

Using Consumer Law to Protect Nursing Facility Residents

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

Key Lessons

1. **Federal law sets requirements for nursing facilities nationwide.** The federal Nursing Home Reform Law applies to every resident of every nursing facility that accepts Medicare and/or Medicaid.
2. Affirmative lawsuits can be a tool to:
 - a. **Stop a facility's illegal use of financial guarantees.** Federal law prohibits a nursing facility from obtaining a financial guarantee from residents' family members or friends. But many facilities nonetheless obtain such guarantees, sometimes under the guise of simply setting duties for the resident's agent. A defendant in a collection action may wish to assert a consumer law cross-complaint against the facility.
 - b. **Prevent residents from being dumped in hospitals.** Hospitalized residents have the right to return to the nursing facility though a state law bed hold, or through a federal law right to return to the next available bed. Facilities nonetheless often refuse to allow residents to return, and the administrative remedies may not be strong or swift enough to remedy the situation. A lawsuit can seek an order compelling the resident's immediate return to the facility.
 - c. **Address misrepresentations in nursing facility admission agreements.** Nursing facility admission agreements commonly misrepresent the law. Lawsuits can produce relief that likely would be unobtainable through the survey agency.
3. **Actions against nursing facilities do not interfere with survey agencies' jurisdiction.** The "primary jurisdiction" defense only applies in areas like tariffs and government rate-setting where court rulings might upend agency decision-making.

Federal Law Sets Requirements for Nursing Facilities Nationwide

The federal Nursing Home Reform Law sets standards for nursing facilities across the country. The law applies to each nursing facility that accepts money from Medicare or Medicaid, or both.¹ Because of the ubiquity of these funding sources, virtually all nursing facilities are subject to the Reform Law.

With rare exceptions, the Reform Law's provisions apply to every facility resident, regardless of that resident's reimbursement source. Specifically, residents paying out-of-pocket are protected by the Reform Law, even though these residents do not rely on Medicare or Medicaid reimbursement.

Attorneys should always keep two central provisions of the Reform Law in mind. First, the facility must provide services so that the resident can “attain or maintain the highest practicable physical, mental, and psychosocial well-being.”² Second, the facility cannot discriminate against Medicaid beneficiaries in service provision or in transfer/discharge decisions.³

Affirmative Lawsuits Can Attack Facilities’ Illegal Use of Financial Guarantees

Federal Law Prohibits Financial Guarantees for Nursing Facility Expenses. Federal law prohibits a nursing facility from requiring or requesting a financial guarantee from a third party.⁴ In other words, a facility cannot have a resident’s family member or friend co-sign an admission agreement to take on financial liability. This does not prevent a nursing facility from obtaining the *signature* of the resident’s agent, binding the *resident* but not the *agent* for nursing facility charges.⁵

Regardless of federal law, nursing facilities have a long history of using admission agreements that conflict with the Reform Law, and particularly with the no-financial-guarantee provision.⁶ Some nursing facilities have falsely claimed the no-financial-guarantee rule applies only to Medicaid-eligible residents.

Other nursing facilities have used admission agreements that claim that the “responsible party” has “volunteered” to take on financial liability, because the federal regulations until November 2016 only prohibited a nursing facility from “requiring” a financial guarantee. When facilities claim the agent volunteered under the “old” regulations, there are three ways to demonstrate these purportedly voluntary financial guarantees are not enforceable. First, the family member or friend has not “volunteered.” There was no actual choice to make. They signed the admission agreement as a financially responsible party because the nursing facility gave them no choice. Second, the admission agreements generally are written and presented in a way that mislead family members or friends into believing that the “responsible party” signature only commits the signatory to being a contact person. Third, a “voluntary” guarantee is unenforceable because “responsible parties” do not receive consideration in return for their promise to take on financial liability. The only possible consideration would be the nursing facility’s agreement to admit and retain the resident, but under the Reform Law, a financial guarantee cannot be quid pro quo for a resident’s nursing facility stay.

