

RACIAL JUSTICE &
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OPPORTUNITY PROJECT

NATIONAL CONSUMER LAW CENTER

Nursing Home Debt: What to Watch Out for and Strategies for Defending Collection Lawsuits

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with Moderator, April
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Moderator – April Kuehnhoff

- April Kuehnhoff is a staff attorney at the National Consumer Law Center whose focus includes fair debt collection. From 2009 to 2010 she was a Skirnick Public Interest Fellow at the Cambridge and Somerville Legal Services office of Greater Boston Legal Services. From 2010 to 2012 she was a law clerk for the Honorable Justice Gary Katzmann at the Massachusetts Appeals Court. From 2012 to 2014 she was an associate at Shapiro Haber & Urmy LLP. Prior to law school, April worked as a member of the Project on Global Working Families at the Harvard School of Public Health and at the Wellesley College Center for Work and Service. April is a graduate of Wellesley College and Harvard Law School.





Presenter – Sarah Rosenthal

Sarah Rosenthal is a staff attorney with the New York Legal Assistance Group’s (NYLAG) Consumer Protection Unit, serving clients facing a wide array of consumer defense related legal challenges. Sarah is a strong advocate and voice for vulnerable New Yorkers who are victims of fraud, predatory lending, identity theft, and illegal debt collection practices and scams. She fights on behalf of clients who face damaging credit reporting errors, subprime loan conditions, and other personal financial crises that can prevent them from becoming financially stable and independent. Among other areas, Sarah has focused on nursing home and medical debt collections cases, utilizing her special knowledge and prior work in Medicaid/Medicare law to strengthen her legal arguments.

For the past 4 years, Sarah has been the lead attorney for UJA’s innovative and holistic Connect to Care program, serving individuals who have been negatively impacted by the recession by helping them to navigate consequential issues stemming from economic instability such as foreclosure prevention, unemployment insurance benefits, bankruptcy, and access to public benefits. Sarah also serves as the Coordinating Attorney for the city-wide Volunteer Lawyer for a Day (“VLFD”) Consumer Credit Project in the Bronx, Queens and Richmond Counties.





Presenter – Michelle Weinberg

Michelle Weinberg is a Supervisory Attorney at LAF (formerly the Legal Assistance Foundation of Metropolitan Chicago), concentrating in the representation of seniors in consumer cases. She is a 1992 graduate of Chicago-Kent College of Law, and began her career as a consumer lawyer in 1993 with the class action firm of Edelman & Combs. Ms. Weinberg has handled a wide range of consumer cases, including claims under the FDCPA, TILA, the Illinois Consumer Fraud Act and other consumer protection statutes. In May, 2005, Ms. Weinberg received the Excellence in Public Interest Service Award from the United States District Court for the Northern District of Illinois and the Chicago Chapter of the Federal Bar Association. She was also named Advocate of the month for July, 2007, by Illinois Legal Aid Online. Ms. Weinberg has been a member of the National Association of Consumer Advocates (“NACA”) since 1997, and in 2011, she received the NACA Consumer Advocate of the Year for public interest work. Ms. Weinberg is frequently called upon to speak at legal conferences and to comment in the news media on emerging consumer issues.



