Nursing homes and long-term care are big business, and private equity investors have flocked to this area, which is expected to grow to $240 billion by 2025. The entry of private equity investors is helping to drive an aggressive profit orientation that includes shockingly abusive collection tactics.

The pressure to increase profits may come at the expense not only of nursing home residents, but of their families, who bear tremendous stress as they struggle to care for ailing loved ones. Family members rarely pay close attention to fine print of nursing home admission agreements that create the obligations of “responsible parties” and make the residents and their families responsible to apply for Medicare or Medicaid nursing home benefits. These unseen contractual terms lead to nursing homes later suing families and friends for their loved ones’ bills—bills that can exceed $100,000. Families are pressured into paying the debts out of their own pockets to avoid loss of the resident’s desperately needed care.

Background on Medicare and Medicaid Coverage

In 2016, the average cost of nursing home care was $82,000 a year—approximately three times the annual income of most seniors. Medicare and Medicaid coverage are thus critical to nursing home affordability.

Medicare and Medicaid both cover care in a skilled nursing facility, but there are significant differences between the two programs. Medicare generally covers only the first 100 days of nursing home skilled care. Days 1 through 20 are fully covered, while patients are responsible for a daily coinsurance payment for days 21 through 100. After Medicare benefits run out, nursing home residents often transition to Medicaid long-term care. While Medicaid is a federal health care program, it is separately administered by each state, and each state sets different requirements for Medicaid eligibility, including age, disability, medical necessity, and asset ceilings.

Examine Medicaid rules in the relevant state to determine whether a nursing home has complied with requirements the state places on nursing homes. Many nursing homes fail to send residents important Medicare notices and make mistakes in applying for Medicare and Medicaid coverage on behalf of the residents. These mistakes may lead to strong defenses to a nursing home’s collection lawsuit. Additionally, if the improper Medicare/Medicaid coverage determination was recent, residents may be able to appeal the decision and secure retroactive coverage to reduce or eliminate a bill.

Here are four practice tips related to Medicare and Medicaid coverage:

1. Pay attention to sloppy nursing home practices relating to Medicare and Medicaid coverage determinations for an estoppel defense against the nursing home;
2. Interrogate the nursing home regarding its alleged entitlement to private pay rates;
3. Determine if the nursing home referred the resident or their family to third-party Medicaid preparation services, and what if any culpability those third parties have;
4. Review Medicare/Medicaid notices to determine if the notices were improperly sent to incapacitated residents instead of their agents and family members.

Defending Nursing Home Collection Lawsuits

The complications of the Medicaid and Medicare programs are difficult for sophisticated attorneys to understand, let alone everyday people who are often unexpectedly thrown into becoming caregivers for their ailing parents without any legal guidance or support. A family’s confusion over Medicare and Medicaid coverage can result in the accrual of large obligations to a nursing home without anyone’s knowledge. Where Medicaid does not provide complete coverage, the home will assess services at private pay rates. An attorney who understands how to handle nursing home collection claims in their earliest stages can help save families and residents costly and complicated litigation and may be able to raise affirmative claims against the nursing homes and their lawyers for collection abuse.

Case selection is critical. Check how the resident’s funds were used and why a bill accrued. If the resident or a third party misused their funds to avoid paying the nursing home, it is more likely that a court will find for the nursing home. In those cases, the defendants may want to consider settlement. Financial exploitation of seniors is an increasingly disturbing issue in long-term care. If a defendant has acted improperly, the case may be difficult to defend.

This article includes discussion of potential defenses to some of the more common nursing home causes of action in collection litigation:
Defending Nursing Home Collection Lawsuits

Consumer lawyers are in a unique position to assist parties in these cases, as the tactics and practices used to collect these debts are like those for credit card, medical, and other consumer debts. There are ample resources available to help the practitioner understand the Medicaid and billing issues. See, e.g., “More Resources,” below. Treat nursing home collection lawsuits as you would any unscrupulous debt collection action, paying particular attention to cases where a third party is sued for the resident’s debt.

While law firms that bring these collection actions are often well-respected and not standard debt collection mills, the firms file a large volume of highly suspect nursing home collection cases each year against third parties who are not liable for the debts. These lawsuits may mirror problems with lawsuits filed by abusive debt buyers.

