

PUBLICATION

CFPB Issues New Nursing Home Debt Collection Guidance

September 28, 2022

The Consumer Financial Protection Bureau (CFPB) recently conducted an analysis of the risks that nursing home residents and their caregivers face in nursing home facilities' admissions contracts and debt collection practices. On September 8, 2022, the CFPB summarized its findings in an Issue Spotlight, circular, and joint letter with the Centers for Medicare & Medicaid Services (CMS) (Guidance Materials), reminding nursing home facilities and debt collectors that certain debt collection practices can violate the Nursing Home Reform Act (NHRA) and, in turn, violate the Fair Debt Collection Practices Act and the Fair Credit Reporting Act.

We believe it is not clear how many facilities engage in these practices, but nursing homes are advised to consider this as an area of focus and enforcement.

The NHRA sets federal quality standards that nursing homes are obligated to meet if they receive Medicare or Medicaid payments. Specifically, the NHRA prohibits facilities from requiring a third party, such as a resident's relative or caregiver, to accept responsibility for charges incurred by a resident. The prohibition applies to all residents and prospective residents of a nursing home facility, regardless of whether they are eligible for Medicare or Medicaid. Investigation by the CFPB, however, claims that during the nursing home admissions process, it is common for caregivers to sign agreements with language that designates the caregiver as a "responsible party" for the cost of nursing home care.

We believe it is important to note that prohibiting "responsible party" clauses does not apply to instances where a third party has volunteered to pay for a resident's nursing home costs. It also does not apply to scenarios where a third party has legal access to a resident's funds and agrees pay the nursing home facility from those funds. Instead, the prohibition applies to contractual language that forces third parties to take on a financial burden they otherwise would not have assumed. Furthermore, although the CFPB discourages the use of boilerplate language to allege that third parties have engaged in fraudulent conveyance, a nursing home may consider a lawsuit when there is sufficient reason to believe that a third party has defrauded the resident to the damage of the facility. Moreover, the new guidance does not speak to the ability of nursing homes to report unlawful third-party misconduct involving the handling of residents' funds to appropriate law enforcement authorities.

The CFPB has cautioned that many responsible party clauses in nursing home admissions contracts violate the NHRA when used as a basis for seeking payment from third parties for unpaid nursing home balances. Although the exact contractual language varies among facilities, the CFPB found many unlawful similarities in responsible party clauses. For example, some admissions contracts contain "joint and several liability" clauses that try to assign to third parties the same personal liability for payment as the resident. Other contracts may require third parties to "personally guarantee" payment of the resident's nursing home bills to ensure the resident's continued stay. The CFPB has also found Medicaid eligibility clauses that attempt to hold third parties personally liable for a resident's costs if they fail to submit an accurate, timely, and complete application for Medicaid.

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. Such enforcement actions could include:

- Civil money penalties
- Termination of the provider agreement
- Denial of payment for all Medicare and/or Medicaid individuals by CMS
- Denial of payment for all new Medicare and/or Medicaid admissions
- State monitoring
- Temporary management
- Transfer of residents
- Transfer of residents with closure of facility
- Directed plan of correction
- Directed in-service training
- Alternative or additional state remedies approved by CMS

Although the CFPB does not enforce the NHRA, any amount that is owed or allegedly owed for nursing home facility services is a debt under the Fair Debt Collection Practices Act (FDCPA) because it arises out of a consumer transaction. The FDCPA, which *is* enforced by the CFPB, prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Therefore, debt collectors violate the FDCPA when they rely on contractual terms that violate the NHRA to falsely claim that caregivers or responsible parties are personally liable for residents' nursing facility bills.

The CFPB has authority to bring administrative enforcement proceedings or civil actions after finding violations during regularly scheduled examinations, Target Reviews (which usually involve a single entity with a significant volume of consumer complaints or a specific concern that has come to the CFPB's attention), or Horizontal Reviews (which involve the examination of multiple entities). The 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:

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

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:

- Any actual damages sustained because of that failure
- In an individual action, punitive damages as allowed by the court, up to \$1,000
- 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
- Costs and a reasonable attorney's fee in any such action

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.

Ultimately, the CFPB strongly urges nursing homes to review their admissions contract language to ensure compliance with the NHRA and, if necessary, remove unlawful responsible party clauses. Debt collectors should also ensure that their practices comply with federal laws, including the FDCPA and FCRA.

If you have any questions about this topic, please contact the Baker Donelson [Long Term Care](#) team member with whom you regularly work.