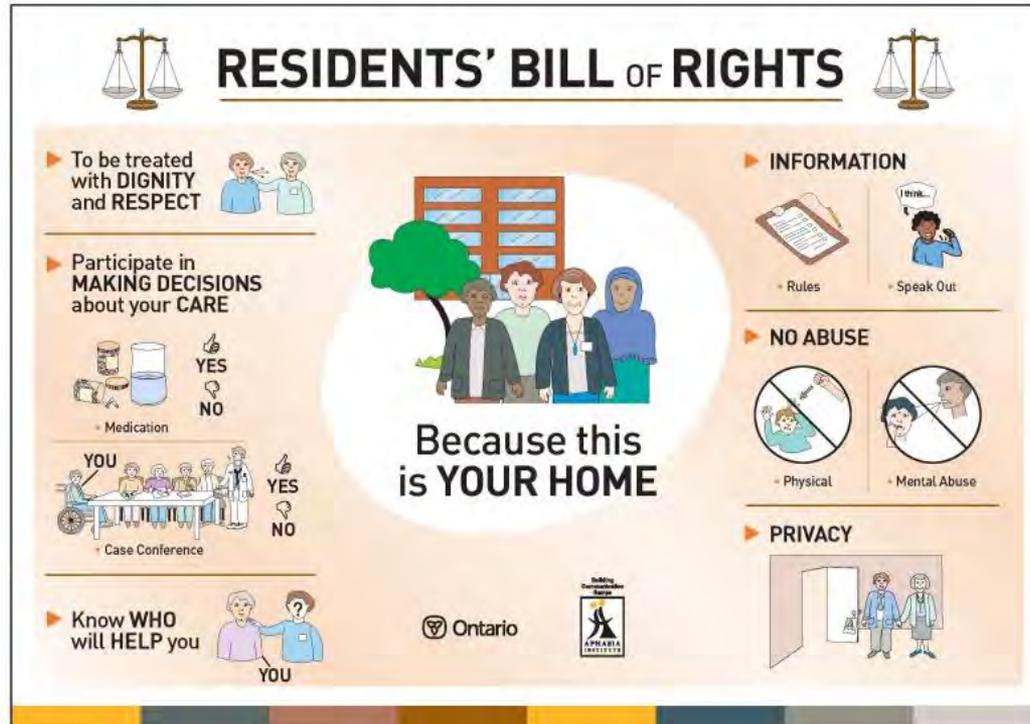
NURSING HOME DEBT

Nursing Home Debt: Planning for Admission & Strategies for Defending Collection Lawsuits

TOPICS TO BE COVERED

- I. Rights of Nursing Home Residents
- II. What Residents, their Families, and Advocates should Know Before Admission
- III. Paying for a Nursing Home Stay
- IV. Nursing Home Debt Collection and Strategies for Litigation

Rights of Nursing Home Residents



RESIDENTS' BILL OF RIGHTS

To be treated with DIGNITY and RESPECT

Participate in MAKING DECISIONS about your CARE

Know WHO will HELP you

INFORMATION

NO ABUSE

PRIVACY

Because this is YOUR HOME

Ontario
Long-Term Care
Act, 2003

The poster features a central illustration of four diverse residents standing in front of a building with a tree. The text is arranged in a grid-like fashion around this central image. Each right is accompanied by small icons: a scale of justice for the title, a person being treated with respect, a person at a table for medication decisions, a person at a case conference, a clipboard for rules, a person speaking for speaking out, a person being physically abused, a person being mentally abused, and a person in a room for privacy. The Ontario logo and the Long-Term Care Act, 2003 logo are at the bottom.

Regulatory Framework

- Nursing Home Reform Act, 42 U.S.C. §§ 1396r et seq;
 - Establishes a bill of rights for Nursing Home residents, including a statement that “A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.”
- Federal Regulations: 42 CFR 483 Subpart B.
 - Recently revised pursuant to new regulations promulgated by the Centers for Medicare & Medicaid Services (“CMS”). Many of the changes enacted are now under threat.

Residents' Rights Under the Nursing Home Reform Act

- Free choice (choose physician, be involved in care, be informed in advance of changes to treatment)
- Freedom from Restraints
- Right to Privacy
- Right to Confidentiality
- Right to Accommodation of needs
- Right to voice Grievances
- Right to Participate in resident and family groups, and participate in other activities
- Right to refuse certain transfers
- Right to be free from psychopharmacologic drugs unless part of a plan of care
- Transfer and Discharge Rights
- Access and visitation rights

2016 Changes to Federal Regulations

- Reinforces and Expands Residents' rights,
 - Equal Access to care
 - Right to participate in their plan of care, including the necessity of receiving informed consent from the resident.
 - Visitation rights: facilities must have a written visitation policy, and the right to receive visitors at any time.
 - Enhanced access to information, including language access rights and new requirements for posting information
 - Development of a policy and procedure for filing grievances
 - Facilities must establish and implement an admission policies.
- Prohibits Pre-Dispute Arbitration Agreements (42 C.F.R. § 483.70)
- Prohibits discouraging a resident from communicating with gov't officials
- Focus on individual needs and preferences
- Enhanced Training Requirements