Today, nursing facilities’ most common strategy is to use an admission agreement that obligates a “responsible party” to 1) apply the resident’s money to nursing facility expenses, to the extent that the responsible party has control over the resident’s money; and 2) take all appropriate steps to make a Medicaid application on the resident’s behalf. Then, if the resident’s bill is unpaid at any point, the facility often files suit against the responsible party, alleging breach of their duties under the admission agreement. These lawsuits are of questionable validity, because they conflict with the general rule that an agent is not liable for the debts of the principal, and are attempting to evade the federal law’s prohibition against nursing facility financial guarantees.⁷ That being said, courts are split on whether these agreements are enforceable through facility collection lawsuits. The rulings in facilities’ favor generally are driven by egregious conduct by a resident’s family member, e.g. using the resident’s money to renovate the family member’s house, rather than paying the nursing facility.⁸

PRACTICE TIP

Beware of “voluntary” language: An attorney’s spidey senses should tingle whenever encountering a contractual claim that a consumer has “volunteered” to take on a certain obligation. The “voluntary” language generally signals attempted evasion of a legal protection that prevents the business from requiring that the consumer take on that obligation.

Improper Financial Guarantees Can Be Attacked through Affirmative Lawsuits or Cross-Complaints.

State consumer law generally is the most accessible mechanism to attack improper financial guarantees. State law often contains some type of “UDAP” statute for addressing a business’s Unfair and Deceptive Acts and Practices.⁹ State law ideally will also include a prohibition against “illegal” or “unlawful” actions, allowing violations of the federal nursing facility law to be incorporated as a qualifying offense.¹⁰ The claim can be brought on behalf of a class of consumers, either through the state’s class action mechanism, or through a provision specific to the consumer law. Often, state law will provide for attorney’s fees for a prevailing plaintiff or cross-complainant.

Another possibility is a claim for misrepresentation. The facts may show that the nursing facility misrepresented the impact of the “responsible party” signature. It is common, for example, for an admissions director to characterize a “responsible party” as merely a contact person, when the agreement itself may impose significant additional duties.

The attorney generally sees this issue in the context of a collection action — the client has been sued by a nursing facility on a financial guarantee. Along with defenses, the attorney can consider filing a cross-complaint for injunctive relief. The proof of a class-wide practice is the existence of the offending language in the facility’s admission agreement. This is particularly true if the admission agreement explicitly includes a financial guarantee. If instead, the admission agreement merely talks about the responsible party’s duties to pay bills and apply for Medicaid, a cross-complaint’s viability may depend on evidence that the facility has filed multiple collection actions around the “responsible party” language. Explicit financial guarantees are significantly more subject to challenge because, as discussed above, some courts have allowed collection actions against “responsible parties” based on language that obligates them to handle residents’ matters in a certain way.

The Cross-Complainant Has Greater Leverage to Pursue Extended Litigation if the Resident Can Pay Off the Nursing Facility Debt Through the Monthly Medicaid Deductible.

Once a cross-complaint is filed, a nursing facility may suggest a simple resolution—joint dismissals with prejudice. This presents complications for the cross-complaint’s attorney, since the defendant/cross-complainant understandably may be focused on getting out from under potential liability, while the cross-complaint may raise the possibility of broad, positive relief, along with a duty to act on behalf of a broader class.

These complications are eased in situations where the resident has the opportunity to slowly pay off the underlying debt. Many nursing facility debts arise due to honest mistakes in the Medicaid application process—for example, when the application is initially denied due to the resident’s savings being slightly too high. The consequences are widely disproportionate: an excess of a few hundred dollars in a savings amount may lead to a resident being liable for thousands of dollars of nursing facility expenses.

