revise their admission agreement so they do not contain illegal language that could stand in the way of collections actions.

Consider reputational impact

"Caregivers have been subjected to wage garnishment and have even lost their homes after being pursued by nursing homes for debts associated with family members' or friends' costs of care."

There is "widespread and routine use of such admission agreements and high-pressure collection tactics in multiple states."

"Those sued sometimes pay the debt; others have had bank accounts frozen or wages garnished."

Questions? Concerns? War stories?

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