Review the Admission Agreement

Breach of contract is a common claim that nursing homes bring against residents and their family members, so it is important to evaluate both the admissions agreement and to discuss with the client the contract formation process. The admission agreement is most often signed by the resident and/or a third-party caregiver, such as a family member or agent under a power of attorney. The admission agreement contains items related to the care and services being provided to the resident and, importantly, the resident’s financial obligations to the facility.

The nursing home reform law prohibits nursing homes from requesting or requiring third-party financial guarantees of payment. See 42 U.S.C. § 1395i-3(c)(5)(A)(ii). Nevertheless, nursing homes evade this prohibition with language in the admission agreement often labeled as the “responsible party clause.” Responsible party clauses require that a resident’s family member, guardian, conservator, or agent under a power of attorney sign the admission agreement and agree to assist the nursing home in getting paid for its services.

Typically, the clause requires the third party to attest that they have access to the resident’s funds and that they agree to help the resident secure Medicare/Medicaid coverage or use the resident’s funds to pay the resident’s bill. The clause will likely include a provision holding the third party personally liable for any damages, including attorney fees, for their failure to comply with their obligations under the agreement.

Most family members and caregivers do not understand what they are signing and do not receive any legal advice about their liability under these agreements. Nursing homes may seek out third parties to sign the responsible party clause even when residents have capacity to handle their own affairs and even where the third party does not have authority or access to the resident’s funds or assets.

Although federal law prohibits “co-signers” in nursing home admissions, for all intents and purposes these responsible party clauses make the third party personally liable for any bill the resident incurs. Time and again, courts have held that these clauses do not violate the Nursing Home Reform Law and can make third parties liable for the resident’s debt. See e.g., Sunrise Healthcare Corp. v. Azarigian, 821 A.2d 835 (Conn. App. Ct. 2003); Troy Nursing & Rehab. Ctr., L.L.C. v. Naylor, 94 A.D.3d 1353 (N.Y. Sup. Ct. App. Div. 2012).

Review the Sufficiency of the Nursing Home’s Pleadings

The pleadings in nursing home cases may remind the practitioner of pleadings filed by law firm collection mills—boilerplate recitations of statutory claims without any factual support, largely copied and pasted from prior boilerplate pleadings. Pleadings in any specific case will be drafted with little or no meaningful attorney review, and with the expectation that the case will not be litigated on the merits. The collection attorney views the lawsuit only as a tool to pressure unsophisticated and unrepresented consumers into settlement or to obtain a default judgment.

A pleading may not even clearly state the cause of action upon which it is based. This is grounds to dismiss the case, since each cause of action has its own required elements and defenses, and the consumer cannot properly defend the claim without

Common Defenses Where Residents Are the Defendant

When a nursing home sues a resident, common defenses relate to inflated bills, the nursing home’s failure to seek proper reimbursement from Medicare or Medicaid, and nursing home negligence or failure in completing the Medicare or Medicaid reimbursement process. Residents may also have detrimental reliance defenses if they relied on the nursing home or its third-party contractor to take care of their Medicaid or Medicare application. In cases against residents’ estates, there are defenses related to service on the estate that can be raised in motions to dismiss for lack of personal jurisdiction. Practitioners can also challenge the nursing home’s right to collect interest and attorney fees, particularly where the nursing home has not proven a binding contract that includes the right to interest and fees.

Common Defenses Where Third Parties Are the Defendant

In nursing home lawsuits against third parties, such as family members, caregivers, guardians, and agents, defenses will depend on the claims asserted in the lawsuits. For breach of contract claims, determine how the facts of the case relate to the contract language, particularly the “responsible party clause” (as discussed above). For example, despite signing a contract with a “responsible party clause,” a person should not be personally liable for the nursing home debt if the person did not have actual access to or authority to use the resident’s funds. See Morningside Acquisition I, L.L.C. v. Gandy, 114 N.Y.S.3d 606, 610 (N.Y. Sup. Ct. 2019).

If bills were never sent to the responsible party during a time when the person had access to the resident’s funds (before authority for the person to act expired by law or was revoked), the third party cannot be responsible for the debt. In addition, a third party who was never sent a statement of account cannot be liable on an account stated theory.

