

## CAN NURSING HOMES AND ASSISTED LIVING FACILITIES GET PAID AND NOT (NECESSARILY) BE PERCEIVED AS THE BAD GUY?

By: Charles R. Powell, Esq.<sup>1</sup>  
Email: [cpowell@devinemillimet.com](mailto:cpowell@devinemillimet.com)  
Phone: 603.695.8736

DECEMBER 20, 2011

The short answer is yes. Nursing homes and assisted living facilities can collect on medical debt of its residents without being the “bad guy.” Not all the time, of course, but through advance planning and diligence, it is possible to resolve nonpayment issues without resorting to adversarial actions. Residents and their families often are not intentionally refusing to pay. To the contrary, they are only overwhelmed by the situation and the confusing array of laws and regulations that govern it. The problem may be a misunderstanding of the requirements of Medicaid (or simply how to file a Medicaid application) or a misunderstanding of the procedures for setting in motion the use of a power of attorney or the establishment of a guardianship. Only in a minority of circumstances is the problem a blatant refusal to pay or, in the worst of scenarios, an overt attempt to hide assets. This newsletter addresses a number of steps that nursing homes or assisted living facilities can take to obtain payment before engaging in contentious litigation, often without appearing to be the “bad guy.”

### Admissions Applications and Declarations of Assets and Income

As an initial matter, nursing facilities should focus on advance planning and preparation. Admissions applications should be the facility’s first and least expensive means of obtaining information regarding a resident’s assets. This includes the obvious, such as name, past addresses, and social security number, but also the less obvious, including the following: ownership of real estate and whether it is a home, a commercial property or undeveloped land (and whether there is equity in the property); a list of the resident’s companies and their tax identification numbers; a list of relatives, such as children, brothers and sisters, nieces and nephews; credit references; past and present employers; long term care insurance information, including policy numbers; prescription medication insurance or any flex spending plans; life insurance policies with their cash values and information concerning any annuities; stocks, bonds and mutual fund information; information concerning vehicles and other personal property in excess of a certain value; and spouses name and address-even if the resident claims to be divorced.

---

<sup>1</sup> All rights reserved by the author.

### Office Locations:

111 Amherst Street  
Manchester, NH 03101  
T 603.669.1000  
F 603.669.8547

43 North Main Street  
Concord, NH 03301  
T 603.226.1000  
F 603.226.1001

[DEVINEMILLIMET.COM](http://DEVINEMILLIMET.COM)

[HEALTHCARE@DEVINEMILLIMET.COM](mailto:HEALTHCARE@DEVINEMILLIMET.COM)

The facilities should require the residents to provide this information up front so the facility will have a leg-up in collections efforts if payments stop (or, in worst case scenarios, never start). For example, with regard to information concerning spouses, under the “Doctrine of Necessaries,” spouses have been held personally liable for debt even where no written agreement exists binding the spouse to pay. Health care facilities have even been allowed to proceed against more distant family members (such as a nephew) for unpaid bills where those parties were supposed to have made out an application for Medicaid, but did not do so.

### **Admissions Agreements**

Prior to admission, the facility should carefully draft an admission agreement which should clearly state that the resident or any person in control of the resident’s assets is responsible for payment. Under federal law, the facility cannot *require* a third-party guarantee of the resident’s debts, but that does not act as a bar to a third party, such as relative or other unrelated person, from agreeing to accept responsibility for those debts. This is more fully addressed in the discussion of “responsible party” provisions directly below.

Admissions agreements also should plainly identify the amount due in simple and clear terms usually stated in the nursing home context as a daily rate. They should also provide for an award of attorney’s fees for the facility in the event that collections activities are required, regardless of whether a lawsuit is filed, and for late penalties for tardy payments. Facilities should avoid referring to such charges as “interest” since that could provide a false impression that the facility is participating in loan or credit transactions which could implicate the application of the Truth-in-Lending Act or other statutes relating to lending and credit. Since the disclosure requirements of those laws (and the penalties for violating them) can be onerous, the facility should refrain from doing anything that might implicate them. A complete recitation of the provisions that should be present in an admissions agreement are too numerous to discuss within this short article, but it is gospel that a well-drafted and properly completed and fully executed admissions agreement can make collections easier and much less expensive in the long-run.

### **Responsible Parties**

Under federal law, it is not permissible to require a third-party guarantee for admission to or a continued stay at the facility which accepts Medicaid or Medicare. However, this is not a complete bar. Whereas the facility cannot require a guarantor, if the guarantee is voluntarily given without coercion then it can be relied upon by the facility in later times for payment where the primary obligor has failed to pay. It is not a “given” that a court will enforce such an agreement, but they have been enforced on many occasions. The admissions agreement should, however, plainly state that third-party guarantees are not required.