But the negative consequences can be ameliorated if the resident remains in the facility with a significant monthly financial obligation. Assume that a resident owes \$15,000 for a three-month delay in Medicaid eligibility and now owes \$1,000 monthly in a patient pay amount (essentially a monthly Medicaid deductible). The resident must pay that \$1,000 for health care expenses before Medicaid payment begins, and under Medicaid rules, the patient pay amount can be directed towards “old” health care bills.¹¹ If the resident, following the state’s procedures, directs the \$1,000 patient pay amount towards the old bill, then each month Medicaid will pay the entirety of the current month’s nursing facility expenses, and the \$15,000 debt can be paid off in 15 months.

Affirmative Lawsuits Can Prevent Residents from Being Dumped in Hospitals

Federal Law Limits Evictions, But Facilities May Take Advantage of Hospitalizations to Abandon Residents in Hospitals.

Under federal nursing facility law, a resident can be evicted only for one of six reasons:

1. Resident has failed to pay.
2. Resident endangers others' safety.
3. Resident endangers others' health.
4. Resident no longer needs nursing facility care.
5. Resident's needs cannot be met in a nursing facility.
6. Facility is closing.¹²

A resident must be given 30-day written notice (shorter in some circumstances), and has the right to challenge the eviction in an administrative hearing. The hearing is conducted by a state hearing officer—specific procedures follow the Medicaid fair hearing rules, but vary to an extent from state to state.¹³

Hospitalization should not result in eviction. When residents are hospitalized, they have at least two possible routes to return to the nursing facility. First, state law generally guarantees a bed hold of a week or two. The Medicaid program will pay for the bed hold, but other residents must pay for bed holds themselves.¹⁴

Second, the next-available-bed rule protects a resident when their hospitalization exceeds the state's bed hold period. This federal rule gives a resident the right to return to their original bed, or if that bed is not available, the facility's next available bed if the resident is returning under Medicaid or Medicare payment.¹⁵ The next-available-bed rule is an equitable way to protect residents: while it may not make sense for a Medicaid program to pay for an empty bed for a month, residents are adequately protected by allowing them to return to the next available bed. And the facility is not disadvantaged, because the room is otherwise unoccupied.

The regulations and surveyor's guidelines have been recently revised to specify that a resident should not be locked out of a nursing facility while hospitalized. If a nursing facility wishes to initiate an eviction action against a hospitalized resident, the resident must be allowed to return through the resolution of any eviction hearing.¹⁶

Despite these recent revisions however, facilities continue to evict residents by refusing to allow them to return after hospitalization. Usually the resident is Medicaid-eligible and "difficult" for the facility, due to relatively extensive care needs or some other reason. Cynical facilities are willing to run the risk of administrative penalties, which often are rather limited under federal enforcement policies.

For hospitalized residents, a significant practical problem is limited time, and the pressure placed upon them to leave the hospital. Most hospitalizations are short, so when a nursing facility refuses to allow a resident to return, the resident likely faces instantaneous pressure from the hospital to go *right now* to a different nursing facility—any nursing facility from the hospital's point of view, as long as the resident leaves on the hospital's designated discharge date.

A resident can complain to the state's survey agency, but without heavy pressure from the resident or resident's representative, the agency likely will not act quickly enough. Or if the agency does act quickly, the penalty may not be significant enough to make the facility relent.

Affirmative Litigation Can Force a Facility to Allow a Resident to Return. In these situations, the resident can skip the survey agency middleman by filing a lawsuit against the facility. One potential claim is violation of the state's UDAP law. Another is the facility's breach of the admission agreement, and yet another is the facility's breach of its Medicaid provider agreement, with the resident as third-party beneficiary of that agreement. Finally, a lawsuit could include tort claims such as wrongful eviction or infliction of emotional distress.

Needless to say, the plaintiff/resident should first seek immediate relief through a temporary restraining order and then a preliminary injunction. As a practical matter, any provisional relief likely would lead to quick settlement discussions.

In seeking provisional relief, the resident has a clear interest in characterizing the requested relief as maintaining the status quo. The real status quo is the resident living in the nursing facility, not the temporary hospitalization. The viability of this argument will vary with the state's case law.