In recent cases, consumer lawyers have successfully argued that a third party was acting as the resident’s agent, and that agency law protects the agent from being responsible for the resident’s debts, despite a responsible party clause. See Extendicare Health Services, Inc. v. Dunkerton, 84 N.E.3d 92 (Ohio Ct. App. 2017). Also consider defenses related to contract formation, such as lack of consideration, duress, and unconscionability.

Another common defense goes to the size of damages being claimed. While a bill for nursing home services can easily be hundreds of thousands of dollars, damages against third parties should be limited to the amount of funds the resident had, and not the total bill for services. The third party’s responsibilities under a responsible party clause can only relate to funds the resident possessed.

The home’s damages claim will be based on its private pay rate. The consumer can challenge that rate as unreasonable, using as a reasonableness benchmark Medicaid’s rate for the services, which will be significantly lower than the home’s private pay rate. See NCLC’s Collection Actions § 9.5.6 [2].

Defending Against the Nursing Home’s Claim of Fraudulent Conveyance

Nursing homes may sue third parties on claims of actual or constructive fraudulent conveyance, conversion, or a related claim for fraud or theft of the resident’s funds. If a third party has access to the resident’s funds to pay for the resident’s needs, the nursing home may claim, without evidence, that the third party misappropriated those funds for other purposes.

Determine if the nursing home complaint recites any facts to support its allegations and whether the allegations are made solely on information and belief. In many cases, claims are bare recitations of statutory language without any supporting factual allegations. The nursing home attorney has not engaged in any meaningful review of the claims before adding them to the complaint and is using the claims to intimidate defendants or to add previously unavailable claims for attorney fees.

The third party’s attorney should seek to dismiss these claims for their failure to state a cause of action, in that they lack factual specificity to allow the defendant to respond to the allegations. See Paradigm BioDevices, Inc. v Viscogliosi Bros., L.L.C., 842 F. Supp. 2d 661 (S.D.N.Y. 2012); County of Monroe v. Estate of Patterson, 2019 WL 5851143 (N.Y. Sup. Ct. Oct. 24, 2019).
Even where a complaint includes some factual details regarding the alleged fraud, the claim may not meet the definition of fraudulent conveyance or other cause of action pleaded. Nursing homes often claim that a third party’s use of any of the resident’s funds on non-nursing-home-related items or expenses represents fraudulent conveyance. However, fraudulent conveyance claims have a very strict definition, and if the resident’s funds were used to pay the resident’s other legitimate expenses, a third party cannot be held liable for fraudulent conveyance.

**Account Stated Claims**

Nursing homes may bring a claim under an account stated theory—instead of proving a breach of contract, the home claims it has sent the defendant a statement of the amount due and that the defendant has implicitly agreed to pay that amount. At a very minimum, the home must produce the statement of account that was sent to the defendant (and not just created for the litigation). The defendant must also have received the statement of account and did not dispute it—a person cannot impliedly consent to an amount due if the person never received the statement and any dispute shows lack of consent. Additionally, if the nursing home sent the statement to a resident the nursing home knew was incapacitated (a frequent problem), the nursing home cannot prevail under this theory. The nursing home cannot seek more than the amount in the statement of account. Since there is no proof of a contract, there is no right to contractual interest or contractual attorney fees. These and additional defenses to an account stated claim are set out in NCLC’s Collection Actions § 4.7 [3].

**Doctrine of Necessaries and Familial Duty to Support**

A nursing home may sue a third party for the resident’s debt based on the doctrine of necessaries. While this typically only applies to spouses, in some states there is a familial duty to support that extends the doctrine to other family members. See NCLC’s Collection Actions § 9.6.4 [4].

Some states abolish the doctrine of necessaries or rule it unconstitutional. See NCLC’s Collection Actions § 9.6.1 [5]. If a state does create liability for spouses or other family members, it is typically set out by statute. The nursing home’s pleadings may have to show facts that meet the statutory elements. The statute will define what is a necessary, which may not include certain nursing home services. The home may also have to prove that it first sought payment from the resident. Attorney fees, interest, and collection costs are not necessaries and are not recoverable. See Jopal Bronx, L.L.C. v. Mateo Montilla, 2021 N.Y. Misc. LEXIS 513 (N.Y. Sup. Ct. 2021); NCLC’s Collection Actions § 9.6.2 [6].