What Residents, their Families, and Advocates should Know Before Admission



Rights for Admission

- Nursing Homes cannot:
 - Require deposits for Admission for residents eligible for Reimbursement from Medicare or Medicaid. 42 CFR 447.15
 - Require a “duration of stay” agreement (a prohibition on applying for Medicaid until a certain amount of time has passed.)
 - Discriminate based on physical ability (pursuant to the Americans with Disabilities Act and Rehabilitation Act.
 - Discriminate based on race or other protected categories

Rights for Admission Con't

- A nursing facility must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services required under the State plan for all individuals regardless of source of payment. 42 U.S.C.A. § 1396r(c)(4)(A).
- However, this does not necessarily prohibit discrimination in admission based on source of payment.

Admission Agreements

- Admission agreements often form the basis for alleging liability in a collection lawsuit
- A well-crafted admission agreement will avoid any blatantly illegal provisions, but still may have language designed to undermine the rights of the Resident.
- Admission agreements are often presented at the point of admission to the facility, when the resident is often being transferred from a hospital, a time of stress for the Resident and their family.

Tips for Dealing with Admission Agreements

- Nursing Homes will frequently ask friends or family members to sign admission agreements, even if the resident is able to sign the agreement themselves.
 - If the resident is able to sign the agreement, themselves, they should do so.
- Delay signing the agreement until after the Resident has been admitted.
 - If the resident has already been admitted, they can only be discharged for very specific reasons, none of which are related to whether the admission agreement has been signed.
- If the person signing the agreement is doing so as the resident's attorney in fact, make it clear that they are signing for the resident, not in their individual capacity.

Admission Agreements: Illegal Provisions

- Requiring a third party guarantee of Payment: 42 USC 1396r(c)(5)(A)(ii); Under the Nursing Home Reform Act, nursing facilities are prohibited from requiring a third party guarantee of payment as a condition of admission.
 - However, federal law specifically allows nursing homes to ask for a “responsible party” who agrees to ensure payment from the resident’s income and assets.
- Right to evict without cause: 42 USC 1396r(c)(2)(A)
 - Nursing homes cannot evict a resident unless they can provide one of six justifications allowed by law; nevertheless, some facilities include a clause in the admission agreement the right to evict a resident without cause.

Admission Agreements: Illegal Provisions

- Waiving right to readmission 42 USC 1396r(c)(2)(D)(iii)
 - Residents have the right to be readmitted to a nursing home after a hospital stay of any length (assuming they are still require a nursing home level of care); admission agreements will often attempt to require a resident waive this readmission right.
- Blanket consent to treatment: 42 USC 1396r(c)(1)(A)(i)
 - Residents have a right to be informed of relevant information before making individual medical decisions and a resident has a right to refuse treatment.
- Waiver of facility liability for resident's health or personal property
- Arbitration Clauses – New CMS ban blocked by injunction

Sample Unlawful Agreement Language Version 1

- WHEREAS, the agent understands that he/she is a financial agent for the Resident because the Agent has access to some or all of the Resident's assets; and
- WHEREAS, the Agent understands the Resident's obligations to the Facility as set forth in the Facility's Admission Agreement and acknowledges that the Resident wishes the Agent to comply with the attached Admission agreement; and
- WHEREAS, the Agent wishes to assist the Resident and to facilitate the Resident's admission to the Facility, and
- WHEREAS, the Agent agrees and acknowledges that the Facility will be relying on the Agent's Agreement herein contained;
- NOW, THEREFORE, in consideration of the foregoing and for other further valuable consideration, the parties hereby agree as follows:

Sample Unlawful Agreement Language v. 1 con't

- The Agent agrees to provide the following assistance to the Facility in the event such assistance is needed and requests.
 - Without incurring the obligation to pay for the cost of the Resident's care from the Agent's own funds, and in recognition that the agent is not currently the Responsible Party for the Resident, the Agent personally agrees to use the Agent's access to the Resident's funds to aid the Resident in meeting his/her obligations under the Admission Agreement if such is necessary to enable the Resident to comply with the terms of such Agreement.
 - More specifically, the Agent personally agrees that, to the extent of his/her authority, the Agent will use his/her access to the Resident's assets to ensure continued satisfaction of the Resident's payment obligations to the Facility and agrees not to use the Resident's assets in such a way as to place the Facility in a position where it cannot receive payment from either the Resident's funds or Medicaid. \ If the Resident becomes Medicaid eligible and if the Agent has access to the resident's income, the Agent personally agrees to ensure that the Facility is paid that portion of the monthly Medicaid rate, which the Medicaid agency may direct the Resident to pay towards the cost of his/her care.
 - The Agent personally agrees to assist in meeting the insurance obligations under this Agreement if necessary and if requested by providing timely financial information and/or documentation of the Resident's assets to which the Agent has access; and
 - The Agent agrees to pay damages to the Facility for any breach of his/her personal obligations as set forth in this Agreement.

Sample Unlawful Agreement Language Version 2

- THE RESIDENT'S AGREEMENT TO PAY FOR SERVICES

- 3.1 Resident's Direction to His/Her Agents. The Resident hereby directs the Responsible Party to ensure that all payment obligations under this Agreement are met from the Resident's assets and to cooperate in obtaining Medicaid coverage if necessary to meet the Resident's obligations under this Agreement.

- THE RESPONSIBLE PARTY'S OBLIGATIONS TO THE FACILITY.

- 4.1 Acknowledgement of Consideration. The Responsible Party desires to facilitate the Resident's admission to the Facility and acknowledges that the Facility has agreed to enter into this Agreement and admit the Resident to the Facility in consideration of the Responsible party's obligations to the Facility under this Agreement.

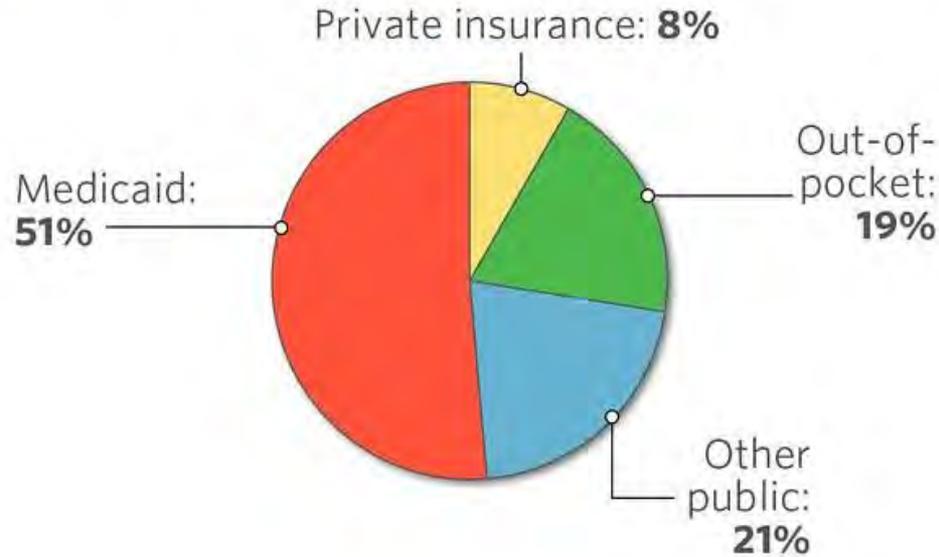
Sample Unlawful Agreement Version 2 con't

- 4.2 Payment obligation from Resident's Funds. The Responsible Party personally and independently guarantees continuity of payment to the Facility from the Resident's funds for the cost of the Resident's care to the extent the Responsible Party has control over the Resident's assets. Unless the Responsible Party is otherwise obligated by law to pay for the Resident's care, as the Resident's spouse may be, the Responsible party is not required to use his/her personal resources to pay for such care.