A judge may well be impressed by the clear illegality of the facility's action. However, if the facility can credibly claim that the resident is a danger to other residents, this will weaken the resident's case. A comparison to wrongful evictions and tenant lock-outs can be persuasive—a judge can appreciate the unfairness of a facility evading a resident's appeal rights.

PRACTICE TIP

A resident trying to return to a facility may wish to both file a lawsuit and make a complaint to the survey agency. The lawsuit will be strengthened by any agency finding that the facility has violated the law. On the other hand, if the agency has a tendency to pull its punches, the resident's safer course of action is to just rely on the lawsuit, in order to avoid the possibility of the facility citing a no-violation agency finding as exoneration.

Affirmative Lawsuits Can Address Misrepresentations in Nursing Facility Admission Agreements

As discussed above, nursing facility admission agreements are notorious for misrepresenting relevant law. Facilities have used admission agreements to construct their own alternative legal reality. Common misrepresentations include:

1. Claiming that the resident understands that certain injuries are unavoidable;
2. Giving the facility great discretion to evict;
3. Granting blanket medical consent to any procedure initiated by the facility; and
4. Consenting to unlimited intra-facility transfers, in violation of a federal regulation that allows a resident to refuse Medicare-motivated transfers within the facility.¹⁷

Historically, survey agencies have paid scant attention to admission agreement violations. Surveyors' expertise generally is in nursing *services*, and unfortunately they have been inclined to pay little attention to *admission agreement* issues. This may change to a certain extent, given that a relatively new federal regulation explicitly states that an admission agreement's terms must not conflict with federal regulations.¹⁸ Even with this regulation, however, surveyors' comfort level will continue to be much higher with regulatory violations involving nursing services rather than contracts.

A consumer law attorney may wish to consider UDAP and misrepresentation claims against a nursing facility chain on a class action basis, particularly if the relevant law allows for attorney's fees.¹⁹ The proof of the

relevant business practice is, to a large extent, in black and white—the language of the admission agreement itself. Generally, nursing facility chains do not have a defense for their improper language. In most cases, the offending language is clearly violative of federal nursing facility law, reflecting the chain’s calculations that the survey agency would probably not take action and, if the agency did take action, the penalties would be relatively minor.

Actions Against Nursing Facilities Do Not Interfere With the Survey Agency’s “Primary Jurisdiction”

In a lawsuit against a nursing facility’s business practices, the facility may assert the defense that the plaintiff is asking the court to intrude on the survey agency’s “primary jurisdiction.” Unfortunately, this defense may initially appeal to a judge, who may see the federal nursing facility law as unfamiliar and esoteric. Actually, however, actions against nursing facilities do not interfere with the survey agency’s “primary jurisdiction.”

Primary jurisdiction applies when an issue’s resolution has “been placed within the special competence of an administrative [agency].”²⁰ In general, an agency has primary jurisdiction only in matters such as price controls and tariffs. In these matters, independent action by a court—for example, a ruling that certain prices or tariffs are unreasonable—could put an entire regulatory scheme in disarray. For example, the Supreme Court twice has ruled that the Interstate Commerce Commission had primary jurisdiction over railroad shipping rates.²¹

For lawsuits against nursing facilities, the analogous Supreme Court case involves fraudulent misrepresentation claims brought against an airline that allegedly had deliberately overbooked a flight. The Supreme Court rejected the primary jurisdiction defense, finding that “[t]he standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.”²²

Thus, a business practices lawsuit against a nursing facility does not interfere with the survey agency’s jurisdiction. A court can rule that facility did (or did not) violate the law, without interfering with the agency’s own enforcement procedures.

Conclusion

Certain illegal nursing facility practices are much too common, and residents and their family members suffer as a result. An attorney can protect consumers and level the playing field by bringing consumer law to bear against noncompliant nursing facilities.