**Failure to Add Resident as a Defendant**

An important defense for many collection actions against third parties for a resident’s nursing home bill is failure to add the resident as a necessary party to the action. Nursing homes often do not add the resident as a defendant to limit the costs of adding or serving a resident’s estate. But before liability is assigned to a third party, a resident’s liability must be determined. Failure to include the resident or the resident’s estate may be fatal to a nursing home’s action.

**Affirmative Claims Against Nursing Homes and Their Collection Lawyers**

Collection litigation misconduct is subject to challenge under the federal Fair Debt Collection Practices Act (FDCPA) and certain state law theories. See NCLC’s Fair Debt Collection § 7.4.9 [7] (FDCPA claims), Chapter 15 [8] (tort remedies), and Chapter 16 [9] (state remedies). Nursing home collection lawsuits are not exempt from these types of claims. See Eades v. Kennedy, PC Law Offices [10], 799 F.3d 161, 169–170 (2d Cir. 2015).

A preliminary issue is deciding whether an affirmative action should be brought as an individual or class counterclaim in the collection action, or whether it should be brought separately, after the consumer has prevailed in the collection action. Factors to consider are that counterclaims will likely result in the collection attorney increasing its effort in the case and cleaning up its litigation misconduct. The consumer’s claim may also be stronger after the case is complete when there is a clearer picture of the litigation misconduct and a court has ruled for the consumer or the case was dismissed without prejudice.

But waiting to file a separate action after the conclusion of the collection case could forfeit any compulsory counterclaims and could lead to statute of limitations problems, particularly for an FDCPA claim. A class counterclaim will stay in state court, while a separate affirmative FDCPA class claim will be litigated in federal court. See generally NCLC’s Collection Actions § 5.7 [11].
The FDCPA typically does not apply to nursing homes, since debt collection is not the principal business, and nursing homes do not regularly collect debts owed to another. The FDCPA though will apply to a nursing home’s attorney where that attorney regularly collects debts owed to another. See NCLC’s Fair Debt Collection § 4.7.3.3 [12]. State debt collection and UDAP claims often can apply to the nursing homes themselves. See NCLC’s Fair Debt Collection §§ 16.2 [13] (state debt collection statutes), 16.3 [14] (UDAP).

While FDCPA claims for litigation misconduct are far from novel, bringing affirmative claims for nursing home collection litigation misconduct are somewhat untested. Carefully evaluate potential cases before filing. If the nursing home’s original collection lawsuit contained a colorable claim for damages, an FDCPA case could potentially fail, even if the other claims were unfounded. Before deciding whether to bring an FDCPA case against a nursing home collection lawyer, consider consulting consumer attorneys with a strong background in FDCPA litigation. For example, see https://www.consumeradvocates.org/find-an-attorney [15] and search under debt collection.

More Resources

For more information on nursing home collection issues, see Eric Carlson, Long-Term Care Advocacy (2000, updated annually), available in print or digitally at Lexis.com. This manual includes an extensive collection of nursing home collection cases and decisions.

To connect with other lawyers and advocates working on nursing home collection cases, join the Nursing Home Debt Coalition, a group of lawyers and advocates across the country working on representing residents and third parties in these disputes. To join, visit https://www.probono.net/nursinghomes/ [16].

More on defense of consumer collection lawsuits, including a special chapter on medical debt, is found at NCLC’s Collection Actions [17]. More information on affirmative claims against those collecting on nursing home debt is found at NCLC’s Fair Debt Collection [18].

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Author Name: Anna Anderson
About Author:
Anna Anderson is a Supervising Attorney at Legal Assistance of Western New York (LawNY), where she oversees the Consumer and Economic Justice Unit, serving 14 counties in Western New York. Prior to the formation of the Consumer Unit, Anna served as an Equal Justice Works Fellow at LawNY and helped lay the groundwork for LawNY’s consumer practice. In her current role, Anna continues to manage the program she established during her Fellowship, which has served over 2,000 people to date and helped eliminate more than $1,000,000 in debt for low-income New Yorkers. Anna is admitted to the New York State Bar, Fourth Department (2016), and the United States District Court, Western District of New York (2019). She currently is the co-chair of the Monroe County Bar Association Elder Law Section, and she is the co-founder and chair of the National Coalition of Nursing Home Debt Advocates.