It is worth noting that third-party guarantees do not just benefit a facility. They also can benefit a resident by providing an additional layer of comfort to the facility to forbear in issuing a notice of discharge or in taking other actions to collect on a growing debt. This can “buy” time for the resident, a guardian or other agent to get the financial picture in focus

and to make the needed payments. As for the facility, a responsible party provides another, independent pool of assets and avenue of recovery, where the assets of the principal debtor/resident may be insufficient to satisfy all of its creditors.

### **Tracking Debt and Securing Payment**

The facility must monitor all accounts and be aware on a monthly basis of who is behind in his or her payments. The facility should have procedures in place for when payment terms are violated. The facility must track debt and respond quickly when accounts fall behind to establish clear deadlines and expectations for residents and their agents. This will likely improve a facility's recovery success. When someone claims an inability to pay, the facility should, at a minimum, establish a new deadline for payment and enforce it. When someone requests an extension, consider other means to ensure payment such as a mortgage on real estate or a lien on personal property as a condition to the requested extension. Since a secured creditor has a great advantage over unsecured creditors, there is an incentive for any facility to memorialize and secure the debt through the use of promissory notes and mortgages. In other words, the facility should secure its ability to get paid with collateral. In simple terms, the collateral serves a "security" that the creditor can liquidate in case of default.

### **Cost of Care Rule- Payments to Past Due Medical Debt**

The facility can sometimes make a so-called "Form 295" request under New Hampshire regulation He-W 654.17(a)(7)(d) for nursing home debt. Form 295, titled "Notice of Change in Patient Liability," must be submitted to the New Hampshire Department of Health and Human Services ("DHHS"). This remedy allows the cost of "currently obligated, unpaid prior medical debt" to be subtracted from a nursing facility resident's monthly income in order to pay off a past due medical debt. This means that by simply making a claim with the DHHS, the facility can begin receiving monthly payments without pursuing potentially contentious litigation. The facility must act quickly on this since the death of the resident terminates the income stream. Importantly, the facility may make this request even when the resident is no longer a resident of your facility. The facility should not assume that any agent of the resident, such as a guardian, would have made the request. Many people, even guardians, are unaware of the regulation that allows this application and overlook their ability to pay past debt using it.

### **Serving as "Rep Payee"**

Nothing in 42 U.S.C. §407 bars the designation of a representative payee, a/k/a "rep payee," for social security benefits. Federal law expressly provides for the designation of the facility as the representative payee for social security. See 42 U.S.C. §405(j)(2)(C)(iii)(III). This enables the facility to control the resident's income stream and to ensure that it is applied appropriately to protect the resident as well as the facility. Generally, the Social Security Administration ("SSA") will choose a "rep payee" based on who will best serve the resident's interests. It is worth noting that if the facility is a creditor and seeking to apply benefits for past care then there is authority that indicates that the SSA must grant

prior approval and there must be an allocation to ongoing care costs that adequately satisfy the current needs of the resident before any payments on the prior debt are made.

### **Other Avenues Short of a Lawsuit**

There are other avenues to explore in collecting for a facility. These include structured settlements where the resident or family provide security for payment down the road, such as by means of a mortgage on real estate or a lien on other assets or by filing a petition in the probate court to appoint a guardian to take the control of a resident's assets away from an uncooperative agent. It may be possible for the facility to intervene and assist the resident and his or her agent in completing an application for Medicaid. Sometimes an offer to do so is all that is required to break a logjam that has hindered the effectiveness of Medicaid and resulted in a growing debt that in the end will hurt all parties, nursing home and resident alike.

### **Demand Letters**

In a worst case scenario, where it becomes obvious that payment will not be made, more aggressive tactics, such as a demand letter, may be required. A prompt demand letter will accomplish several goals. First, it will establish in the debtor's mind that you are on top of the situation and prepared to take action. Second, it will establish that a default has occurred and the amount owed and demanded. This simple step, promptly taken, will often result in payment.

If the facility is not paid, continued prompt action is important. Engage counsel to follow-up. Consider issuing a notice of discharge to exert pressure and get the attention of a resident or agent who is ignoring your demands. Many times the simple entry of counsel into the dispute or a notice of discharge will tip the balance and induce the debtor to cooperate. If none of these efforts work, a lawsuit may be a facility's only option.

### **Conclusion**

Collecting a debt is never a pleasant undertaking. With advance planning and the assistance of competent counsel, however, you can streamline the process and limit those circumstances where the involvement of the court is absolutely necessary. In many instances, you can even move forward cooperatively with a resident and the resident's agents. In this way, you preserve the relationship and avoid the expenses and distraction of a lawsuit. Even in the unpleasant event that a lawsuit is unavoidable, the facility's advance planning can enable the facility to fully recover the debt with minimal expense and distraction. In other words, meeting the challenges of collections head-on before any money is owed by the resident benefits the facility in all scenarios.

**The Devine, Millimet & Branch Healthcare Practice offers this free periodic E-Mail Alert service to provide information on recent healthcare developments in statutory, regulatory and case law, and decisions. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at [healthcare@devinemillimet.com](mailto:healthcare@devinemillimet.com).**