Paying for a Nursing Home Stay

Sources of payments for long-term care, 2013



Methods of Payment

- Private Pay
- Long Term Care Insurance
- Medicare
- Medicaid

Medicare

- Prerequisites for Medicare coverage:
 - Need for skilled nursing care seven days per week or skilled therapy services at least five days per week.
 - Within 30 days prior to admission to a skilled nursing facility resident must have been formally admitted as an inpatient to a hospital for at least three consecutive days.
- Medicare Coverage of a nursing home stay is time limited
 - Medicare will pay for 100 days in total; the first 20 days are paid in full, and the remaining 80 days have a co-pay (currently \$164.50 per day)

Medicaid

- To be eligible for Medicaid, an individual must:
 - Need a nursing-home level of care or meet nursing home functional eligibility criteria; **and**
 - have income and assets below certain guidelines
- Financial eligibility varies by state but, in general, there is a five year lookback where you may be ineligible if there was an uncompensated transfer.
- If possible, contact a Medicaid expert in your state to discuss eligibility before admission to the nursing home; understanding the eligibility rules in your state will help avoid denials of coverage that might result in large, unpaid medical bills.

Net Available Monthly Income

- Residents whose stay is being paid for by Medicaid are expected to contribute the majority of their income towards the cost of their care.
- However, this money is often needed to maintain a residence; as a result, a significant bill can accrue, resulting in a collection lawsuit.
- There may be a way to minimize the amount of money that needs to be paid to the Nursing Home
 - In New York, the Net Available Monthly Income (“NAMI”) amount is greatly reduced if the method of budgeting is adjusted.
 - community budgeting vs. chronic care budgeting
 - Spousal Impoverishment Rules

Chronic Care vs. Community Budgeting

- Which budget is used by the local DSS will determine how large the Resident's NAMI will be (and therefore how much money the resident will be expected to pay the nursing home every month)
- Chronic Care budgeting assumes that the resident will not be returning home to the community; therefore, they are required to remit all of their income (with the exception of a \$50 personal needs allowance) to the nursing home.
 - This is the default budgeting for a Medicaid nursing home resident
- Community (or non-chronic care) budgeting assumes that the resident will return home to the community and allows the resident to retain a larger portion of their income so that they can maintain their residence in the community.

Example: Chronic Care vs. Community Budgeting

- In New York, a resident subject to a chronic care budget would be able to keep \$50 of their income as a Personal Needs Allowance; a resident subject to community budgeting would keep \$820, the current income limited for a disabled, aged or blind person.
- Example: Sam has \$1020 in income per month.
 - Community budgeting: Sam would have to pay the nursing home \$200 per month as his NAMI.
 - Chronic Care Budgeting: Sam would have to pay the nursing home \$970 per month as his NAMI.

Resources

- Side by Side comparison of the different versions of the regulations :
http://theconsumervoice.org/uploads/files/issues/Side-by-Side_Comparison_of_Revised_and_Previous_Requirements_of_Participation_1-20-2017.pdf
- Treatise: Long-Term Care Advocacy, by Eric Carlson, available through LexisNexis
- Medicare Interactive: <https://www.medicareinteractive.org/> from the Center for Medicare Rights
- To Find an elder law attorney near you, visit the National Academy of Elder Law Attorneys, www.naela.org or consult with your local legal services organization.
- New York Medicaid resource: New York Health Access, www.nyhealthaccess.org

Nursing Home Debt Collection

- Typically defending family members, not the resident, from collection efforts
- Often, the basis for the suit is failure to pay the Medicaid “NAMI” cost-sharing
- Family member may have signed admission agreement or “undertaking” as “resident’s representative” or “responsible party”
- Family member failed to turn over resident’s income
- Spouse sued under Family Expense Act or similar

Potential Causes of Action Alleged by Plaintiff

- Breach of Contract
- Conversion
- Fraudulent Conveyance
- Doctrine of Necessaries

Nursing Home Debt Collection -- Defenses and Counterclaims

- No consideration given to defendant (adult child of resident)
- No contractual obligation
- Regulations prohibit third party guaranty
- Billing errors
- Medicaid Budgeting Errors
- Substandard care
- Consumer Fraud Act – misrepresentations about financial liability
- Equal Credit Opportunity Act (ECOA) theory as to spouses

Nursing Home Debt Collection Litigation Strategies



- Discovery into facility's intake and admission procedures, billing details, market basis for charges, insurance or Medicare coverage, Medicaid application and approval, method of assessing resident's "personal portion" of the bill
- Depositions of key personnel
- Summary Judgment