

# Using Consumer Law to Protect Nursing Facility Residents

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

# Agenda

- Federal Nursing Home Reform Law
- Litigation to Protect Against:
  - Illegal Financial Guarantees
  - Residents Being Dumped in Hospitals
  - Misrepresentations in Admission Agreements
- Rejecting Facilities' "Primary Jurisdiction" Defense
- Looking at Case Example

# Nursing Home Reform Law

- Covers every nursing facility that accepts Medicare or Medicaid, or both.
- Protects every resident, regardless of individual resident's payment source.

# 25 Common Nursing Home Problems and How to Resolve Them

- [This guide](#) from Justice in Aging covers 25 common nursing home problems encountered by residents and their families.
- The guide is based on federal law, and instructs on:
  - Recognizing facilities' false claims.
  - Citing relevant law.
  - Advocating for change.
  - Obtaining assistance.

# Litigation to Protect Against Illegal Financial Guarantees



# Federal Law Prohibits Nursing Facility Financial Guarantees

- Facility cannot require or request third-party financial guarantee.
  - CMS added prohibition against “requesting” financial guarantee in 2016.

# Facilities Have Long History of Seeking Financial Guarantees

- Some admission agreements claim falsely that the “no-financial-guarantee” rule applies only to Medicaid-eligible residents.

# Some Facilities Claim that Person Has “Volunteered” to Guarantee Payment

- New regulations prohibit voluntary guarantees.
- In addition, “voluntary” guarantees generally were improper even under previous regulations:
  - Purportedly voluntary guarantee generally was **required** by facility staff.
  - Family and friends were deceived into signing as financially-liable “responsible parties.”
  - A voluntary guarantee agreement provides no consideration to guarantor or resident, so is unenforceable and unconscionable.

# Facilities Today Often Sue Based on Purported Violation of Duty

- Admission agreement states that “responsible party”:
  - Asserts control over resident’s finances, and
  - Promises to:
    - Use resident’s money to pay nursing facility expenses, and
    - Take all necessary steps to seek Medicaid coverage.
- If bill is unpaid at any point, facility sues responsible party for alleged breach of duty.

# “Breach of Duty” Lawsuits Are Sometimes Successful

- Arguments Against:
  - Lawsuit is an attempt to evade federal law’s no-guarantee rule.
  - Under agency law, agent generally is not liable for debt of principal.
- But bad facts can make bad law.
  - Court is more likely to rule in facility’s favor if “responsible party” has misused resident’s money for responsible party’s benefit.

# Attacking Financial Guarantees Through Litigation

- Cross-complaint to collection action
- Alleging:
  - Violation of state consumer law, e.g., UDAP laws prohibiting Unfair and Deceptive Acts and Practices
  - Misrepresentation

# Example: Lukaszewski v. Oakview Convalescent Hospital

- Cross-complaint to collection action.
- Result: permanent injunction plus \$25,000 for attorney's fees and costs.

# Cross-Complaint Is Stronger If Bill Is Paid

- In *Lukaszewski*, responsible party's attorney had offered to get bill paid through monthly patient pay amount, but collection attorney refused offer.
  - Unmarried nursing facility resident generally has a monthly Medicaid deductible called the "patient pay amount."
  - Patient pay amount generally can be directed to "old" medical bills.
- In *Lukaszewski*, bill was paid through patient pay amount, eliminating risk to "responsible party."



# Litigation to Prevent Residents from Being Dumped in Hospitals

# Only Six Reasons to Evict Nursing Facility Resident

1. Nonpayment
2. Endangering others' safety.
3. Endangering others' health.
4. Needing higher level of care.
5. Not needing nursing facility care.
6. Nursing facility closing.

**Resident has right to an administrative hearing.**

# Returning to Nursing Facility After Hospitalization

- Bed hold under state law.
  - Paid out-of-pocket or through Medicaid.
- Beyond bed hold, right to return to next available bed if returning under Medicaid or Medicare payment.

# What If Facility Refuses to Let Resident Return?

- Federal regulations and guidance are clear that facility must comply with transfer/discharge rules, and must allow resident to return pending eviction hearing.
- But some facilities nonetheless refuse to let residents return.
- Resident may have difficulty getting prompt action from survey and certification agency.

# Poll Question

- Would your local agency take adequate steps to ensure a resident's right to return following hospitalization?
  - Yes
  - No

# Litigation Can Seek Prompt Return

- Potential causes of action:
  - Consumer law violations
  - Breach of admission agreement
  - Breach of Medicaid provider agreement, with resident as third-party beneficiary
  - Tort claims, e.g., infliction of emotional distress
- Request for immediate relief; i.e., temporary restraining order.
- Judge likely will recognize unfairness of being “locked out” without due process.

# Strategy Issues

- See *Nissan v. Hancock Park Convalescent Materials*.
- Complaint to survey and certification agency may be complementary, but not if agency might issue negative findings.
- If possible, characterize relief as maintaining status quo.
- Facility admission agreement may provide for attorney's fees.

# Using Litigation to Address Misrepresentations in Nursing Facility Admission Agreements



# Frequent Misrepresentations in Admission Agreements

- Frequent misrepresentations, as documented by many studies.
- For example,
  - Establishing “reasonable expectations” regarding injuries that are characterized as inevitable.
  - Giving facility discretion to evict.
  - Blank consent to medical treatment.
  - Unlimited intra-facility transfers.

# What To Do

- Administrative complaint
  - Federal regulations now state that an admission agreement's terms must not conflict with federal law.
- Consumer law litigation, seeking injunctive relief
  - See, e.g., *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89 (Cal. Ct. App. 1996).
  - Proof is relatively simple – the language of the admission agreement itself.

# Is Litigation Interfering with Jurisdiction of Survey and Certification Agency?

# Facility May Assert “Primary Jurisdiction” Defense

- But “primary jurisdiction” generally only applies to matters like prices and tariffs where court intervention could disrupt system.
- Agency jurisdiction is *not* impeded by court enforcement of relevant laws.
  - E.g., Supreme Court allows misrepresentation claim based on alleged deliberate overbooking of flight, finding no interference with Civil Aeronautics Authority.

Example:  
Carespring Health Care  
Management v. Doe (Jan. 2019)

# Additional Resources and Citations

- 42 U.S.C. §§ 1395i-3, 1396r
- 42 C.F.R. §§ 483.1- 483.95
- Unfair and Deceptive Acts and Practices (Nat'l Consumer Law Ctr. 2018)
- Eric Carlson, [Long-Term Care Advocacy](#) (Lexis Publishing 2018)
- Contact Us:
  - Eric Carlson, [ecarlson@justiceinaging.org](mailto:ecarlson@justiceinaging.org)

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# Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).