Additional Resources

- Eric Carlson, ecarlson@justiceinaging.org
- 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)

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

Endnotes

- 1 In Title 42 of the United States Code, section 1395i-3 applies to Medicare-certified facilities, while section 1396r applies to Medicaid-certified facilities. Sections 1395i-3 and 1396r are virtually identical. The regulations are found at sections 483.1 through 483.95 of Title 42 of the Code of Federal Regulations. With very rare exceptions, each of these regulations applies to both Medicare-certified and Medicaid-certified facilities.
- 2 42 U.S.C. §§ 1395i-3(b)(2), 1396r(b)(2).
- 3 42 U.S.C. § 1396r(c)(4); 42 C.F.R. § 483.10(a)(2).
- 4 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(2); 42 C.F.R. § 483.15(a)(3).
- 5 42 U.S.C. §§ 1395i-3(c)(5)(B)(ii), 1396r(c)(5)(B)(2); 42 C.F.R. § 483.15(a)(3).
- 6 See Eric Carlson, Nat'l Senior Citizens Law Ctr. (now Justice in Aging), *Think Twice Before Signing: Improper and Unfair Provisions in Missouri Nursing Home Admission Agreements* (2007); Office of New York State Attorney General, Press Release, *Nursing Homes Agree to Revise Admission Policies* (Mar. 13, 2003) (facilities agreeing to eliminate illegal provisions in admission agreements), available at oag.state.ny.us/press/2003/mar/mar13a_03.html; Eric Carlson, Bet Tzedek Legal Services, "If Only I Had Known": Misrepresentations By Nursing Homes Which Deprive Residents of Legal Protection (1995); Rebecca Benson, *Check Your Rights at the Door: Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements* (1997); Patricia Nemore, *Illegal Terms in Nursing Home Admissions Contracts*, 18 Clearinghouse Rev. 1165 (1985); Charles Sabatino, *Nursing Home Admission Contracts: Undermining Rights the Old-Fashioned Way*, 24 Clearinghouse Rev. 553 (1990).
- 7 See, e.g., *Lexington Health Care Ctr. of Streamwood, Inc. v. Graves*, 2013 WL 1279487, 2013 Ill. App. Unpub. LEXIS 623 (Ill. App. Ct. 2013).
- 8 See, e.g., [Sunrise Healthcare Corp. v. Azarigian](#), 821 A.2d 835 (Conn. App. Ct. 2003) (resident's daughter found liable; gifts made from resident's money).
- 9 See generally *Unfair and Deceptive Acts and Practices* (Nat'l Consumer Law Ctr. 2018).
- 10 See, e.g., Cal. Bus. & Prof. Code § 17200.
- 11 42 C.F.R. §§ 435.832(c)(4); Maryland Dep't of Health and Mental Hygiene v. CMS, 542 F.3d 424 (4th Cir. 2008).
- 12 42 U.S.C. §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A); 42 C.F.R. § 483.15(c)(1)(i).
- 13 42 U.S.C. §§ 1395i-3(c)(2)(B), (f)(3), 1396r(c)(2)(B), (f)(3); 42 C.F.R. §§ 431.241(b), 483.15(c)(3), 483.204(a)(1).
- 14 42 U.S.C. § 1396r(c)(2)(D)(i); 42 C.F.R. § 483.15(d)(1).
- 15 42 U.S.C. § 1396r(c)(2)(D)(iii); 42 C.F.R. § 483.15(e).
- 16 42 C.F.R. § 483.15(e)(1)(ii); Surveyor's Guideline to 42 C.F.R. § 483.15(e)(1), Appendix PP to CMS State Operations Manual.
- 17 See *supra*, note 6.
- 18 42 C.F.R. § 483.10(g)(18)(v).
- 19 See, e.g., *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89 (Cal. Ct. App. 1996) (lawsuit alleging illegal admission agreement terms; appellate court addressing only financial guarantee issue).
- 20 *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).
- 21 *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59 (1956).
- 22 *Nader v. Allegheny Airlines*, 426 U.S. 290, 305–306 (1976).